

IN THE HIGH COURT OF TELANGANA AT HYDERABAD

WRIT PETITION No. 28781 of 2023

Between:

M/s Chaitanya Energy Private Limited

... Petitioner

And

Indian Bank and another

... Respondents

JUDGMENT PRONOUNCED ON: 03.06.2024

THE HON'BLE MRS. JUSTICE SUREPALLI NANDA

1. Whether Reporters of Local newspapers : Yes
may be allowed to see the Judgment?
2. Whether the copies of judgment may be : Yes
marked to Law Reporters/Journals?
3. Whether Their Lordships wish to : Yes
see the fair copy of the Judgment?

SUREPALLI NANDA, J

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< **Gist:**

> **Head Note:**

! Counsel for the Petitioner

: Mr R.S.Associates
Sri S.Ravi Sr. Counsel

^ Counsel for Respondent No.1

: Smt V.Dyumani

^Counsel for Respondent No.2

: Sri D.V.Sitaram Murthy
Sr.Counsel representing
Sri A.Chandra Shaker

? **Cases Referred:**

- (1) (2016) 10 SCC 46
- (2) (1999) 8 SC 436
- (3) (2000) 6 SCC 293
- (4) (2021) 10 SCC 690
- (5) (2004) 3 SCC 553
- (6) (2002) 1 SCC 216
- (7) (2015) 7 SCC 728
- (8) (2021) 6 SCC 771
- (9) (1998) 8 SCC 1
- (10) 2021 SCC Online SC 801

HON'BLE MRS JUSTICE SUREPALLI NANDA**WRIT PETITION No. 28781 of 2023****ORDER:**

Heard learned senior counsel Sri S.Ravi, appearing on behalf of the Petitioner, the learned counsel Smt. V. Dyumani appearing on behalf of 1st Respondent and learned senior designate counsel Sri D.V.Sitaram Murthy, representing Sri A.Chandra Shaker, learned counsel appearing on behalf of the 2nd Respondent.

2. **The petitioner approached the court seeking prayer as under:**

"...to issue a Writ of Mandamus directing the Respondent No. 1 not to encash/allow fraudulent invocation of the subject Bank Guarantees mentioned in para 51 of the present writ petition by the Respondent No.2 including under Letter of Invocation dated 09.10.2023..."

3. **PERUSED THE RECORD :**

a) **The counter affidavit filed by the 1st Respondent, in particular, Paras 4, 5 and 6, read as under :**

"4. It is humbly submitted that the Petitioner has been in the line of activity Electrical Contractor and has been availing the credit facilities from the Respondent 1 since

2017 and the said credit facilities has been renewed/enhanced from time to time. At the request of the petitioner the Respondent bank sanctioned the following credit facilities subject to the terms and conditions mentioned in the sanction letter dated 15.02.2022 under Sole Banking.

S.No.	Nature of Credit Facility	Amount in Crores
1.	OCC	50.00
2.	Bank Guarantee	85.00
3.	GECLS 1.0	3.34
4.	GECLS 1.0 Extension	2.00
5.	Ind COVID Emergency	1.04
6.	IB Vehicle Loan	0.10
	Total	141.48

5. It is submitted that the Respondent Bank has sanctioned the Credit Facility to the Petitioner in the normal course of the Banking Law and Practise. It is the contention of the Petitioner that Respondent No.2 has not supplied the material and Respondent No.2 is fraudulently trying to encash the Bank Guarantees issued by this Respondent No. 1 at the instances of the Petitioner to Respondent No.2. It is submitted that in view of the orders dated 05/10/2023 passed by the Hon'ble Court in WP 27689 of 2023, the Respondent Bank "directed not to take any coercive steps against the petitioner and/or guarantors and from degrading the account of the petitioner to NPA".

As per the norms of the bank if an account has been classified as NPA only, Vigilance Dept. & Recovery Dept. Corporate Office will order Forensic Audit to find out the reasons to slip the account as NPA and also to determine the Fraud Angle and initiate appropriate proceedings.

