.* IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment pronounced on : June 04, 2014*

+ **O.M.P. 704/2013**

ISCO TRACK SLEEPERS PVT LTD ..... Petitioner
Through: Mr. R.K. Sanghi & Mr. Satyendra Kumar, Advs.

versus

DELHI AIRPORT METRO EXPRESS PVT LTD & ANR
..... Respondents
Through: Mr. Arvind Nigam, Sr. Advocate
With Mr. Dinesh Pardasani,
Ms. Isha J Kumar & Ms. Sneha,
Advs. for R-1.
Ms. Shilpa Gupta, Adv. for R-2

+ **O.M.P. 702/2013**

PATIL RAIL INFRASTRUCTURE PVT LTD ..... Petitioner
Through: Mr. R.K. Sanghi & Mr. Satyendra Kumar, Advs.

versus

DELHI AIRPORT METRO EXPRESS PVT LTD & ANR
..... Respondents
Through: Mr. Arvind Nigam, Sr. Advocate
with Mr. Dinesh Pardasani,
Ms. Isha J Kumar & Ms. Sneha,
Advs. for R-1.
Ms. Shilpa Gupta, Adv. for R-2.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

OMP No.704/2013

1. The petitioner has filed the petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") seeking the following reliefs:

(a) Pass ex parte ad interim order restraining the respondent No.1 and respondent No.2 encashing the Bank Guarantee in any manner whatsoever;

(b) Pass an ex-parte ad interim order restraining the respondent No.2 from making any payment to respondent No.1 in any manner whatsoever including handing over of a demand draft/pay order and restraining the respondent No.1 from depositing/ encashing the draft issued by the respondent No.2 and respondent No.2 be restrained from honouring the demand draft/pay order issued to respondent No.1 in any manner whatsoever and respondent No.2 be directed to credit the amount to the account of petitioner forthwith;

(c) If the amount has been received by respondent No.1 then respondent No.1 be directed to refund the amount to respondent No.2 forthwith;

(d) Confirm the order passed in terms of prayers (a), (b) and (c), after notice to the respondents.

2. The petitioner ISCO in OMP No.704/2013 has entered into contract for supply of sleepers with respondent No.1, Delhi Airport Metro Express Pvt. Ltd. (in short, called the "DAMEPL") under the Contract dated 19th November, 2009. The petitioner was to submit a Performance Bank Guarantee. The relevant clause of the contract

being Article 7 under which the respondent can invoke the bank guarantee is reproduced as under:

> Article 7 is reproduced herein below: -
>
> "*Article 7: PERFORMANCE BANK GUARANTEE*
>
> *7.1 ISCO shall within fourteen (14) days of the signing of the Contract provide an unconditional performance bank guarantee for an amount equal to ten per cent (10%) of the Contract Price ("Performance Bank Guarantee") for performance of all its obligations under the Contract.*
>
> *7.5 DAMEPL shall be entitled to call upon the Performance Bank Guarantee in the following circumstances:*
>
> *(a) for recovery of liquidated damages payable under the contract;*
>
> *(b) for any payment due to DAMEPL on termination of the Contract; and*
>
> *(c) for any loss or damage caused to DAMEPL due to any act or omission of ISCO under the Contract excluding Article 11.7."*

3. The word 'Contract' is defined in Article 1.14 to mean the Contract comprising of the documents listed in Article 1.4. In Article 1.14, the Performance Bank Guarantee has been defined. The Petitioner has to submit the Performance Bank Guarantee as per Article 4.1(e) of contract.

4. 1.14: Definition

> *"Contract" means this contract comprising the documents listed in Article 1.4 above.*

Performance Bank Guarantee shall have the meaning ascribed to it in Article 7.1

5. 4.1(e)

"ISCO shall furnish the necessary Performance Bank Guarantee and Advance Payment Guarantee in terms of the Contract."

Relevant Portion of Bank Guarantee

"By a Contract dated 11.01.2010….."

"…….Pursuant to the terms of the Contract,……"

"*Where applicable the words and expressions used in this Performance Bank Guarantee shall have the meaning assigned to them in the Contract, unless otherwise defined herein.*"

6. The submission of the petitioner is that the Bank Guarantee is integral part of the Contract (Article 1.4 of the Contract as the BG is part of contracts comprising the documents listed in Article 1.4). Performance Bank Guarantee has to be submitted as per Article 4.1(e) of the contract. The PBG states that the word and expression used in BG have the meaning as per the Contract. The word PBG is defined Contract to mean as described in article 7.1 of contract.

7. i) As per Clause 7.5 (a), the respondent No.1 is entitled to call upon the PBG for recovery of liquidated damages. There is no notice or claim made by the respondent No.1 of liquidated damages is available on record.

ii) The clause 7.5 (b) relates to the payment due to respondent No.1 on termination of the contract. In the present case, the contract

has not been terminated. The contract can be terminated under Article 19, 19(2) and the contract can be terminated only if the Respondent gives 15 days notice in writing to the Petitioner to rectify such defects and if the defects are not rectified. No notice of termination has been issued, therefore, this clause is not applicable.

iii) Clause 7.5 (c) relates to any loss or damage caused to Respondent due to any act or omission of the Petitioner under the contract. The Respondent has no where stated that it has suffered any loss or damage because of the act or omission of the Petitioner rather the case of the Respondent is "that due to the several breaches committed by the Petitioner under the contract, the Respondent invoked the bank guarantee in terms of the bank guarantee vide its letter dated 17th July, 2013. If there is any breach of the contract then the respondent should have issued the notice of termination giving 15-days notice to rectify the defects and if the said defects are not rectified within 15-days then the Respondent has a right to terminate the contract which is not the case. Learned counsel appearing on behalf of petitioner has referred Article19 of the contract.

