
2017 eGLR_HC 10006189

Before the Hon'ble MR M R SHAH, JUSTICE the Hon'ble MR. B.N. KARIA, JUSTICE

HINDUSTAN DORR OLIVER LIMITED Vs. GUJARAT STATE FERTILIZERS AND CHEMICALS LIMITED

FIRST APPEAL No: 891 of 2017 , Decided On: 09/03/2017

Mr R. S. SANJANWALA, Sr Advocate with Mr PRANAV M TRIVEDI, for SINGHI & CO, for the Appellant(s) No. 1 Mr K. S. NANAVATI, Sr Advocate for NANAVATI ASSOCIATES, CAVEATOR for the Defendant(s) No. 1

M. R. SHAH, J. 1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 16th February 2017 passed by the learned Judge, Commercial Court, Vadodara in Commercial Civil Miscellaneous Application No. 112 of 2016, by which, the learned Commercial Court has rejected the said Application submitted by the original applicant under Section 9 of the Arbitration & Conciliation Act, 1996 and has refused to grant interim injunction restraining the respondent herein [original opponent] from en-cashing the respective bank guarantees, the original applicant has preferred the present Appeal.

2. Facts leading to the present Appeal in nutshell are as under :

2.1 The opponent herein, a public sector undertaking, was in need of Engineering Procurement and Construction [EPC] contractors for establishing production facilities for 2000 MTPY Water Soluble Fertilizer, NPX 19-19-19 Grade and Micronrient Mixture with required bagging along with additional bagging facilities for 10000 MTPY other grades of WSFs lump sum turnkey [LSTK] basis. That thereafter, pursuant to the tender process, the respondent expressed their intention of awarding the contract to the applicant and issued a Letter of Intent dated 3rd November 2012. The original applicant [hereinafter referred to as, "the Contractor"] accepted the said Letter of Intent vide communication dated 5th November 2012. That, the said Letter of Intent came to be amended by the original respondent vide letter dated 27th December 2012 and pursuant thereto, the Contractor entered into a contract on 25th April 2013 for the said facilities on LSTK basis. As per the terms of the contract, the contract was to be executed and completed within a period of fifteen months i.e., on or before 30th July 2014. That, the contract was awarded for a total amount of Rs. 38,29,00,000/=. As per the terms of the contract, the Contractor was required to furnish advance Advance Bank Guarantee and a Performance Bank Guarantee in favour of the original respondent for the sum of Rs. 5,17,17,726/= and Rs. 3,82,90,000/= respectively. It is an admitted position that as per the terms and conditions of the contract, the Contractor was paid in advance a sum of Rs. 3,82,90,000/=. Accordingly, the Contractor furnished two Bank Guarantees viz., [i] an Advance Bank Guarantee, bearing No. 002812GFIN0058 and [ii] Performance Bank Guarantee, bearing No. 0119JFJBG120078 through its Bankers on 20th December 2012. That thereafter, it appears that disputes arose between the parties as the contractor failed to execute/complete the contract within the stipulated time and according to the original respondent because of delay in completion of the project, the original respondent had suffered huge loss. However, it is the case on behalf of the

contractor that during the course of execution of the contract, because of irregularities in release of the payments in time by the respondent, it was facing financial crunch, and therefore, the project could not be completed within the time limited. That thereafter, at the request of the Contractor, the time was extended from time to time. However, thereafter, the respondent terminated the contract and also claimed damages/loss caused because of delay in completion of the project. As per the terms of the contract, the parties initiated arbitration proceedings, however, till the contractor approached the learned Commercial Court by way of preferring an Application under Section 9 of the Arbitration & Conciliation Act, the Arbitral Tribunal was not constituted. In the meantime, as the original respondent was to encash the aforesaid respective bank guarantees, and therefore, the Contractor submitted aforesaid Commercial Civil Misc. Application before the learned Commercial Court at Vadodara under Section 9 of the Arbitration & Conciliation Act for interim measures and prayed for the following reliefs :

[A] The Honble Court be pleased to grant interim measures of protection restraining the respondent from acting upon or enforcing the notice dated 11.07.2016 and/or from taking any other coercive measures including but not limited to termination of the contract and/or the invocation of the Advance Bank Guarantee and Performance Bank Guarantee pursuant to such notice or even otherwise;

[B] The Honble Court be pleased to grant interim mandatory direction that the respondent do pay/release the outstanding amounts and/or any part thereof to the applicant, to enable the applicant to complete the balance work in response to the notice dated 11.07.2016;

[C] The Honble Court be pleased to grant an order directing the respondent to provide security to the tune of approximately Rs. 12.15 Crores [Rupees Twelve Crores and Fifteen lacs] to secure the approximate claim for outstanding dues to the applicant as per the provisions of the Agreement;

[D] Ex parte ad interim relief in terms of prayers [A], [B] and [C] above;

[E] Any other or further orders that this Honble Court may deem fit in the interest of justice.

