

Banerjee and Banerjee Vs. Hindusthan Steel Works Construction Ltd. and ors.

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Court : Kolkata

Decided On : May-08-1986

Reported in : AIR1986Cal374,[1990]68CompCas344(Cal)

Judge : Pratibha Bonnerjea, J.

Acts : [Contract Act, 1872](#) - Sections 73 and 126

Appeal No. : Matter No. Nil of 1985

Appellant : Banerjee and Banerjee

Respondent : Hindusthan Steel Works Construction Ltd. and ors.

Advocate for Def. : Bhaskar Gupta and ;Debasis Bose, Adv.

Advocate for Pet/Ap. : A.C. Bhabra and ;D.K. Bose, Adv.;Utpal Bose, Adv.

Judgement :

ORDER

Pratibha Bonnerjea, J.

1. This is an application under Section 41 of the Arbitration Act for an Order restraining the respondent No. 1 from enforcing seven Bank guarantees for a total

sum of Rs. 11,50,000/- furnished by the Bank of Madura Limited and the Indian Overseas Bank the respondents Nos. 2 and 3 herein, on behalf of the petitioner in favour of the respondent No. 1. These bank guarantees were given pursuant to the express terms of the contract dated 12-5-84 entered into between the petitioner and the respondent No. 1 for construction works in the Farakka Super Power Thermal Project at Farakka. Out of the seven Bank guarantees, two are in lieu of security deposit and five are for securing mobilisation advance made by the respondent No. 1 to the petitioner.

2. The respondent No. 3 Indian Overseas Bank issued two guarantees particulars whereof are set out below :

1) LG/013/8/84 dated 15-5-85 for Rs. 1,50,000/- 2) LG/013/12/84 dated 26-9-84 for Rs. 1,00,000/-

And the rest of these five Bank guarantees were issued by the Bank of Madura Limited, the respondent No. 2 herein, which were as follows:

1) LG/G/ S/2/84 dated 7-3-84 for Rs. 4,00,000/- 2) LG/G/S/5/84 dated 15-3-84 for Rs. 2,00,000/- 3) LG/G/S/5/84 dated 28-4-84 for Rs. 1,00,000/- 4) LG/RR/US/5/84 dated 28-4-84 for Rs. 1,00,000/- 5) LG/RR/US/4/84 dated 28-4-84 for Rs. 1,00,000/-

3. The forms of two Guarantees for security deposit issued by the two Banks, were approved by the respondent No. 1. The essential terms necessary for enforcing these Bank guarantees are as follows :

1) The Bank undertakes to indemnify the respondent No. 1 to the extent of the amount specified in the guarantee against any loss or damage caused to or suffered by the respondent No. 1 by reason of any breach of the petitioner of any of the terms and conditions of the contract between the petitioner and the respondent No. 1.

2) The Banks further agree that the respondent No. 1 shall be the sole Judge as to whether the petitioner has committed any breach or breaches of the terms and conditions of the said contract and the extent of loss, damage, costs, charges and expenses caused to or suffered by or that may be caused to or suffered by the

respondent No. 1 on account thereof and the decision of the respondent No. 1 on this point will be final and binding on the Banks.

4. Therefore, in the present case, for enforcement of the guarantees for security deposit, the respondent No. 1 will have to make a written demand stating that the petitioner has committed breach of any terms of the contract and the extent or the quantum of loss or damages suffered or to be suffered by the respondent No. 1 as a result thereof. The decision of the respondent No. 1 regarding the quantum of damage will not be questioned or challenged by the Banks. On fulfilment of these two conditions, the Bank will be bound to release the guaranteed amount.

5. Similarly the five guarantees against mobilisation advance which were approved by the respondent No. 1, could be enforced only on following terms and conditions :

1) The Bank guarantees the due recovery of the money advanced by the respondent No. 1 to the petitioner by way of mobilisation advance. If the petitioner fails to utilise the said advance for the purposes of the contract or the respondent fails to fully recover the said sum with interest in accordance with the stipulation in the contract, the Bank undertakes to pay to the respondent No. 1 unconditionally, irrevocably and without demur to the extent of the amount guaranteed on demand by the respondent No. 1 for the loss or damage caused to it or suffered by the respondent No. 1 by being unable to recover in full the said sum with interest. The respondent No. 1 was the sole judge for deciding whether the petitioner had failed to utilise the advance or the extent or the quantum of loss suffered by it or its failure to recover the balance of advance and this decision would be final and binding on the bank.