Relevant portion of the said clause Article is reproduced below:-

"Article 19. TERMINATION

19.1 DAMEPL shall have the right to terminate the Contract on occurrence of any of the following events, if:

(a) ISCO is in breach of a material obligation under the Contract; or

(b) The Concession Agreement is terminated; or

(c) ISCO fails to furnish the Performance Bank Guarantee in accordance with Article 27 or renew or replenish the Performance Bank Guarantee to the extent of 10% of the Contract Price within seven (7) days of its expiry or invocation; or

(d) ISCO gives any warranty or has made any representation under the Contract which is found to be false or misleading; or

(e) ISCO's liability for liquidated damages under the Contract exceeds ten per cent (10%) of the Contract Price and the default or defect(committed by ISCO) for which liquidated damages are / were charged continues to exist; or

(f) A petition for the winding up of ISCO has been admitted and a liquidator or provisional liquidator has been appointed or an order of bankruptcy or an order for the winding up or dissolution of ISCO has been made by a court of competent jurisdiction; or

(g) ISCO fails to adhere to the Standards and approved ISCO Documents; or changes in quantity in terms of the Contract; or

(h) ISCO persistently disregards instructions of the Representative or contravenes any provisions of the Contract; or

(i) ISCO fails to afford the DAMEPL, Representative or inspecting Authority proper facilities as per the provisions of the Contract for inspecting the Works or any part thereof; or

(j) ISCO commits default under any Applicable Law in relation to this Contract; or

(k) ISCO fails to resume work in accordance with Article 20.5.

(l) DMRC instructs DAMEPL to use any alternate trackform or sleepers in place of Rheda 2000 System or the Rheda 2000 bi-block sleepers respectively

19.2 On occurrence of any of the events under Article 19.1, DAMEPL shall give notice in writing to ISCO to rectify such default within a period of fifteen (15) days from the date of receipt of such notice. If ISCO fails to rectify the default within such period, or a period as reasonably requested by ISCO by way of a reply to the notice and accepted by DAMEPL, DAMEPL shall have the right to terminate the Contract forthwith without giving any further notice. However, in case of events specified in Article 19.1 (b), (f) and (l), DAMEPL shall be entitled to immediately terminate the Contract without giving any notice.

19.4 ***Payments on termination due to ISCO's default***

Upon termination of the Contract under Article 19.1 and 19.2, ISCO shall not be entitled to any compensation and DAMEPL shall have the right to call the whole or such portion of the Performance Bank Guarantee amount as DAMEPL may deem fit. After termination of the Contract under Article 19.1 and 19.2, DAMEPL shall also be entitled to recover from ISCO the cost of carrying out the balance Works in excess of the sum which ISCO would have been paid. If the Works had been carried out and completed by ISCO under the terms of the Contract. The amount to be recovered may be deducted by DAMEPL from any monies then due or which, at any time thereafter, may become due to ISCO alone or jointly under this or any other contract or otherwise. Any amount outstanding to DAMEPL under this Article 19.4 shall be recovered from ISCO as debt due."

8. It is argued by Mr.R.K.Sanghi, learned counsel appearing on behalf of the petitioner that the contract in the present case has not been terminated by either party. There is no occasion on the part of the respondent to invoke the bank guarantee. By letter dated 17.07.2013 addressed by the respondent for invoking the Bank Guarantee does not mention any reason. Letter plainly mentioned that we hereby exercise our right to invoke the PBG on account of the Petitioner. It is therefore submitted that the Respondent has no right to invoke the bank guarantee under the contract and the bank guarantee can only be invoked as per clause 7.5 of the Contract. The Invocation letter does not show any cause as to why the Respondent has invoked bank guarantee. Invocation without any cause is wholly illegal.

The relevant extract of the letter dated 17.7.2013 referred by the counsel is reproduced herein below: -

> "*We hereby exercise our right to invoke the referred Performance Bank Guarantee issued by you on account of M/s ISCO Track Sleepers Private Limited.*
>
> *Please credit the proceeds of this Performance Bank Guarantee in full to our bank account as per following details immediately and inform us accordingly.*
>
> | | |
> |---|---|
> | *Account Name* | *Delhi Airport Metro Express Private Limited* |
> | *Account Number* | *173010200018045* |
> | *Bank Name* | *Axis Bank Limited* |
> | *Bank Branch* | *Nariman Point, Mumbai* |

IFSC Code UTIB0000173"

There is no cause/claim reason given by the Respondent. No amount has been quantified by the Respondent.

9. It is submitted by Mr. Sanghi that the invocation of Bank Guarantee is contrary to the terms of contract and term of Bank Guarantee. There is no cause/reason of claim is given in the invocation letter, therefore, it amounts to a fraudulent invocation. By invocation, the petitioner has committed fraud. In para-11 of the petition, it is stated that the bank guarantee had outlived its purpose. By invoking bank guarantee contrary to the terms of the contract by the respondent No.1 is unconscionable and lacks bonafide and respondent No.1 committed in invoking the bank guarantee. If the Respondent is allowed to encash the bank guarantee, it would result harm and injustice to the petitioner. It was further submitted that the bank was aware of the fraudulent action of the Respondent.

10. On merit, it is the case of the petitioner as per petition that:

a. The petitioner has completed the work. It appears that because of the disputes between the respondent No.1 and DMRC, the Respondents are trying to recover the amount from the various contractors on frivolous grounds. The Respondent No.1 is also facing financial difficulties.

b. As per the Bank Guarantee, the guarantee shall cease on 10th September, 2012 or on completion of 100% supply of Rheda 2000 Bi Block Sleepers. It is further submitted that

the Respondent No.1 has issued a completion certificate stating that the work has been completed on 15th March, 2010. Copy of the Completion Certificate dated 27th July, 2011 is annexed herewith. It is submitted that in this view of the matter, the Bank Guarantee has been ceased and the Respondent No.1 has no power to invoke the Bank Guarantee and the Respondent No.2 has no power to encash the Bank Guarantee as per the request made by the Respondent No.1. The petitioner has learnt that the Respondent No.1 has requested the Respondent No.2 to encash the Bank Guarantee. It is submitted that the action of the Respondent No.1 and Respondent No.2 are contrary to the terms of the Bank Guarantee. It is submitted that the Respondent No.1 never made any claim for breach of the contract against the Petitioner during the validity of the Bank Guarantee and the said Bank Guarantee had outlived its purpose. It is submitted that the Bank Guarantee is sought to be invoked not in terms of the agreement but for something which is alien to the agreement and the same is unconscionable and lacks bonafides. It is submitted that the invocation was made in bad faith and fraudulently. A fraud has been committed by the Respondent No.1 invoking the Bank Guarantee. The Respondent No.1 by committing such a fraud is trying to take advantage. It is further submitted that if the Respondents are allowed to encash the Bank Guarantee it would result in irretrievable harm and injustice

to the Petitioner. It is submitted that the action of the Respondents are contrary to the terms of the Bank Guarantee. It is submitted that the Respondent No.2 is also aware of the fraudulent action of the Respondent No.1.