2.2 That the learned Commercial Court initially granted ex parte injunction restraining the original opponent from invoking/ encashing the bank guarantees. That thereafter, while deciding Application Exh. 9, the learned Commercial Court passed an order disposing of the said application and thereby continued ex parte ad interim injunction till the applicant approaches the learned Arbitral Tribunal and obtains appropriate order under Section 17 of the Arbitration & Conciliation Act.

3. Feeling aggrieved and dissatisfied with the order passed by the learned Commercial Court, Vadodara disposing of the said Application under Section 9 without deciding the same on merits and continuing earlier ad interim injunction till the applicant approaches the learned Arbitral Tribunal, the original respondent preferred First Appeal before this Court and this Court quashed and set-aside the order passed by the learned Commercial Court disposing of Section 9 application and directed the learned Commercial Court to decide and dispose of the Application preferred under Section 9 on merits. That thereafter, by the impugned order, the learned Commercial Court has rejected Section 9 Application submitted by the original applicant and has refused to continue injunction restraining the respondent from encashing the respective bank guarantees. Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the learned Commercial Court, Vadodara, the Contractor has preferred the present First Appeal.

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4. At the outset, it is required to be noted that at the time of initial hearing of the present Appeal on 23rd February 2017 and after hearing learned counsel appearing on behalf of the respective parties at length, we were not inclined to extend ad interim injunction with respect to Performance Bank Guarantee, bearing No. 0119JFJBG120078. Though, we were to pass a detailed reasoned order, Shri R.S Sanjanwala, learned counsel appearing on behalf of the appellant did not invite any reasoned order, and therefore, vide Oral Order dated 23rd February 2017, we continued ad interim injunction granted earlier by the learned Commercial Court, Vadodara in respect of Advance Bank Guarantee, bearing No. 002812IGFIN0058 and consequently, permitted the respondent-original opponent to encash the Performance Bank Guarantee bearing no. 0119JFJBG120078. Under the circumstances, the learned counsel appearing on behalf of the respective parties have made elaborate submissions with respect to the Bank Guarantees. Therefore, while disposing of the present First Appeal, we are concerned with Advance Bank Guarantee, bearing No. 002812IGFIN0058 only and learned counsel appearing on behalf of the respective parties have also made elaborate submissions on Bank Guarantee, bearing No. 002812IGFIN0058 only.

5. Shri R.S Sanjanwala, learned senior advocate has appeared with Pranav M Trivedi, learned advocate for the appellant-original applicant. Shri K.S Nanavati, learned senior advocate has appeared on behalf of the respondent-original opponent-GSFC Limited.

5.1 Shri R.S Sanjanwala, learned counsel for the appellant has vehemently submitted that in the facts and circumstances of the case, the learned Commercial Court, Vadodara has materially erred in rejecting Application Exh. 9 and in not granting any injunction restraining the opponent from encashing the Bank Guarantee [ie., Advance Bank Guarantee, bearing No.002812IGFIN0058]. It is vehemently submitted by learned counsel Shri RS Sanjanwala that as such the Bank Guarantee No. 002812IGFIN0058 is an advance Bank Guarantee for an advance payment of Rs.3,82,90,000/= made by the owner-original respondent and as such to secure the said amount paid in advance. It is submitted that in the present case against the dues of the Contractor-appellant, an amount of Rs.3,82,90,000/= has already been deducted and/or adjusted against the dues of the appellant-Contractor, and therefore, it can be said that the said amount of Rs. 3,82,90,000/= paid against the advance payment has already been recovered by the respondent owner. It is submitted that therefore, when the said bank guarantee is an Advance Bank Guarantee to secure the amount of Rs. 3,82,90,000/= against the advance payment, thereafter, the said Bank Guarantee comes to an end. And therefore, the respondent owner is required to be enjoined from encashing the bank guarantee. It is submitted that if the respondent owner is permitted to encash the Bank Guarantee of Rs.3,82,90,000/= [ie., Advance Bank Guarantee No. 002812IGFIN0058] in that case, it can be said that the respondent owner is paid double the amount ie., Rs.3,82,90,000/= on encashing the bank guarantee and Rs. 3,82,90,000/= already adjusted against the dues of the appellant. It is submitted that the aforesaid aspect has not been properly appreciated by the learned Commercial Court at Vadodara.

5.2 It is further submitted by Shri Sanjanwala, learned counsel appearing on behalf of the appellant that while considering Section 9 application, the learned Commercial Court has not properly appreciated the basic object and purpose of furnishing the said Bank Guarantee No. 002812IGFIN0058. It is submitted that as such, the purpose and object of the said Bank Guarantee is to secure amount of Rs. 3,82,90,000/= paid in advance by the owner. It is submitted that there is no failure on the part of the contractor not to use the said amount and/or the contractor has misused or misapplied the said funds and not used it for execution of the contract for which the respondent owner can recover the said amount by encashing the said bank guarantee. It is submitted that ~~moment the amount of Rs. 3,82,90,000/= is recovered by way of adjustment of the dues of the~~

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appellant, in that case, it can be said that the Contractor has discharged his liability and/or application in respect of such advance payment has been made, and therefore, it will not be open for the respondent owner to encash the said Bank Guarantee.