6. The counsel for the petitioner submits that to enforce the guarantees for security deposit or the mobilisation advance, the respondent No. 1 is bound to state the quantum or the extent of damage suffered or to be suffered by the respondent No. 1 on account of the breach of contract by the petitioner. In case of enforcement of the guarantees against mobilisation advance, the respondent No. 1 has to say that the petitioner committed breach of the contract by not being able to utilise the advance in terms of the contract and also must say how much of the advance it

has been able to recover and what is the balance due. The respondent No. 1 will be entitled to enforce these five bank guarantees only to the extent of the outstanding balance due. Mr. Bhabra the counsel for the petitioner further submits that unless the loss or damage is quantified or assessed by the respondent No. 1, the Banks will not incur any liability under the guarantees. In support of his contention, he cites : [1974]3SCR556 (Union of India v. Raman Iron Foundry) para 9, where the Supreme Court laid down the principle as follows :

'Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eo instanti incur any pecuniary obligation nor does the party complaining of the breach become entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages.'

7. Mr. Bhabra invites my attention to the written demand made by the respondent No. 1. Demands have been made for enforcing all the seven guarantees almost in identical languages. A specimen copy of which is the letter dated 3-9-85 for enforcing the guarantees for security deposit and the same is set out below :

'M/s. Banerjee & Banerjee have failed to fulfil the terms and conditions of the contract referred to in aforesaid Bank guarantee and committed breach of the terms of the aforesaid contract and in consequence we have suffered loss and/or damage far exceeding the amount guaranteed by you. We have, therefore, in terms of the aforesaid bank guarantee become entitled to receive from you the sum of Rs. 2,00,000/-.Please be good enough to pay the aforesaid sum without delay.'

8. One of the specimen copies of the demand letters for enforcing the five Bank guarantees against mobilisation advance, is the letter dated 31-8-85 which is set out below :

'As M/s. Banerjee & Banerjee have failed to utilise the advance referred to in the above Bank guarantee for the purpose of the contract and/or we have not been

able to recover the said advance in accordance with the stipulation of the subject contract, we have suffered huge loss and/or damages far exceeding the amount guaranteed by you We have, therefore, become entitled under the terms of the guarantee to receive from you the sum of Rs. 4,00,000/-.....Please be good enough to pay the sum demanded immediately and without demur.'

9. It is submitted on behalf of the petitioner that in none of these demand letters, the alleged damage or loss has been quantified, specified, ascertained or assessed although under the Bank guarantees, the parties have agreed that the respondent No. 1 will be the sole adjudicatory authority to decide the same. Such a term had to be introduced in the guarantees, so that the Bank guarantees could be enforced on the basis of this tentative assessment of damages made by the respondent No. 1. Unless the damage is ascertained or assessed the banks will not incur any liability to the respondent No. 1 for suffering unliquidated damage. It should be remembered that under the general principles of law, no person can be the judge of his own cause but this general principle of law has to be given a go by in case of bank guarantees and letters of credit for the sake of smooth functioning of the international trade and commerce. This tentative decision of the beneficiary under the guarantee or L/C, regarding the quantum of loss or damage is of course subject to the final decision on this issue by the court or the arbitrator as the case may be in the litigation between the petitioner and the respondent No. 1. But so far as the Banks are concerned, the decision of the respondent No. 1 on this point is final and binding and they must release the guaranteed amount immediately without demur. By not deciding the quantum of alleged damage the respondent No. 1 failed to discharge its function as the sole Judge in terms of the agreements and in breach of terms of the guarantees has wrongfully attempted to recover unliquidated damages which is prohibited by law as held in : [1974]3SCR556 . The words 'far exceeding the guaranteed amounts' as mentioned in the demand letters, only indicate that the alleged damage is unascertained and unliquidated.