c. The act of Respondent No.1 to call upon the Respondent No.2 to make payments under the Performance Security and to realise any of the demand drafts issued by the Respondent No.2 pursuant to such encashment of the Performance Security is not only fraud on the Petitioner, but is also against the provisions of the Agreement/Bank Guarantee.

d. The Petitioner has requested the Respondent No.1 to comply with the terms and conditions of the arbitration clause contained in the Supply Agreement but the Respondent No.1 has failed to comply with the arbitration clause and is proceeding to recover the amount under the Bank Guarantee fraudulently. The action of the Respondent No.1 in invoking and encashing the Bank Guarantee is wholly illegal, contrary to the law and contrary to the terms and conditions of the Bank Guarantee.

e. It is submitted that the disputes and differences between the parties shall be decided by the arbitral tribunal and till the arbitral tribunal give the award, the Respondent No.1 cannot be invoked the Bank Guarantee. The Petitioner is renewing the Bank Guarantee from time to time and undertakes to renew the same till the award was passed. Therefore in the

interest of justice, the Respondent No.1 should be restrained from encashing the Bank Guarantee and Respondent No.2 should be restrained from making any payment to the Respondent No.1 under the Bank Guarantee.

f. The petitioner has a strong prima facie case and the balance of convenience is also in its favour. The grant of injunction will not cause any irreparable injury or hardship to the respondents inasmuch as the petitioner is ready and willing to continue with the Performance Security until the arbitration award. However, allowing the Respondents to encash the Bank Guarantee will cause irretrievable injustice and hardship to the Petitioner. Urgent interim orders also necessary in order to prevent the Respondent No.1 from a fraud being played on the Petitioner and the respondent No.2.

11. The reason for invoking the Bank Guarantee in the reply filed by the respondent No.1 is that the petitioner committed breach of contract not intensified in the invocation letter and in breach of contract notice has to be given to cure the defects. The petitioner has supplied the entire goods and certificate has been issued, full payment is made to the petitioner against the supply by the Respondent. The Bank Guarantee has been invoked as per the reply of the Respondent due to breaches committed by the Petitioner, in case of breach of contract the notice is to be given to the Petitioner to remedy the breach as per Clause 7.5 and if the said defects are

not cured then only the Respondent has a right to terminate the contract.

12. Mr.Arvind Nigam, learned Senior counsel has made his submissions on behalf of respondent No.1. His submissions are outlined as under:

i) The bank guarantee in question is an unconditional bank guarantee, a bank issuing a bank guarantee is not concerned with the underlying contract between the parties. Once the invocation is valid, it must be honoured. It is nature of obligation of the bank. The only two exceptions are; first exception is a case when there is a clear fraud where it is proved that the bank knows. The fraud must be of an egregious nature such as to vitiate the underling contract and the second option is irretrievable injury by proof of special equity otherwise the courts will not interfere directly or indirectly to withhold payment, otherwise faith in commercial transactions would be lost.

ii) The present case is fit case, which establishes that the bank guarantee is invoked correctly. Thus, the interim orders already passed are liable to be vacated. Learned Senior counsel has relied upon the order passed on 17th January, 2014 in OMP No.695/2007. Mr. Nigam learned counsel for the respondent No.1 has already referred the conduct of the petitioner while obtaining the ad-interim orders. The petitioners have cancelled various information given and

misled and misrepresented the court. Even information given by the petitioner to the respondent No.2-bank are contrary to the orders passed. He argues that the petitioners have with malafide intentions not placed the complete information to the Court, otherwise the interim orders ought not to have been passed.

13. In reply to the argument addressed by respondent No.1, it is admitted by the petitioner that on 17th July, 2013, the Respondent issued the letter to the bank invoking the bank guarantee no reason has been given. Copy of the said letter has not been sent to the Petitioner. The Petitioner came to know that the Petitioner is likely to invoke the bank guarantee, therefore, petitioner on 18th July, 2013 filed the petition under a hurriedly manner, mentioning the matter before the court and the court has taken up the matter on that day itself and passed the order of dated 18th July, 2013. On 18th July, 2013 itself the petitioner has informed the bank about the order. The copy was made available to the petitioner later on. On 19th July, 2013 the petitioned informed the respondent also about the order and forwarded a copy of the petition as well as the order passed by this Court. In spite of the order passed by this Court, the Respondent issued a letter dated 25th July, 2013 to the Bank. In the said letter, it has been stated that the bare perusal of the order makes it clear that there is no restrain against the bank to honour the guarantee. It is further stated that in the order the respondent is to give a one week notice to the Petitioner before encashment and there is no restrain or

direction against the Bank and the Bank continues to be liable to honour the guarantee. The Respondent called upon the bank to honour the guarantee immediately and in case the bank fails to pay the amount, the Respondent will take appropriate action against the bank before the RBI. The Respondent by writing a letter has misconstrued the orders and has pressurized the bank to make the payment. Since the Bank was about to make the payment, the Petitioner immediately approached this Court on 26th July, 2013 and status quo order was passed. Copy of the letter dated 25th July, 2013 and order dated 26th July, 2013 is enclosed.