5.3 It is further submitted by Shri Sanjanwala, learned counsel for the appellant that even otherwise, permitting the respondent owner to encash the said bank guarantee would be inequitable. It is submitted that the amount of Rs. 3,82,90,000/= is already adjusted by the respondent owner against the dues of the appellant contractor. It is submitted that over and above the above amount, a sum of Rs. 5,77,00,260/= is already withheld by the respondent owner towards 15% HB against September bills. It is submitted that therefore, approximately more than Rs. 12 crores would be retained by the respondent owner. It is submitted that therefore, the learned Commercial Court ought to have considered the same as a special equity in favour of the appellant and ought to have granted injunction restraining the respondent owner from encashing the said bank guarantee.

5.4 It is further submitted by Shri Sanjanwala, learned counsel appearing on behalf of the appellant that even otherwise, the learned Commercial Court has materially erred in considering and/or treating the said bank guarantee as unconditional bank guarantee. It is submitted that even as per the terms and conditions mentioned in the bank guarantee, apart from the fact that the said bank guarantee is an advance bank guarantee, the same can be said to be an conditional bank guarantee on establishing and/or proving the loss or damage caused or suffered by the owner by reason of any breach, failure or default by and/or on the part of the contractor. It is submitted that therefore, the bank guarantee even can be said to be conditional bank guarantee. In support of his above submissions, Shri R.S Sanjanwala, learned counsel appearing on behalf of the appellant has heavily relied upon decision of the Honble Supreme Court in the case of Hindustan Construction Company Limited v. State of Bihar & Ors., (1998) 8 SCC 436. It is submitted that while considering the similar terms and conditions in the Bank Guarantee, the Honble Supreme Court has held that, "...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."

5.5 Shri Sanjanwala, learned counsel for the appellant- contractor has also submitted that as of now, the claim of the respondent owner is with respect to the loss or damages suffered, and therefore, unless and until the breach is established and the loss/damages gets adjudicated in arbitration proceedings, it cannot be said that there is any sum due or payable in praesenti. Therefore, at this stage, it is not open for the respondent owner to invoke the bank guarantee for the sum which is neither duly adjudicated upon, nor it can be said that any sum is payable in praesenti. In support of his above submissions, Shri Sanjanwala, learned counsel for the appellant has heavily placed reliance upon a decision of the Honble Supreme Court rendered in case of Gangotri Enterprises Limited v. Union of India & Ors., reported in [2016] 11 SCC 720.

5.6 Shri R.S Sanjanwala, learned counsel appearing on behalf of the appellant has further submitted that even otherwise, considering the terms and conditions of the contract, the loss or damages can only be upto 10% of the contract amount ie., Rs. 3,82,900/=. It is submitted that against the said amount, approximately Rs. 12Crores can be said to have been with the respondent owner. It is submitted that therefore also, the learned Commercial Court ought to have granted injunction against invocation of bank guarantee.

5.7 Shri Sanjanwala, learned counsel for the appellant has further submitted that the Commercial Court has materially erred in observing that time was the essence of the contract. It is submitted that

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even after 30th June 2014, the period was extended by the respondent owner from time to time, and thereafter the contractor continued to perform its part of the contract and in fact, approximately 95% of the work has been completed by then. It is submitted that therefore, when the time was not the essence of the contract, as the respondent owner itself extended the period from time to time, prima facie, the respondent owner is not entitled to any loss or damage on delayed completion of the project. In support of his submissions, learned counsel Shri Sanjanwala appearing on behalf of the appellant has placed reliance upon Section 55 of the Contract Act.

5.8 Shri Sanjanwala, learned counsel for the appellant has further submitted that the learned Commercial Court has not properly appreciated the fact that as such the contractor was not at fault at all in not completing the project and/or executing the contract in time. It is submitted that as such because of irregular payments and/or delay in payment of the amount due, there was a delay in execution of the contract and in completing the project. It is submitted that therefore, prima facie, the respondent owner is not entitled to any loss or damage; more particularly when the time was not the essence of the contract and the respondent agreed and in fact extended the period from time to time.

5.9 Making the above submissions and relying upon the above decisions, it is requested to admit/allow the present Appeal and continue the interim injunction restraining the respondent owner from encashing the bank guarantee [ie., Advance Bank Guarantee No.002812IGFIN0058].

6. The present Appeal is vehemently opposed by Shri K.S Nanavati, learned senior advocate appearing on behalf of the respondent-owner.