10. The counsel for the respondent No. 1 however submits that in cases of unconditional and irrevocable Bank guarantees, the court have no jurisdiction to injunct either the Bank from making payment thereunder or the beneficiary from

encashing the same. The Bank guarantees and the Letters of Credit constitute the life blood of international commerce and the Bank's creditworthiness in the market will be greatly eroded if it is prevented from honouring its obligations under the Bank guarantee which the parties furnish as security at the time ,of entering into contracts. The respondent's counsel relies on (1977) 3 WLR 752 (Mercantile Ltd. v. National Westminster Bank Ltd.) where concerning enforcement of Bank guarantees. Mr. Justice Kerr held at page 870 : --

'Except possibly in clear cases of fraud of which the Banks have notice, the court will leave the merchants to settle their disputes under the contract by litigation or arbitration as available to them or stipulated in the contracts, These are risks which the merchants take. In this case, the plaintiff took the risk of the unconditional wordings of the guarantees. The machinery and commitments of banks are on a different level. This must be allowed to be honoured free from interference by the courts. Otherwise, trust in international commerce would be irreparably damaged.'

11. The counsel also relies on (1977) 3 WLR 764 : (1978) 1 All ER 976 (Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.) where Lord Denning M. R. held at page 983:--

'All these leads to the conclusion that the performance guarantee stands on a similar footing to a Letter of Credit. A Bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer, nor with the question whether the supplier is in default or not. The Bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the Bank has notice.'

12. The counsel for the respondent No. 1 cites Indian authorities on this point, reported in : [1981]3SCR300 (United Commercial Bank v. Bank of India). He strongly relies on paragraph 39 where approving the English authorities quoted above, it was held :

'If temporary injunction were to be granted in a transaction between a Banker and a Banker the whole banking system in the country would fail.'

13. He submits that similar view has been taken by this court in : AIR1979 Cal44 (Texmaco Ltd. v. State Bank of India) where Sabyasachi Mukherjee J. after approving the English decisions mentioned above, held at paragraph 10 :

'In my opinion, the position in law is as follows : Whether the bank is obliged to pay and to pay on what terms, must depend upon both in the case of Bank guarantee, and in the case of Letter of Credit on the terms of the document..... The court of appeal has referred to the exception of a clear fraud. I venture to suggest that there may be another exception in the form of special equities arising from a particular situation which might entitle the party to an injunction restraining the performance of Bank guarantee. But in the absence of such special equities and in the absence of any clear fraud, the Bank must pay on demand if so stipulated, and whether the terms are such must have to be found out from the performance guarantee as such.'

14. In this case, Texmaco had filed a suit against the purchaser to which the Bank was also a party defendant. The plaintiff Texmaco also filed an application for an order of injunction restraining the Bank from making payment under the performance guarantee to the purchaser. The court refused to pass any order on that application. On appeal from that decision reported in : AIR1979 Cal44 , the Division Bench of this court, in (1979) 83 Cal WN 807, considered another earlier Division Bench decision of this court reported in (1970) 74 Cal WN 991 and held in paragraphs 14 and 23 thereof, that the Bank guarantee must be enforced in accordance with its terms only and it is a separate and independent contract to which only the beneficiary and the bank are parties. The plaintiff at whose instance the bank has given the guarantee knows that the beneficiary under the guarantee is the sole Judge to foist any liability on the Bank to pay under the guarantee. But while holding that the Bank guarantee is an independent agreement, and its enforcement should not be prevented by courts, the Division Bench also held that to this general principle, there is an exception and the enforcement of the guarantee can be stopped only on the ground as observed by Lord Denning MR. :

'when there is a clear fraud of which the Bank has notice.'

15. The Division Bench in (1979) 83 Cal WN 807 also did not disapprove the other exception suggested by Sabyasachi Mukharjee J. that where there was a special equity arising from a particular situation, the court would pass an order of injunction restraining the enforcement of the Bank guarantee.