14. It is now not disputed that the bank guarantee has been extended till 10th September, 2014. The petitioner undertakes to renew the same till further order of this Court. The BG has been extended in view of the request made by the petitioner on 17th September, 2013, 25th November, 2013 and 23rd April, 2014. Copy of the relevant communication is filed on record.

15. Counsel has also referred the covering letter of the Bank Guarantee and argues that the covering letter of Bank guarantee states that the guarantee is to be returned to Bank within 15-days from the date of its cease/in force. If the guarantee is not received back by Bank than it shall be deemed to be automatically cancelled and that the letter is an internal part of the guarantee.

16. It is also submitted by Mr. Sanghi that the petitioner has received the entire payment from the Respondent and also the Respondent has issued a certificate stating that the contract has

been completed and that the contractor has supplied the material. The certificate was issued on 27th July, 2011.

It is the case of the petitioner that in view thereof the Bank guarantee is ceased to be in operation on 27th July, 2011 when the completion certificate has been issued by the Respondent. Without prejudice, it is submitted that bank guarantee is ceased to be in operation 10th September, 2012. This clause has not been amended although Bank Guarantee has been extended. The bank guarantee has been invoked by the Respondent on 17th July, 2013 without any cause.

As per the end of BG last clause-4 of the bank guarantee, the Bank Guarantee is to be returned for cancellation once purpose of the bank guarantee was fulfilled. The purpose of the bank guarantee has been fulfilled immediately on issue of the completion certificate.

17. There is a specific plea raised by the petitioner that bank guarantee furnished by them stood discharged after the prescribed period. The invoking of bank guarantee by the respondent No.1 are acts of threat and coercion on the part of respondent No.1 and respondent No.2 is aware about it. Such actions are impermissible in law.

18. Mr.Nigam has not disputed the fact that contract has not been terminated between the parties. There is a specific provision prescribed in clause 7 of the contract which mandates under which the respondent No.1 shall be entitled to call upon the performance of

bank guarantee. The same are i) recovery of liquidated damages; ii) on termination of contract; and iii) loss of damages due to any act of the petitioner.

It is not denied that no notice of termination was issued on the date of invocation. No specific notice was issued to the petitioner for a recovery of liquidated damages. With regard to loss of damages the Respondent has filed certain documents on the last date of hearing without any affidavit. The first document is a letter dated 21st January, 2012 from the Respondent to Patil Rail Infrastructure. The petitioner in OMP No.702/2013. But the said letter does not constitute any breach or termination of the contract. Demand is made for certain clips. The second letter is from Canara Bank to Respondent dated 1st July, 2013. The Delhi Metro has invoked the bank guarantee. It cannot be a ground for invoking the bank guarantee furnished by the petitioner as rightly submitted by Mr. Sanghi the third letter is with regard to amendment application before the Arbitral Tribunal by the Delhi Metro mentioning in case of dispute between the respondent and the Delhi Metro. The matter is still pending before the tribunal. No order has been passed and it is not relevant in the present case.

19. It is the admitted position that in Para 16 and 17 of the petition, it has been stated that the Petitioner is renewing the bank guarantee and undertakes to renew the same till the award was passed. It is relevant to point out in the reply and has raised an issue that "if the petitioner aggrieved to the invocation by the said bank guarantee,

appropriate remedy available to the petitioner is to approach the arbitral tribunal". The petitioner submits that till arbitral tribunal decide the application under Section 17 of the Act and till the order is passed, the bank guarantee should not be encashed.

20. The Bank Guarantee in the present case was issued in pursuant of the contract:

> "*Pursuant to the terms of the Contract, ISCO has agreed to provide a performance bank guarantee ("Performance Bank Guarantee") to "DAMEPL" for the due performance of its obligations under the Contract".*

Under this, the clause of the guarantee is Clause-5 which reads as under:-

> "*The liability of the bank under this Performance Bank Guarantee shall cease on whichever of the following events first occurs:*
>
> *"i……..*
>
> *ii……..*
>
> *iii. On completion of 100% supply of Rheda 2000 Block Sleepers; or*
>
> *iv. 10th Day of September, 2012"*

OMP No.702/2013

21. Most of the facts in OMP No.702/2013 are common and it is not necessary to discuss the entire gamut again. Only the relevant facts are mentioned. I may also point out that in this case by order dated 2nd August, 2013 it was directed by the Court to respondent No.2 to make out a cheque in favour of Registrar General of this Court who

will deposit the money in an FDR. The said order has been complied with by respondent No.2.

22. In the present case the Performance Bank Guarantee is a schedule annexed to the Contract. The relevant clauses are reproduced hereinbelow:

> "1.2 (g)
>
> *The Schedule shall form an integral part of the Contract and shall be in full force and effect as though they were expressly set out in the body of the Contract*."

23. As per Article 27, the Bank Guarantee can only be invoked on certain eventuality. The said Clause is reproduced below: -

> Article 27 is reproduced herein below: -
>
> "*27. PERFORMANCE BANK GUARANTEE*
>
> *27.1 Within fourteen (14) days of signing of the Contract PRIL shall furnish the Performance Bank Guarantee in favour of the Employer from a scheduled commercial bank in India acceptable to the Employer payable in Delhi for an amount equivalent to ten per cent (10%) of the Contract Price. PRIL shall procure the Performance Bank Guarantee in the form set out in Schedule I. PRIL shall maintain the Performance Bank Guarantee at its own expense, and shall ensure that the same shall remain valid at all times during the term of the Contract and for a period of two (2) years and six (6) months thereafter, in the event of a revision of the Contract Price in excess of ten percent (10%) during the term of the Contract for any reason whatsoever, the value of the Performance Bank Guarantee shall be revised proportionately by PRIL within ten (10) business days.*
>
> *27.2 The Employer shall be entitled to call upon the Performance Bank Guarantee in the following circumstances:*

(a) for recovery of liquidated damages payable under the Contract;

(b) for any payments due to the Employer on termination of the Contract; and

(c) for any loss or damage caused to the Employer due to any act or omission of PRIL under the Contract excluding Article 24.7."