7. It is vehemently submitted by Shri Nanavati, learned counsel appearing for the respondent that in the facts and circumstances of the case and as the bank guarantee is an unconditional bank guarantee, the learned Commercial Court has rightly refused to grant any injunction restraining the respondent owner from encashing the same. It is submitted that in the facts and circumstances of the case and considering the terms and conditions of the Bank Guarantee, the learned Commercial Court has rightly held the bank guarantee as unconditional bank guarantee and thereby has rightly refused to grant any injunction against encashing of the said bank guarantee. It is vehemently urged by Shri K.S Nanavati, learned counsel appearing on behalf of the respondent that as such the bank guarantee no. 002812IGFIN0058 cannot be said to be an advance bank guarantee only. It is submitted that reading the bank guarantee as a whole and the terms and conditions mentioned in the said bank guarantee as a whole, the same can be said to be Advance Bank Guarantee-cum-Performance Bank Guarantee. It is further submitted by Shri Nanavati, learned counsel on behalf of the owner that as such in the facts and circumstances of the case and as per the terms and conditions of the contract, the Contractor was required to complete the project on or before 30th June 2014, which he failed to complete and because of that, the respondent owner had suffered huge loss/damages. It is submitted that as such, till February 2016, the Contractor never made any complaint with respect to irregular payments and/or delayed payment of its dues by the respondent owner. It is submitted that such a dispute has been raised for the first time in the month of February 2016. It is further submitted that even otherwise, the appellant contractor could not have made such request as at that stage Rs. 3,82,90,000/= was also available with the contractor which was paid to it as advance payment. It is submitted that in any case, no complaint was made at all by the contractor till February 2016 with respect to any irregular or delayed payment, which has resulted into delay in completion of the project by the contractor. It is submitted that as such as per the original terms and conditions of the contract, the Contractor was required to execute the project and

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was required to complete the same and make it operational prior to 30th June 2014 and therefore, the learned Commercial Court has rightly held that time was the essence of the contract.

7.1 In the alternative, it is submitted that even if subsequently, the owner granted extension and even if for the sake of submissions, it is accepted that time may not be essence of the contract, in that case also, as per Section 55 of the Contract Act, still the owner shall be entitled to compensation for delay in completion of the project.

7.2 It is submitted by Shri K.S Nanavati, learned counsel appearing on behalf of the respondent-owner that even the circumstances under which the owner was required to extend the period is also required to be considered. It is submitted that, as such, the contractor failed to complete the project and the construction was half-way, there was no other contractor ready to take up the work in half-the-way of the project, and therefore, the owner had no other alternate but to get the work done through the appellant-contractor and thereby extended the period.

7.3 Learned counsel Shri K.S Nanavati further submitted that if one looks at the terms and conditions of the Bank Guarantee No. 002812IGFIN0058, as such, it is an unconditional bank guarantee where the surety has agreed to pay to the owner, without any demur, dispute or objection of whatsoever nature, forthwith on receipt of a written request from the owner notifying any breach, failure or default on the part of the Contractor in providing, doing, performing, executing, fulfilling, keeping or carrying out any, each and every obligations and liabilities; as agreed to by and between the Contractor and the Owner under stipulations, terms and conditions of the Contract in respect of which such advance payment has been made, or any loss or damage caused to or suffered by the Owner by reason of any such breach, failure or default by or on the part of the Contractor in providing, doing, performing, executing, fulfilling, keeping or carrying out any, each and every of the obligations and liabilities under and in respect of the stipulations, terms and conditions of the Contract in respect of which such advance payment has been made. It is submitted that as such, the said Bank Guarantee is an unconditional bank guarantee and so rightly held by the learned Commercial Court.

7.4 It is further submitted by Shri K.S Nanavati, learned counsel appearing on behalf of the respondent- Owner that as such, the said Bank Guarantee cannot be said to be an Advance Bank Guarantee only, as sought to be contended on behalf of the Contractor.

7.5 Shri Nanavati, learned counsel has heavily relied upon a decision of the Honble Supreme Court in the case of Vintec Electronics Private Limited v. HCL Infosystems Limited, reported in [2008] 1 SCC 544 as well as in the case of BSES Limited [Now Reliance Energy Limited] vs. Fenner India Limited & Anr., reported in [2006] 2 SCC 728 in support of his submissions that the bank guarantee is an unconditional bank guarantee, and therefore, no injunction can be granted against invocation of such bank guarantee by the owner. It is submitted by Shri K.S Nanavati, learned counsel appearing on behalf of the respondent that in the case of Vintec Electronics Private Limited [Supra], the Honble Supreme Court did consider its earlier decision rendered in Hindustan Construction Company Limited [Supra] which has been relied upon by Shri R.S Sanjanwala, learned counsel appearing on behalf of the appellant-Contractor and thereafter, the Honble Apex Court has refused to grant injunction restraining the owner encashing the bank guarantee. It is submitted that therefore, as such, in the case of Vintec Electronics Private Limited [Supra], the Honble Supreme Court had not agreed with the view taken in the case of Hindustan Construction Company Limited [Supra].