16. This aforesaid second exception suggested by Sabyasachi Mukharjee, J. in Texmaco's case was accepted by another Division Bench of this court reported in : AIR1985 Cal23 (National Project Construction Corpn. Ltd. v. M/s. G. Rajan) where the Division Bench considered : AIR1979 Cal44 and on the facts of the case before them held in paragraph 39 :

'There was no question of any fraud or any equity entitling the plaintiff to an injunction. If that is the position then, in my opinion, the plaintiff is not entitled to an injunction in this application.'

17. In : AIR1985 Cal23 , it was argued before the Division Bench on behalf of the beneficiary, that the court would have no jurisdiction to pass any order in favour of the contractor preventing enforcement of the Bank guarantee as the contractor had no nexus therein. The privity of contract was between the beneficiary and the Bank. The contractor being a third party to the bank guarantee had no locus standi to restrain the beneficiary from enforcing the guarantee or the Bank from paying the money. It was also argued relying on : [1983]1SCR561 (MSEB Bombay v. Official Liquidator) that the Bank guarantee was an independent transaction irrespective of other claims and disputes between the parties to the main contract pursuant to which the Bank guarantee was given. The counsel for the beneficiary further submitted that the learned trial Judge had exercised jurisdiction not vested in him by law in passing the impugned order of injunction inasmuch as there was no allegation of fraud against his client : AIR1985 Cal23 . It is therefore clear that on behalf of the beneficiary, in the above case before the Appeal Court, it was conceded that in case of fraud, the contractor could obtain an order of injunction in his suit or in his arbitration proceeding as the case may be, and to that extent, the contractor would have the locus standi. The aforesaid concession was made by the counsel for the beneficiary, on the basis of the settled law both in England and

in this country. But our courts have gone one step further to add that in cases, where any special equity would arise out of the particular situation of the case, the court can stop parties to the guarantee from enforcing the guarantee at the instance of the contractor. The reason is simple. The bank guarantees and the Letters of Credit are given by the bankers at the instance of one of the parties to the main contract and pursuant to the express terms of the main contract. Therefore, the contractor, at whose request the bank guarantee is given or the L/C is opened, has nexus therein. He cannot be said to be a total stranger to the contract of guarantee or L/C. A wrongful or fraudulent enforcement of the bank guarantee will vitally affect the contractor. Hence if the guarantee is enforced by fraud, misrepresentation, deliberate suppression of material facts, or the like, that will give rise to a special equity in favour of the contractor who will then have the right to stop its enforcement by obtaining an order from court. But for obtaining an order from court, a very strong prima facie arguable case in support of the contention that there is a fraud or special equity, must be made out. The courts will not interfere with the enforcement of unconditional or conditional bank guarantees or Letters of Credit on the mere allegation of fraud or special equity.

18. It has been contended before me, on behalf of the respondent, that the bank guarantees in this case are not covered by the Arbitration agreement. It is true that these documents, are executed by and between the Bank and the beneficiary and as such are not covered by the arbitration clause contained in the main contract between the beneficiary and the contractor. But the beneficiary's right to enforce the same, or his cause of action for enforcing it, must arise under the main contract. These guarantees are given on the basis of the terms of the main contract and are enforced on the ground or breach of terms of the main contract which contains the arbitration clause. Therefore the Arbitrator has the jurisdiction to decide about the legality or validity of the enforcement of the bank guarantee or the quantum of damage suffered by the claimant before it. If there is no arbitration agreement, then the court would decide the same in a suit between the main parties. The decision of the court or the award of the arbitrator on this point will be final. If the enforcement of guarantee is alleged to be fraudulent or wrongful and the court or the arbitrator upholds the same, the beneficiary will be liable to reconstitute the benefit received under the guarantee and may also be liable to

damages to the contractor. But otherwise the guarantee or the Letter of Credit is treated as completely independent document and if it is enforced bona fide strictly in accordance with its terms, in that case, the contractor cannot prevent its enforcement. But this enforcement will be subject to the result of the suit on the arbitration proceeding as the case may be.