24. Petitioner's Submissions:

(a) As per Clause 27(a) the respondent is entitled to call upon the PBG for recovery of liquidated damages. There is no claim of liquidated damages and this clause is not applicable in the facts of the case.

(b) The clause 27 (b) relates to the payment due to Respondent on termination of the contract. In the present case, the contract has not been terminated. However the contract can be terminated under Article 13 & 13.1A and the contract can be terminated only if the Respondent gives 15 days notice in writing to the Petitioner to rectify such defects and if the defects are not rectified. Admittedly no notice of termination has been issued, therefore, this clause is not applicable.

(c) Clause 27(c) relates to any loss or damage caused to Respondent due to any act or omission of the Petitioner under the contract. The Respondent has no where stated that it has suffered any loss or damage because of the act or omission of the Petitioner rather the case of the Respondent is "that due to the several breaches committed by the Petitioner under the contract, the Respondent invoked the bank guarantee in terms of the bank

guarantee vide its letter dated 17th July, 2013. If there is any breach of the contract then the respondent should have issued the notice of termination giving 15-days notice to rectify the defects and if the said defects are not rectified within 15-days then the Respondent has a right to terminate the contract which is not the case.

(d) The relevant clause of contract is Termination which is reproduced below:-

> ***"Article 13. TERMINATION***
>
> *"13.1 The Employer shall have the right to terminate the Contract on occurrence of any of the following events:*
>
> *(a) PRIL is in breach of a material obligation under the Contract; or*
>
> *(b) The Concession Agreement is terminated; or*
>
> *(c) PRIL fails to furnish the Performance Bank Guarantee in accordance with Clause 27 or renew or replenish the Performance Bank Guarantee to the extent of 10% of the Contract Price within seven (7) days of its expiry or invocation; or*
>
> *(d) PRIL gives any warranty or has made any representation under the Contract which is found to be false or misleading; or*
>
> *(e) PRIL's liability for liquidated damages under the Contract exceeds ten per cent (10%) of the Contract Price and the default or defect(committed by PRIL) for which liquidated damages are / were charged continues to exist; or*

(f) A petition for the winding up of PRIL has been admitted and a liquidator or provisional liquidator has been appointed or an order of bankruptcy or an order for the winding up or dissolution of PRIL has been made by a court of competent jurisdiction; or

(g) PRIL fails to adhere to the Requirements; or

(h) PRIL persistently disregards instructions of the Employer's Representative in relation to contractual obligations or contravenes any provisions of the Contract; or

(i) PRIL fails to afford the Employer, Employer's Representative or inspecting Authority proper facilities as per the provisions of the Contract for inspecting the Services or any part thereof; or

(j) PRIL commits default under any Applicable Law in relation to the Contract; or

(k) PRIL fails to resume work in accordance with Clause 12.

(l) DMRC instructs DAMEPL to use any alternate trackform or sleepers in place of Rheda 2000 System or the Rheda 2000 bi-block sleepers respectively.

13.1A On occurrence of any of the events under Clause 13.1, the Employer shall give notice in writing to PRIL to rectify such default within a period of fifteen (15) days from the date of receipt of such notice. If PRIL fails to rectify such default within such period or a period as reasonably requested by PRIL, the Employer shall have the right to terminate the Contract forthwith without giving any further notice. However, in case of events specified in Clause 13.1 (b), (f) and (l), the Employer shall be

entitled to immediately terminate the Contract without giving any notice.

13.2 Upon termination of the Contract, PRIL shall immediately cease performance of the service and deliver to the employer all designs and drawings prepared by PRIL upto the date of termination of the Contract.

13.3 PRIL shall have the right to terminate the Contract on occurrence of any of the following events:

(a) the Employer suspends the Services as per Clause 12 which continues for a period beyond 45 days; or

(b) the Employer fails to open a confirmed, irrevocable LC acceptable to PRIL within 45 days from the effective date as provided under Clause 2.1; or

(c) the Employer fails to pay Advance Payment within 21 days from receipt of Advance Bank Guarantee.

On occurrence of any of the events under Clause 13.3, PRIL shall give notice in writing to the Employer to rectify such default within a period of thirty (30) days from the date of receipt of such notice. If the Employer fails to rectify the default within such period, or in a period as reasonably requested by the Employer by way of a reply to the notice and accepted by PRIL, PRIL shall have the right to terminate the Contract forthwith without giving any further notice.

13.4 ***Payments on termination due to PRIL's default***

Upon termination of the Contract under Clause 13.1 and 13.1A, PRIL shall not be entitled to any compensation and the Employer shall have the right to call the whole or such portion of the Performance Bank Guarantee amount as the Employer may deem fit. After termination of the Contract under Clause 13.1 and 13.1A, the Employer shall also be entitled to recover from PRIL the cost of carrying out the balance Services in excess of the sum

which PRIL would have been paid, if the Service had been carried out and completed by PRIL under the terms of the Contract. The amount to be recovered may be deducted by the Employer from any monies then due or which, at any time thereafter, may become due to PRIL alone or jointly under this or any other contract or otherwise. Any amount outstanding to the Employer under this Clause 13.4 shall be recovered from PRIL as debt due."

25. The petitioner has made the following averments in the petition which are reproduced herein below:-

"10. The Petitioner has completed the work. It appears that because of the disputes between the respondent No.1 and DMRC, the respondents are trying to recover the amount from the various contractors on frivolous grounds. The respondent No.1 is also facing financial difficulties.