7.6 It is further submitted by Shri K.S Nanavati that in the case of Fenner India Limited & Anr. [Supra], considering the similar bank guarantee which was found to be unconditional, irrevocable

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bank guarantee, securing performance of the contract as well as advance paid to him, the Honble Supreme Court has set-aside the order passed by the High Court granting injunction against encashing the bank guarantee. It is submitted that in the aforesaid case, the respondent contended that the bank guarantees were for different purposes viz., either to secure the payments of advances, or to secure the performance. As far as the bank guarantees to secure advance payments were concerned, there was a provision in the contract itself that the amount of advance was to be recovered by deduction from the gross accepted amount of any running bill. Therefore, it was contended on behalf of the respondent therein that when the entire amount of the bank guarantee had been recovered from the running bills of the respondent, encashing the bank guarantee after having recovered the full amount of advances from the running bills was an "egregious fraud " or at any rate, created a situation of "special equities" in favour of the respondent, however, the Honble Supreme Court has not accepted the same and despite the above, considering the bank guarantee as Performance Bank Guarantee as well as Advance Bank Guarantee and considering the same as unconditional irrevocable bank guarantees, the Honble Supreme Court has refused to grant injunction against invocation of the bank guarantees. It is further submitted by Shri K.S Nanavati that in the present case, neither any fraud is alleged nor it can be said that any special equities have been pleaded and/or made out by the Contractor, and therefore, the learned Commercial Court has rightly refused to grant injunction.

7.7 Making the above submissions and relying upon the above decision, it is requested to dismiss the present Appeal.

8. In reply, Shri R.S Sanjanwala, learned counsel appearing on behalf of the appellant-Contractor has submitted that as such it cannot be said that in the case of Vintec Electronics Private Limited [Supra]], the Honble Supreme Court has not approved the decision in the case of Hindustan Construction Co. Limited [Supra]. It is submitted that therefore, as such, it cannot be said that by the decision in case of Vintec Electronics Private Limited [Supra], the Honble Apex Court has over-ruled its earlier decision in the case of Hindustan Construction Co. Limited [Supra].

8.1 It is further submitted that in the facts and circumstances of the case, even the decision of the Honble Supreme Court in the case of Fenner India Limited & Anr. [Supra], relied upon by the learned counsel appearing on behalf of the owner, shall not be applicable to the facts of the case on hand. Making the above additional submission, it is requested by the learned counsel for the appellant to admit/allow the present Appeal.

9. Heard learned counsel appearing on behalf of the respective parties at a greater length.

10. At the outset, it is required to be noted that the controversy in the present First Appeal is centered around the bank guarantee no. 002812IGFIN0058 which was furnished in favour of the owner as per the terms and conditions of the contract entered into by and between the Contractor and the Owner. Certain disputes have arisen between the parties, and therefore, as such, disputes are required to be referred to the Arbitrator and in the meantime, as the owner was to encash the bank guarantee/s, the Contractor submitted an Application under Section 9 of the Arbitration Act for interim measure restraining the Owner from encashing the bank guarantee. That, by the impugned judgment and order, the learned Commercial Court at Vadodara has rejected the said Application and has refused to grant any injunction, restraining the Owner from encashing the bank guarantee, which is the subject matter of the present First Appeal.

11. It is the case on behalf of the appellant-Contractor that the Bank Guarantee no. 002812IGFIN0058 is a conditional Bank Guarantee and that it is an Advance Bank Guarantee to secure an amount of Rs.3,82,90,000/= paid in advance by the respondent Owner and as the said amount of Rs. 3,82,90,000/= has already been recovered/adjusted against the dues of the Contractor, and therefore, the owner cannot encash the said bank guarantee. It is also the case on behalf of the appellant-Contractor that as such, in view of the subsequent extension by the Owner, extending the period from time to time during which the Contractor proceeded further with the work, the time cannot be said to be essence of the contract, and therefore, for any delay in completion of the project, the Owner is not entitled to any damages/loss. As observed hereinabove, the learned counsel appearing on behalf of the Contractor has heavily relied upon decision of the Honble Supreme Court in the case of Hindustan Construction Co. Limited [Supra] and Gangotri Enterprises Limited [Supra].

11.1 On the other hand, it is the case on behalf of the Owner that if the terms of the bank guarantee is read as a whole, in that case, the bank guarantee in question cannot be said to be Advance Bank Guarantee only to secure the amount of Rs. 3,82,90,000/= paid by the owner in advance. It is submitted that considering the bank guarantee as a whole and the terms and conditions of the bank guarantee, the bank guarantee can be said to be an unconditional, irrevocable bank guarantee, securing performance of the contract as well as Advance paid to the contractor. Therefore, as the bank guarantee in question is an unconditional bank guarantee and as neither any fraud is alleged nor pleaded nor any special equities is pleaded and/or proved and/or established, the Contractor is not entitled to any injunction, restraining the Owner from encashing the said bank guarantee. As observed hereinabove, the learned counsel appearing on behalf of the Owner has heavily relied upon decisions of the Honble Supreme Court in the case of Vintec Electronics Private Limited [Supra] and Fenner India Limited & Anr. [Supra].