19. Therefore in my opinion, the court has to find out from the facts of each case :--

1 Whether demands for enforcing the Bank guarantees has been made strictly in accordance with the terms of the document concerned; or

2) Whether there is any allegation of fraud against the beneficiary of which the Bank has notice; or

3) Whether there is any special equity arising out of the particular situation of the case giving rise to a strong prima facie arguable case against enforcement of the Bank guarantee or not.

Whether the enforcement of the Bank guarantee should be allowed or not in a particular case, will depend on the facts and circumstances of each case and the finding of the court on the aforesaid points.

20. Mr. Bhabra, appearing on behalf of the petitioner submits that the seven Bank guarantees in this case are all conditional similar to that of in : AIR1985 Cal23 which has been made clear by the Calcutta High Court by holding in para 14 that the Bank guarantees were conditional one(s). On behalf of the respondent No. 1 it has been argued that the Bank guarantees are commercial documents and as such may be invoked in a 'commercial manner'. This submission is made on the basis of : AIR1983 Cal91 (Road Machines (India) Ltd. v. Projects & Equipment Corpn. of India Ltd.). But Mr. Bhabra invites my attention to the observation of the learned single Judge in that case, made in paragraph 15 of the said report, stating that the invocation would be sufficient and proper when :

'the guarantee is being invoked by the beneficiary in pursuance of the guarantee'.

21. Mr. Bhabra submits that enforcement in 'commercial manner' does not mean that the court will allow enforcement without investigating the allegation of fraud or special equity. The court will allow enforcement only when the enforcement is made in accordance with the terms of the document.

22. He relied on (1947) 1 All ER 500 at 503 (Eastern Countries Building Society v. Russel) which lays down how a Bank guarantee should be construed :

'The whole instrument, as it stands, must be construed so as to give effect to the intention of the parties discovered from the actual terms agreed by the parties and employed by them in the written instrument as expressing what they intend to agree..... The terms employed in the contract, defining the surety's undertaking and expression the terms on which he is to be freed from his undertaking, ought to be strictly construed..... Neither equity 'or law will put a construction on the document which results in imposing on the surety any more than on the strictest construction of the instrument, he must be said expressly to have undertaken. If authority is needed for saying that the surety's contract has been said to be one strictissimi juris, I would refer to Bacon v. Chesney (1816(1) Stark 192) (1) Stamford, Spalding & Boston Banking Co. v. Ball (1862 (45) ER 1203);(2) and Blest v. Brown (1862 (45) ER 1225);(3) There are plenty of authority for saying that the court treat a surety as favoured debtor..... Such are the principles which I must apply in construing the document in question.'

23. The aforesaid principle laid down in (1947) 1 All ER 500 was approved by the Court of Appeal in (1947) 2 All ER 734 (Eastern Countries Building Society v. Russel). It is also a well settled law that the guarantee becomes operative only when the demand is made in accordance with the terms of the guarantee. In : [1981]3SCR300 (United Commercial Bank v. Bank of India) paragraph 37 it was held :

'Unless documents tendered under a credit are in accordance with those for which the credit calls and which are embodied in the promise of the paying or negotiating Banker, the beneficiary cannot claim against the paying banker, and it is the paying banker's duty to refuse payment. The documents must be those called for and not documents which are almost the same or which will do just well

In paragraph 41 of this report the Supreme Court held ; 'A Letter of Credit sometimes resembles and is analogous to a contract of guarantee. In *Elian v. Matsas*, (1966) 2 Li LR 495 Lord Denning M. R. while refusing to grant an injunction stated..... a bankguarantee is very much like a letter of credit....A Bank which gives a performange guarantee must honour that guarantee according to its terms.'

24. Therefore whether a bank guarantee has become enforceable or not will depend of its terms and the language of the letter of demand. If the document is unconditional and irrevocable, the Bank must pay whenever the demand is made by the beneficiary in accordance with its terms, unless the contractor sets up a strong prima facie case of fraud or special equity. But if the guarantee is a conditional one, it becomes enforceable upon fulfilment of the conditions stipulated and the beneficiary must allege in the demand letter that the conditions have been fulfilled. Otherwise the Bank will not be liable to pay. As a matter of fact, if the conditions are not fulfilled, it is the duty of the bank to refuse payment.