11. As per the Bank Guarantee clause 5, the guarantee shall cease on 10.09.2012. It is further submitted that the Respondent No.1 has issued a completion certificate stating that the work of submission of detailed design approved by Systra has been completed on 28.02.2010. Copy of the Completion Certificate dated 12.02.2010 is annexed herewith the petition. It is submitted that in this view of the matter, the Bank Guarantee has been ceased and the Respondent No.1 has no power to invoke the Bank Guarantee and the Respondent No.2 has no power to encash the Bank Guarantee as per the request made by the Respondent No.1. The Petitioner has learnt that the Respondent No.1 has requested the Respondent No.2 to encash the Bank Guarantee. It is submitted that the action of the Respondent No.1 and Respondent No.2 are contrary to the terms of the Bank Guarantee. It is submitted that the Respondent No.1 never made any claim for breach of the contract

against the Petitioner during the validity of the Bank Guarantee and the said Bank Guarantee had outlived its purpose. It is submitted that the Bank Guarantee is sought to be invoked not in terms of the agreement but for something which is alien to the agreement and the same is unconscionable and lacks bonafides. It is submitted that the invocation was made in bad faith and fraudulently. A fraud has been committed by the Respondent No.1 invoking the Bank Guarantee. The Respondent No.2 by committing such a fraud is trying to take advantage. It is further submitted that if the Respondents are allowed to encash the Bank Guarantee it would result in irretrievably harm and injustice to the Petitioner. It is submitted that the action of the Respondents are contrary to the terms of the Bank Guarantee. It is submitted that the Respondent No.2 is also aware of the fraudulent action of the Respondent No.1.

12. *The act of Respondent No.1 to call upon the Respondent No.2 to make payments under the Performance Security and to realise any of the demand drafts issued by the Respondent No.2 pursuant to such encashment of the Performance Security is not only fraud on the Petitioner, but is also against the provisions of the Agreement/Bank Guarantee.*

15. *The Petitioner has requested the Respondent No.1 to comply with the terms and conditions of the arbitration clause contained in the Supply Agreement but the Respondent No.1 has failed to comply with the arbitration clause and is proceeding to recover the amount under the Bank Guarantee fraudulently. The action of the Respondent No.1 in invoking and encashing the Bank Guarantee is wholly illegal, contrary to the law and contrary to the terms and conditions of the Bank Guarantee.*

16. *It is submitted that the disputes and differences between the parties shall be decided by the arbitral tribunal and till the arbitral tribunal give the award, the Respondent No.1 cannot be invoked the Bank Guarantee. The Petitioner is renewing the Bank Guarantee from time to time and undertakes to renew the same till the award was passed. Therefore in the interest of justice, the Respondent No.1 should be restrained from encashing the Bank Guarantee and Respondent No.2 should be restrained from making any payment to the Respondent No.1 under the Bank Guarantee.*

17. *The Petitioner has a strong prima facie case and the balance of convenience is also in its favour. The grant of injunction will not cause any irreparable injury or hardship to the Respondents inasmuch as the Petitioner is ready and willing to continue with the Performance Security until the arbitration award. However, allowing the Respondents to encash the Bank Guarantee will cause irretrievable injustice and hardship to the Petitioner. Urgent interim orders are also necessary in order to prevent the Respondent No.1 from a fraud being played on the Petitioner and the Respondent No.2."*

26. In the reply, it is specifically mentioned that the petitioner is aggrieved by the invocation of the subject bank guarantee, the appropriate remedy available to the petitioner is to approach the arbitral tribunal.

27. In Para-11 of the petition, it has been stated that the bank guarantee had outlived its purpose. The Bank guarantee is sought to be invoked not in terms of the agreement for something which is alien agreement and the same is unconscionable and lacks bonafide. Fraud has been committed by the Respondent in invoking the bank

guarantee. However, if the Respondent is allowed to encash the bank guarantee, it would result harm and injustice to the petitioner. It was further submitted that the bank was aware of the fraudulent action of the Respondent.

In Para 16 and 17 of the petition, it has been stated that the Petitioner is renewing the bank guarantee and undertakes to renew the same till the award is passed. It is relevant to point out in the reply and has raised an issue that "if the petitioner aggrieved by the invocation of the subject Bank Guarantee, the appropriate remedy available to the petitioner is to approach the arbitral tribunal. The Petitioner submits that till arbitral tribunal decide the application under Section 17 of Arbitration Act and till the order is passed, the bank guarantee should not be encashed.

28. The respondent No.1 has filed certain documents on the last date of hearing without any affidavit.

i) The said letter dated 21st January, 2012 does not constitute any breach or termination of the contract. Demand is made for certain clips.

ii) The second letter is from Canara Bank to Respondent dated 1st July, 2013. The Delhi Metro has invoked the bank guarantee. It cannot be a ground for invoking the bank guarantee furnished by the petitioner.

iii) The third letter is with regard to amendment application before the Arbitral Tribunal by the Delhi Metro in case of dispute between the respondent and the Delhi Metro. It is stated that the claimant has not filed all the relevant papers of the arbitration case. Matter is still

pending before the tribunal. No order has been passed and it is not relevant in the present case. The Tribunal has no found default on the part of the petitioner nor petitioner name has been mentioned.

29. Let me now deal with the abovementioned case in view of the facts and circumstances and settled law in the issue of exceptions were judicial intervention may be called for or not in relation to invocation of bank guarantee by the respondent in view of unequivocal terms, unconditional and recite that the amount would be paid without demur. In case, the petitioner's matter falls within the exceptions i.e. fraud or irretrievable harm or injustice, then the case of interim order may be made out otherwise not.

30. It is a settled law of the land that in case of an unconditional bank guarantee, the nature of obligation of the bank is absolute and not dependent upon any dispute or proceeding between the party at whose instance the bank guarantee is given and the beneficiary. The only two exceptions were fraud, which was not pleaded in that case, and the other was special equities. Special equities were claimed on the basis as to who had committed breach of the contract. Determination of disputes was stated to be not a factor which would be sufficient to make the case as exceptional case justifying interference by the court restraining invocation of the bank guarantee.

31. 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 the 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 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.

32. In view of law laid down by the Supreme Court in its different judgments, it is clear that injunction against encashment of bank guarantee is an exception and not the rule. Cases of such exceptions would have to be evidenced by documents and pleadings on record and compulsorily should fall within any of the following limited categories:-

i) If there is a fraud in connection with the bank guarantee which would vitiate the very foundation of such guarantee and the beneficiary seeks to take advantage of such fraud.

ii) The applicant, in the facts and circumstance of the case, clearly establishes a case of irretrievable injustice or irreparable damage.

iii) The applicant is able to establish exceptional or special equities of the kind which would prick the judicial conscience of the court.

iv) When the bank guarantee is not invoked strictly in its terms and by the person empowered to invoke under the terms of the guarantee. In other words, the letter of invocation is in apparent violation to the specific terms of the bank guarantee.