11.2 Therefor, in the present First Appeal, this Court is required to consider whether in the facts and circumstances of the case, the learned Commercial Court at Vadodara has rightly rejected Section 9Application and has rightly refused to grant any injunction in favour of the Contractor restraining the owner from encashing the bank guarantee in question ? In the present Appeal, this Court is not required to consider whether there was any delay on the part of the Owner in making the payments belatedly; as alleged by the Contractor and due to which, there was delay on the part of the contractor in performing his part of the contract or the Contractor himself was responsible for delay in completing the project, due to which the Owner had suffered loss/damages. What is required to be considered is whether by way of interim measure under Section 9 of the Arbitration Act, the respondent Owner is required to be restrained from encashing the bank guarantee or not, and for which, it is required to be considered whether the Bank Guarantee in question can be said to be an "unconditional bank guarantee" and/or the bank guarantee in question can be said to be an "Advance Bank Guarantee" to secure an amount of Rs.3,82,90,000/= paid by the Owner to the Contractor in advance; as alleged and/or it can be said to be an unconditional, irrevocable bank guarantee securing performance of the contract as well as Advance paid to him.

12. While answering the aforesaid questions, the terms and conditions of the Bank Guarantee no. 002812IGFIN0058 are required to be referred to and therefore, the relevant terms and conditions of the said Bank Guarantee are extracted and reproduced hereunder :

"1. The Owner has entered into an agreement/LOI on the 3rd day of November 2012 [hereinafter referred to as, "~~the Contractor~~"] with Messrs. Hindustan Dorr Oliver Limited, a Public Company [Reproduction from GLRONLine] © Copyright with Gujarat Law Reporter Office, Ahmedabad

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incorporated in the State of Maharashtra under the Companies Act of 1956, having its registered office at Dorr-Oliver House, Chakala, Andheri [East], Mumbai 400 099 [hereinafter referred to as, "the Contractor"] for the Work and jobs described in the Contract, and hereinafter referred to as, "the Let Work"].

2. Under the provisions of the Contract, the Contractor is required to furnish at its cost to the Owner, a security bond in the form of a Bank Guarantee, in the amount of Rs. 3,82,90,000/= [Rupees Three Crores Eighty Two Lakhs Ninety Thousand Only] against the advance payment in the like amount to be made by the Owner to the Contractor, for the refund of such advance payment, in the event that the Contractor fails to duly and faithfully provide, do, perform, execute, keep, fulfill, discharge and carry out all or any of its obligations and liabilities in respect of which such advance payment has been made, in time and manner as provided in the Contract and to the fullest satisfaction of the Owner, and valid till the end of sixty days after the date of satisfactory completion and acceptance of the entire Let Work in all respects.

3. The Surety has at the request of the Contractor agreed to issue this Security Bond as the irrevocable letter of Bank Guarantee in terms of the Contract, on behalf of the Contractor, and the Owner has agreed to accept the same.

NOW THIS BOND WITNESSETH AND KNOWN ALL MEN BY THESE PRESENTS that the Surety is hereby held and firmly bound unto the Owner in the sum of Rs.3,82,90,000/= [Rupees Three Crores Eighty Two Lakhs Ninety Thousand only] to be paid to the Owner at its registered office on first demand without any demur, dispute or objection of whatsoever nature by the Owner to the Contractor till the date of refund thereof by the Contractor to the Owner, for the payment of which sum as aforesaid well and truly to be made, the Surety hereby unconditionally and irrevocably binds itself, its successors and assigns, firmly by these presents.

IT IS HEREBY STIPULATED AND AGREED that the Surety shall pay to the Owner as aforesaid at the registered office of the Owner, without any demur, dispute or objection of whatsoever nature, forthwith on receipt of a written request from the Owner notifying any breach, failure or default on the part of the Contractor in providing, doing, performing, executing, fulfilling, keeping or carrying out any, each and every obligations and liabilities as agreed to by and between the Contractor and the Owner under stipulations, terms and conditions of the Contract in respect of which such advance payment has been made, or any loss or damage caused to or suffered by the Owner by reason of any such breach, failure or default by or on the part of the Contractor in providing, doing, performing, executing, fulfilling, keeping or carrying out any, each and every of the obligations and liabilities under advance payment has been made. The surety hereby agrees, undertakes and confirms that the aforesaid written request so received from the Owner notifying breach, default or failure on the part of the Contractor shall be construed and deemed as final conclusively binding upon the surety who shall forthwith pay the aforesaid amount without any demur or dispute whatsoever.

NOW THE CONDITION OF THIS OBLIGATION IS THAT if the Contractor shall faithfully provide, do, perform, execute, fulfill, keep and carry out any, each and every of its obligations and

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liabilities under the Contract in respect of which such advance payment has been made, in time and manner provided therein and to the fullest satisfaction of the Owner, and the Owner shall certify that the obligations, liabilities, stipulations, terms and conditions under the Contract in respect of which provided, done, performed, executed, fulfilled, kept and carried out by the Contractor and/or that the Contractor has repaid to the Owner the full amount of such advance payment as aforesaid, and accordingly discharges this guarantee, then this obligation shall be null and void; otherwise the same shall remain in force, virtue and effect."