25. I have already pointed out that in the present case, guarantees for security deposit are conditional. The guarantees become enforceable on fulfilment of two conditions : --

1) The beneficiary will have to assess the extent of loss or damage caused or suffered by the beneficiary by reason of breach of contract by the contractor.

2. The beneficiary is the final adjudicatory authority and/or the sole judge to decide whether the contractor had committed breach of contract and the quantum of loss, damage, costs, charges etc. suffered or to be suffered by the beneficiary.

26. Therefore, in the demand letter, the beneficiary must allege that the contractor committed breach of contract and the quantum of damage or loss suffered by it on account of the breach.

27. Similarly in respect of the five guarantees against mobilisation advances which were also conditional the conditions are as follows:

- 1) The contractor must fail to utilise the said advance for the purpose of the contract in terms of the agreement.
- 2) The beneficiary has failed to recover the advance in full with interest thereon in terms of the stipulations contained in the bank guarantee.
- 3) The beneficiary as the sole judge will assess the quantum of loss or damages suffered or to be suffered by the beneficiary on account of the aforesaid facts.
- 4) The extent of recovery already made by the beneficiary and the outstanding balance due on the five guarantees. The demand letter must mention that all the aforesaid four conditions to make the banks liable under the guarantees have been fulfilled. Otherwise, the banks will not incur any liability at all

28. It is the petitioner's case in paragraph 13 of the petition, that the petitioner had completed substantial portion of the work before the respondent No. 1 wrongfully terminated the contract. The petitioner further alleged that it submitted its running bills from time to time up to November 1984 and the respondent No. 1 paid to the petitioner to the tune of Rs. 18 lakhs. In paragraph 22 of the petition the petitioner alleged that the respondent No. 1 has already recovered Rs. 1,98,063.52 towards mobilisation advance and interest and Rs. 1,51,343/- against security deposit from its running bills as would be evident from the certificate of statement of payments issued and confirmed by the Resident Engineer of the respondent No. 1 in his letter dated 4-9-85 which is annexure 'F' to the petition. The petitioner further alleged that a sum of Rs. 83 lakhs is still due and payable to the petitioner by the respondent No. 1 for the works done. The counsel for the respondent No. 1 did not dispute the correctness of annexure 'F' to the petition.

29. In the demand letters, however, the respondent No. 1 completely suppressed the facts of aforesaid recoveries made by it from the petitioners running bills and alleged that it has been unable to recover the advance in terms of the agreement. It is contended on behalf of the respondent No. 1 that the guarantees can still be invoked to the extent of the amount remaining outstanding thereunder pursuant to the demand letters. But in my opinion, the construction of the guarantees show that the intention of the parties to the agreement was different. The respondent

No. 1 failed to discharge its duty as the sole judge to quantify the damages and to mention the extent of recoveries made by it although it was within its special knowledge. The expression used in the demand letters that 'the loss or damage will far exceed the amount guaranteed' clearly indicates that the respondent No. 1 was complaining that it had suffered or going to suffer unliquidated and unascertained damages. But this allegation cannot foist any liability upon the banks under the guarantees as held in : [1974]3SCR556 . The demand letters also must be in accordance with the bank guarantees. The observation made in AIR 1981 SC 1246 regarding the construction of guarantee also applies to the construction of demand letters. 'The documents must be called for and not documents which are almost the same or which will do just well'. Relying on the observation made in paragraph 16 of : AIR1985 Cal23 as follows :

'The petitioner, as we find, relies upon the second condition for enforcement of the Bank guarantee on the ground that out of the running bills of the opposite party only a part of the mobilisation advance has been recovered leaving a balance of Rs. 2,65,400/-including interest and this amount according to Dr. Mukherjee, is clearly recoverable by the enforcement of the Bank guarantee and the Bank has no other option but to pay the amount unconditionally on demand without demur.'