33. At the midst of hearing in both the matters, respondent No.1 has filed three documents in OMP No.702/2013. One of them is a copy of letter dated 21st January, 2012 issued by respondent No.1 to the petitioner. Learned counsel appearing on behalf of respondent No.1 has tried to explain that the said letter is sent in view of Clause 7.5 of the Contract which discloses the breaches and defects to cure. In view of the order dated 17th January, 2014 passed by Hon'ble Mr. Justice Vipin Sanghi in OMP No.695/2013, the interim orders passed in the present petition are liable to be vacated.

34. The contention of the learned counsel for respondent No.1 is refuted by the learned counsel for the petitioner who states that the alleged letter is not disclosing the specific breaches and the defects to cure under Clause 7.5 of the Contract and no advantage can be derived by respondent No.1 in order to invoke the bank guarantee.

35. After having gone through the said letter, I am of the view that the submission of the petitioner, to some extent, is correct. In case, the said letter is read carefully, it is stated in the said letter that respondent No.1 inspected over 1,30,000 rail clips of which around 2600 are detected as having failed and they need to be replaced. In the said letter, respondent No.1 has asked the petitioner to send at least 5000 more rail clips and make available experts for inspection. The said letter is not a notice strictly under Clause 7.5 of the Contract rather the petitioner was requested to supply certain clips etc. As far as the order referred by the learned counsel for respondent No.1 passed in OMP No.695/2013 is concerned, in that case, it was the admitted position that respondent No.1 gave a 30 days' notice to the

petitioner to cure the defect who failed to comply the requirements of the said notice. Therefore, the Court has recorded in the order that the petitioner has waived its right after the expiry of 30 days. The situation in the present case is, therefore, different. Para 10 of the said order reads as under:-

> *"10. On the other hand, learned senior counsel for the respondent submits that the respondent has complied with clause 7.5.1 by issuing it notice dated 26.09.2012 to the petitioner with copy to the respondent bank. In this communication, respondent No.1 had communicated the several failures on the part of the plaintiff in respect of its obligations under the Contract and given a 30 days cure period to the petitioner."*

36. In the present case, no notice of termination was issued. No specific notice was issued by the respondent No.1 to the petitioner of liquidated damages with regard to loss of damages. The main claim in the notice was for the demand of certain clips.

37. The following decisions were referred by the petitioners in support of their submissions:-

(i) In the case of ***Syndicate Bank vs. Vijay Kumar and Ors.***, (1992) 2 SCC 330, the Supreme Court indicated the importance of an automatic discharge clause in the contract and its effects on the bank guarantee, as under:

> "From the above discussion it can be gathered that the bank guarantee are on different level and they must be allowed to be honoured free from interference by the courts and a bank which gives a guarantee must honour the same according to its terms and it is only in exceptional cases that the court will interfere with the

machinery of irrevocable obligations assumed by the banks. A fortiori the same principle applies in respect of bank guarantees which are discharged. When once the bank guarantee is discharged the obligation of the bank ends and there is no question of going behind such discharged bank guarantee. The courts should refrain from probing into the nature of the transactions between the bank and the customer which led to the furnishing of the bank guarantee."

(ii) In the case of ***Larsen & Toubro Ltd. vs. Maharashtra State Electricity Board and Ors.***, AIR 1996 SC 334 while allowing the relief of injunction in relation to the bank guarantee, the court held as under:

> "The appellant wrote to the first respondent on 21.2.1994 that the plant was completed and so all bank guarantees have served their contractual requirements. On a perusal of the relevant clauses in the contract, executed between the appellant and the first respondent and the communication of the first respondent dated 10.6.1994, it is fairly clear that the stipulations or conditions mentioned as per clauses 70.2, 70.3 and 70.4 have been successfully fulfilled and the plant was admittedly taken over by the first respondent. The guarantee given by the Citibank, N.A. dated 10.5.1989 appearing in Vol. II at pp. 122 to 126 will ensure only till successful completion of the trial operations and the plant is taken over. That event having ensued, the invocation of the guarantee given by the Citibank dated 10.5.1985 in the sum of Rs.2.72 crores is not encashable on its terms and in order to prevent irretrievable injustice, an injunction as prayed for, to respondents 1 to 4 deserves to be issued on that score. The court below was in error in not doing so. We hereby restrain respondents 1 and 4 from invoking the bank guarantee aforesaid."

(iii) Admittedly, no such notice was received by the petitioner at the time of invoking of bank guarantee. However, it appears that in the letter of invocation, it was mentioned that due to several breaches committed by the petitioner under the contract, the respondent No.1 is invoking the bank guarantee issued by the respondent. Clause 7.1 mandates that the respondent No.1 is entitled to call upon the performance bank guarantee in terms of Clause 7.5 (a) to (c). There is no cogent evidence produced by the respondent No.1 in this regard strictly as per Clause 7.5.

(iv) The Calcutta High Court in the case of ***GIS Limited Vs. Indiana Conveyors Limited 1999 Law Suit (Cal) 63*** has held as under: -

> *"The two broad principles, rather two broad parameters which the courts have to consider in favour of granting injunctions against encashment of Bank Guarantees relate to question of 'fraud' and irretrievable injustice', or, as some call it 'special equities'.*
>
> "……. *The case of the petitioner (in the present case) can be said to be covered by both the aforesaid parameters of 'fraud' and 'irretrievable injustice' bordering on 'special equities'.*
>
> *"When a party to a contract admittedly has no claim against the other, its act of invoking or encashing a Bank Guarantee….. may amount to practising fraud….. and if the party practising fraud is allowed to encash the Bank Guarantee, the other party does not suffer irretrievable injustice".*
>
> *"When the very claim……. Has already been satisfied or stands extinguished……..invocation of Bank Guarantee in respect of such a claim cannot be*

permitted because special equities created in the mean time would immediately come in the way of allowing the party to encash the Bank Guarantee."