12.1 Thus, considering the aforesaid terms and conditions of the Bank Guarantee in question, it can be said to be an "unconditional, irrevocable bank guarantee" securing the Advance paid to the Contractor as well as securing the Performance of the Contractor. Therefore, as such, the Bank Guarantee in question cannot be said to be an Advance Bank Guarantee to secure advance paid to the Contractor only. Over and above the amount of Rs. 3,82,90,000/= secured by way of bank guarantee, the aforesaid bank guarantee is also for performance of the contract. Thus, the surety i.e., the Bank has agreed to pay to the Owner, without any demur, dispute or objection of whatsoever nature, forthwith on receipt of a written request from the Owner notifying any breach, failure or default on the part of the Contractor in providing, doing, performing, executing, fulfilling, keeping or carrying out any, each and every obligations and liabilities, as agreed to by and between the Contractor and the Owner under stipulations, terms and conditions of the Contract in respect of which such advance payment has been made, or any loss or damage caused to or suffered by the Owner by reason of any such breach, failure or default by or on the part of the Contractor in providing, doing, performing, executing, fulfilling, keeping or carrying out any, each and every of the obligations and liabilities under and in respect of the stipulations, terms and conditions of the Contract in respect of which, such Advance payment has been made. The Surety has also further agreed and undertaken that the aforesaid written request so received from the Owner notifying breach, default or failure on the part of Contractor shall be construed as deemed as final and conclusively binding upon the surety who shall forthwith pay the aforesaid amount without any demur or dispute whatsoever. Thus, the Bank Guarantee in question can be said to be an unconditional, irrevocable bank guarantee securing performance of the contract as well as Advance paid to him. Under the circumstances, unless and until case of fraud is made out or special equities are pleaded and established, there cannot be any injunction against encashing such unconditional bank guarantee.

13. In the case of Vintec Electronics Private Limited [Supra], while discussing and considering the law on the invocation of the bank guarantee, in para 11 to 14, the Honble Supreme Court has observed and held as under :-

"11. The law relating to invocation of bank guarantees is by now well settled by a catena of decisions of this Court. The bank guarantees which provided that they are payable by the guarantor on demand is considered to be an un-conditional bank guarantee. When in the course of commercial dealings, unconditional guarantees have been given or accepted the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. In U.P. State Sugar Corporation v. Sumac International Ltd, [1997] 1 SCC 568, this Court observed that :

"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

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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."

12. It is equally well settled in law that bank guarantee is an independent contract between bank and the beneficiary thereof. The bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and of no consequence. In BSES Limited v. Fenner India Ltd. & Anr, [2006] 2 SCC728, this Court held :

"10. There are, however, two exceptions to this Rule. The first is when there is a clear fraud of which the Bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non-intervention is when there are special equities in favour of injunction, such as when irretrievable injury or irretrievable injustice would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this Court, viz., U.P State Sugar Corpn. v. Sumac International Limited [1997] 1 SCC 568; State of Maharashtra v. National Construction Co. [1996] 1 SCC 735; United Commercial Bank v. Bank of India [1981] 2 SCC 766 and Centax [India] Limited v. Vinmar Impex Inc. [1986] 4 SCC 136, that in U.P. State Sugar Corpn. v. Sumac International Ltd. (1997) 1 SCC 568 (hereinafter U.P. State Sugar Corpn.) this Court, correctly declare that the law was settled.

13. In Himadri Chemicals Industries Ltd. v. Coal Tar Refining Company, [2007] 8 SCC 110, this Court summarized the principles for grant of refusal to grant of injunction to restrain the enforcement of a bank guarantee or a letter of credit in the following manner :

"14.. ...(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realize such a Bank Guarantee or a Letter of Credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The Bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

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(iii) The Courts should be slow in granting an order of injunction to restrain the realization of a bank guarantee or a Letter of Credit.

(iv) Since a Bank Guarantee or a Letter of Credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of Bank Guarantees or Letters of Credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a Bank Guarantee or Letter of Credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional Bank Guarantee or a Letter of Credit would result in irretrievable harm or injustice to one of the parties concerned.

14. In *Mahatama Gandhi Sahakra Sakkare Karkhane v. National Heavy Engg. Co-op. Ltd.*, [2007] 6 SCC 470, this Court observed :

"If the bank guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction from enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury.

What is relevant are the terms incorporated in the guarantee executed by the bank. On careful analysis of the terms and conditions of the guarantee in the present case, it is found that the guarantee is an unconditional one. The respondent, therefore, cannot be allowed to raise any dispute and prevent the appellant from encashing the bank guarantee. The mere fact that the bank guarantee refers to the principal agreement without referring to any specific clause in the preamble of the deed of guarantee does not make the guarantee furnished by the bank to be a conditional one. (Para 22 and 28) [Emphasis supplied]

13.1 In the said decision, the Honble Supreme Court has reiterated what was held in the case of *Fenner India Limited & Anr.* [Supra].