It is contended that in the present case, the guarantees should be allowed to be invoked to the extent of outstanding dues thereunder. I am unable to accept this submission because of the facts of the present case. The demand letter in : AIR1985 Cal23 was fair and honest and was in accordance with the terms of the guarantee. The demand letter clearly mentioned the balance amount of Rs. 2,65,400/- due under the guarantee which by implication revealed how much was recovered by the beneficiary. We get these facts from paragraph 6 of the report. But that is not the fact in the present case. Although Rs. 3,50,000/- was recovered by the respondent No. 1 but there is no whisper about the same in the demand letters. By suppressing this material fact from the banks, the respondent No. 1 attempted to recover the entire sum of Rs. 11,50,000/-under the seven guarantees. The suppression of this material fact in the demand letters has given rise to a special equity in favour of the petitioner to stop payment by the bank on the basis of these demand letters. Although in the petition, there is no allegation of

fraud, I venture to say that this wilful false representation by the beneficiary that the entire guaranteed amount has become due and payable by suppressing the facts of recoveries already made, is a factor, which must be treated on the same footing as 'fraud' giving rise to special equity and must be treated as an exception to the general rule that the Court should not interfere in these matters. By enunciating this general principle of non-interference by Courts in respect of guarantee and L/C,- the Courts only intended that the international trade and commerce should function smoothly without interference from Court. At the same time, the Courts expected that the merchants and traders in international trade and commerce will honour their respective commitments and the business honesty would be maintained. By the theory of noninterference in cases of L/Cs and guarantees, certainly the Courts did not intend that international trade and commerce should flourish and thrive by adopting dishonest unscrupulous practice. These trade practices and the commitments by the Banks are treated on a different level by the Courts and are allowed to function without interference from Court only with the view that the trust in international commerce is not damaged in any way and not for encouraging mala fide activities of unscrupulous traders. If so, fraud or the special equity arising out of the peculiar situation of the case could not have been made exceptions to the general principles of noninterference by Courts. The Courts have repeatedly held that guarantees and L/Cs must be enforced in accordance with the terms of the documents only which ipso facto excludes the possibility of enforcement of these documents contrary to their terms. Therefore suppression of material facts, misrepresentation, fraud or the like on the part of the beneficiary in enforcement of these documents, will always entitle the party affected thereby to take legal recourse to stop unlawful enforcement of the same. In the present case, apart from suppressing the material facts of recovery made to the tune of Rs. 3,50,000/-out of me bills of the petitioner, the respondent No. 1 has also damaged its own case by alleging that it had suffered unliquidated and/or unascertained damages far exceeding Rs. 11,50,000/-. On both grounds, the Court must stop enforcement of these seven bank guarantees as under the law the Banks have incurred no liability under the guarantees as yet. The respondent No. 1 must wait until the disputes are resolved by the arbitrator.

30. Moreover it should be noted that whether a bank would be liable to pay under the guarantee or L/C would depend not only on the terms of the documents alone but also on the grounds alleged in the demand letters for enforcing the same. Both the documents have to be read together to find out whether demand has been made according to the terms of guarantee and the liability of the Bank to pay has arisen under the document. Unfortunately, in most of the cases, the demand letters are written in a perfunctory manner without looking into the terms of the guarantee or L/C. The present case is only another instance of such practice. The demand letters in the present case are not only tainted with suppression of material facts but are also not in accordance with the terms of the documents inasmuch as the respondent No. 1 failed to discharge its function as the adjudicating authority to assess the damage claimed by it.

31. If the allegation of the petitioner that Rs. 83 lakhs is payable to them by the respondent No. 1 is true, then the respondent No. 1 can safely recover the entire balance of the mobilisation advance as well as balance security out of that money.

32. The petitioner is directed to go on renewing all the seven bank guarantees as and when their renewals fall due until the disposal of arbitration proceedings and to give notice to the respondent No. 1 within 7 days from the date of renewal.

33. On the returnable date when the petitioner prayed for continuation of the interim order, the respondent declined to file any affidavit-in-opposition and the matter was heard on the point of law only. In that view of the matter, the interim order is confirmed. Costs cost in the arbitration proceedings. It is recorded that the respondent is not admitting the allegations in the petition on the merit of the case. All parties and the banks concerned are to act on the signed copy of the minutes.