(v) In the matter of ***Satluj Jal Vidyut Nigam Ltd. Vs. Jai Prakash Hyundai Corsortium,*** AIR 2006 DELHI 239: 129 (2006) DLT 453, this Court held as under;

"25. While quoting Samwoh Asphalt Premix PTE Ltd. v. Sum Cheong Piling PTE Ltd. [2002] Build LR 459, the Court held:-

"… a demand under the performance guarantee can only be made when "the seller has failed or refused to fulfill his obligation under the contract". The seller's demand or refusal is a condition precedent to the buyer making a demand. An assertion to that effect is implied in a demand made by the buyer. In circumstances where it can be said that the buyer has no honest belief that the seller has failed or refused to perform its obligation, a demand by the buyer in my view is a dishonest act which would justify a restraint order".

26. In our considered opinion, a performance guarantee which was to be invoked in terms of the contract of guarantee but the same is being sought to be invoked not in terms of the agreement but for something which is alien to the agreement would be unconscionable and would lack in bona fides. The sum and substance of the agreement of the learned counsel for the respondent was that the call was made in bad faith. We agree with the submission. Hence, we uphold the impugned order to the extent it relates to passing of the injunction order in favour of contractor and against the department of bank guarantee in question."

(vi) In the Matter of ***GIS Limited Vs. Indiana Conveyors Limited,*** (1999 Law Suit (Cal) 63) Calcutta High Court held as under:

> "*[16]. If the arbitrator has to decide the dispute with regard to the respondent's obligation to return the bank guarantees, this court cannot remain oblivious or shirk its responsibility of looking to the prima facie nature of the petitioner's case to find out whether the merits of the case warrant the grant of any interim Injunction under section 9 of the Act or not.*
>
> *[17] From what I have narrated the inescapable conclusion which emerges is that the petitioner has a strong prima facie case in its favour and that the situation warrants that this court should, while exercising its Jurisdiction under section 9 of the Act restrain the respondent from invoking/encashing the aforesaid bank guarantees, to enable the parties to have the adjudication of this dispute through arbitration.*
>
> *[18] The petitions accordingly are allowed. It is directed that pending the adjudication of disputes by arbitration and until the award is finally passed by the arbitral Tribunal, the respondent shall not Invoke/encash the two bank guarantees in question."*

(vii) In the case of ***Continental Construction Ltd. and Anr. Vs. Satluj Jal Vidyut Nigam Ltd.,*** 2006(1) ARBLR321 (Delhi), it was held as under:

> *"22. In the opinion of the court, the petitioners have prima facie established on record the case of extra-ordinary special equities apparently causing irreparable prejudice to the petitioners. In fact, they have also been able to show that the bank guarantee has not been invoked strictly in terms of the bank guarantee which in turn refers to discharge of right and obligation under the contract. The judgment of the court in the case of M/s.*

Hindustan Construction Ltd. and anr. (supra) is certainly of relevance and is applicable to the facts of the present case as spelled. Any observations made in this order would be of no consequence in regard to pendency of proceedings before the arbitral tribunal as the court has not, in any way directly or indirectly, touched upon the merits of the disputes arising between the parties from the main contract".

38. On 30th April, 2014 the Arbitral Tribunal comprising of Dr. Justice Arijit Pasayat (Retd.) as Presiding Arbitrator, Mr. Justice B.P. Singh (Retd.) as Arbitrator – Respondent and Mr. Justice K. Ramamoorthy (Retd.) as Arbitrator – Claimant have fixed the preliminary hearing on 2nd June, 2014.

39. From the entire gamut of the matter and settled law on the aspect, these cases are not a case of keeping the bank guarantee alive but these cases are of wrong invocation by the respondent. Therefore, this Court at this stage is not inclined to dismiss the petitions and vacate the interim orders. Even in reply, the following statement was made by respondent No.1: "If the petitioner aggrieved to the invocation by the said bank guarantee, appropriate remedy available to the petitioner is to approach the arbitral tribunal".

The interim order shall continue during the arbitration proceedings unless it is modified and vacated by the Arbitral Tribunal on the petition filed by the respondent either on the basis of facts available or change of circumstances.

40. As matters are being decided on merit, still as far as the submissions of Mr. Nigam, learned Senior Counsel appearing on behalf of respondent No.1, the court agrees with his argument that

the entire picture has not been disclosed by the petitioners when the interim orders were obtained. The petitioners have also not communicated the correct orders passed by the Court. The reply of the respondent No.2-bank to the respondent No.1 was contrary to order passed when the respondent No.1 tried to give correct information. It is duty of the bank to interpret the Court order correctly. Similar is the duty cast upon petitioners to give correct information of order to the bank. For the said error, the petitioners are burdened with costs of Rs.30,000/-, which shall be deposited by the petitioners in equal proportion with the Prime Minister's Relief Fund within two weeks. Similarly, the respondent No.2 is also directed to deposit the cost of Rs.15,000/- for misinterpreting the orders of the Court. The respondent No.2 shall deposit the cost in the similar manner.

41. Accordingly, the OMP Nos.702/2013 and 704/2013 under Section 9 of the Arbitration & Conciliation Act, 1996 are disposed of with an order of restraint against the respondent-bank not to encash bank guarantees and not to receive the payment in terms of order passed by this Court on 2nd August, 2013 in OMP No.702/2013 subject to the condition that the bank guarantees would be kept alive by the petitioners during the pendency of arbitral proceedings and until the award is finally passed or subject to such orders as may be passed by the arbitral tribunal even during the pendency of the proceedings.

42. Liberty is also granted to the respondent to move an appropriate application for modification/vacation of orders, if

necessary, on the basis of material available on record or due to change of circumstances. The said petition would be determined as per its own merit.

43. Both petitions are accordingly disposed of.

(MANMOHAN SINGH)
JUDGE

JUNE 04, 2014