14. Now so far as reliance placed upon the decision of the Honble Supreme Court in the case of *Hindustan Construction Company Limited* [Supra] and *Gangotri Enterprises Limited* [Supra] relied upon by Shri R.S Sanjanwala, learned counsel for the appellant is concerned, in the facts and circumstances of the case and considering the terms and conditions of the bank guarantee in question, the aforesaid decisions shall not be applicable to the facts of the case on hand. In the case

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before the Honble Supreme Court in the case of Hindustan Construction Company Limited [Supra], on facts and having regard to the terms and conditions of the bank guarantee which was against mobilisation advance, the Honble Supreme Court has observed that the bank guarantee was not unequivocal or unconditional, and therefore, the trial Court was justified in granting the injunction.

15. Now so far as reliance placed upon a decision of the Honble Supreme Court in the case of Gangotri Enterprises Limited [Supra] by Shri R.S Sanjanwala, learned counsel for the appellant in support of his submissions that for any loss or damages, unless and until any amount is determined and/or adjudicated upon in the Arbitration the bank guarantee cannot be invoked is concerned, it is required to be noted that in the case of Gangotri Enterprises Limited [Supra], as such, there is no absolute proposition of law laid down by the Honble Supreme Court, as sought to be canvassed on behalf of the Contractor. In the case before the Honble Supreme Court, while granting injunction against invocation of the bank guarantee, what was found by the Honble Supreme Court was that arbitration proceedings relating to the contract were still pending; the sum claimed by the respondents from the appellant did not relate to the contract for which the bank guarantee was furnished; but it related to another contract which was subject matter of arbitration and in which no bank guarantee was furnished. The Honble Apex Court further observed that the sum claimed by the respondents from the appellant was in the nature of damages, which awaits adjudication in the arbitration proceedings and that, the sum claimed was neither a sum due in praesenti nor a sum payable. In the terms and conditions, the word used was, "money due" and therefore, in the facts and circumstances of the case, the Honble Supreme Court granted injunction against invocation of the bank guarantee. The aforesaid decision shall not be applicable to facts and circumstances of the case on hand, more particularly as observed hereinabove, the bank guarantee in question is unconditional bank guarantee securing Performance of the work as well as Advance payment.

16. Similarly, submission made on behalf of the Owner that by the decision of the Honble Supreme Court in the case of Vintec Electronics Private Limited [Supra], the Apex Court has over-ruled its earlier decision in the case of Hindustan Construction Co. Limited is concerned, the same also cannot be accepted. It is true that in the case of Vintec Electronics Private Limited [Supra], the Honble Supreme Court did consider its earlier decision in the case of Hindustan Construction Company Limited. However, on facts and considering the terms and conditions of the bank guarantee, the Honble Apex Court distinguished the decision in the case of Hindustan Construction Co. Limited [Supra].

17. Now so far as submission made on behalf of the Contractor that time is not the essence of the contract since it was extended from time to time, and therefore, time cannot be said to be the essence of the contract, and therefore, the Owner is not entitled to any loss or damages and that the submissions made on behalf of the Owner that despite the above, considering Section 55 of the Contract Act, the Owner shall be entitled to compensation is concerned; as observed hereinabove, at this stage, the aforesaid dispute is not required to be considered. Even other submissions made by the learned counsel appearing on behalf of the respective parties with respect to the amount due and/or retained by the owner and/or whether there was delay on the part of the Contractor and/or Owner are not required to be considered at this stage. While considering the Application under Section 9 and while considering whether by way of interim measure under Section 9 of the Arbitration Act, there shall be injunction against invocation of the bank guarantee or not.

18. In view of the above and for the reasons aforesaid, when the Bank Guarantee in question is held to be unconditional, irrevocable bank guarantee with respect to the performance of the contract

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and also Advance payments, in the facts and circumstances of the case, the learned Commercial Court at Vadodara has not committed any error in rejecting the said application and refusing to grant injunction restraining the respondent from encashing the bank guarantee.

19. In view of the above and for the reasons stated above, the present First Appeal deserves to be dismissed and is accordingly dismissed to costs.

20. Civil Application No. 3082 of 2017 stands disposed of accordingly.

FURTHER ORDER

At this stage Shri Sanjanwala, learned counsel appearing on behalf of the appellant has requested to continue ad interim relief granted earlier vide order dated 23rd February 2017, so as to enable the appellant to approach the Honble Supreme Court.

Prayer is opposed by Shri Nanavati, learned counsel appearing on behalf of the respondent herein. However, in the facts and circumstances of the case and so as to enable the appellant to challenge the present order before the Honble Supreme Court and obtain appropriate order, ad interim relief granted earlier vide order dated 23rd February 2017 i.e., qua the Bank Guarantee No. 0028121GFIN0058 only, is hereby extended upto 27th March 2017.

Appeal dismissed