6. It is submitted that for invocation of the Bank Guarantee that there shall be a liability on the part of the Petitioner. Since the petitioner is alleging that the Respondent No.2 has not supplied the material for which the Bank Guarantees were obtained, it is the incumbent of the part of the Respondent No.2, that the material has been supplied to the Petitioner which is a precondition in between the petitioner and Respondent No.2 to invoke the Bank Guarantees issued by the Respondent No.1 in favour of the Respondent No.2. It is submitted the matter requires a detailed enquiry to find out whether the material is supplied by the Respondent No.2 and whether the BGs are invoked in respect of the liability that has arisen out of the material supplied by the Respondent No.2 to the Petitioner."

b) **The counter affidavit filed on behalf of 2nd Respondent, in particular, Para 16 (IV), (VI), (VIII), Para 18 (C) and (D), read as under :**

“16.IV. In reply to the averments made in para no.5, it is submitted that the averments that the this vacate stay petitioner/Respondent No. 2 is a company incorporated under the provisions of the Companies Act 2013 having its registered office as mentioned in the cause title and is engaged in the business of providing online service inter alia relating to B2B sale of raw materials, such as building and construction, mild steel, stainless steel, steel scrap and metallics, ferrous/non-ferrous scrap are matter of record and facts as such needs no specific reply. It is submitted that the group company namely OXYZO is in the Business of Financing, a fact conveniently ignored by the Petitioner with an intention to mislead this Hon'ble Court.

VI. The averments made in para no.7 that in the month of January 2021, the vacate stay petitioner represented to the Writ Petitioner that it would facilitate on-time delivery of the raw materials at various locations of the undergoing projects of the Writ Petitioner, and for the same a Purchase Agreement was to be executed between the Writ Petitioner and the vacate stay petitioner are facts borne by records. However, the Purchase Agreement's were indeed executed between Oxyzo, the writ petitioner and the vacate stay petitioner, a fact of which the writ petitioner has very conveniently chosen to conceal from this Hon'ble Court in order to secure favourable orders. Prima facie, it is fraud, on the part of the writ petitioner. By concealing the fact and misleading the Court, the Writ Petitioner has obtained the order. It is

a settled law that fraud vitiates everything. Although, the entire issue at hand is purely a complex commercial transaction, however, this Court must consider the malafide conduct of the writ petitioner in concealing the complete information from this Hon'ble court. The Purchase Agreement is a composite agreement which includes facilitation/supply/arrangement of raw material from third parties/credit facility arrangement for purchase of material and loan credit facility arrangement and advancement of loans through the subsidiary of vacate stay petitioner/Respondent No.2. The Purchase Agreement were indeed executed and the entire arrangement is clearly explained in the Purchase Agreement. Hence, the averments made in the said para are not factually correct and the same are denied in toto.

VIII. The averments made in Para no. 9 are matter of fact. However, it is submitted that as such there were no representations made by this vacate stay petitioner which could have been the reason for the issuance of the bank guarantee's mentioned in the said para. The issuance of the bank guarantee's, as already stated, were in furtherance of the business and commercial transactions for which the parties entered into commercial agreements. It is a fact that the Writ Petitioner and this vacate stay petitioner entered into various Purchase Agreements. The relevant bank guarantee amount and the date on which the agreements were entered are as follows-

S.No.	Date of Agreement	Bank Guarantee Amount
1.	19-03-2020	1.5 Crore
2.	04-02-2021	2 Crore
3.	16-02-2021	1 Crore
4.	16-02-2021	1 Crore
5.	18-02-2021	2 Crore
6.	11-11-2021	7 Crore

It will not be out of place to mention that the group/affiliate company of the vacate stay petitioner/2nd Respondent was a necessary party to the Purchase Agreements. As already mentioned, the Purchase Agreement was a composite agreement which included the terms of the commercial relationship between the vacate stay petitioner and the writ petitioner. Copies of the Purchase agreements annexed as Annexure E (Colly)

That in addition to the Purchase Agreement, the Writ Petitioner also entered into master facility agreements on 18.02.2021 (for 5.5 cr), 23.08.2021 (2 cr), and 16.11.2021 (7 crores) with this vacate stay petitioner/2nd Respondent wherein the 2nd Respondent bank was a confirming party to whom the bank guarantee were issued. This is an example of the composite nature of the agreement and the business transaction between the parties. Copies of the Financial Facility Agreements annexed as Annexure F (Colly).

A mere perusal of the above agreements would reveal that the Writ Petitioner was aware of the issuance of the bank guarantees and also its obligations under the agreements. In fact, the Writ Petitioner itself agreed to the issuance of the bank guarantees without which these bank guarantees would have never been given to the vacate stay petitioner.

It is further submitted that the claim period as mentioned by the writ petitioner is denied as the same is not factually correct. The correct position, however, can be extracted by a mere reading of clause 3 of the bank guarantee which provides for a claim period of 12 (twelve) months from the date of expiration of the bank guarantee claim. The writ petitioner has yet again concealed the said fact from this Hon'ble court. The relevant portion of the bank guarantee clause is extracted herein for easy reference:

"We are liable to pay under this Bank Guarantee or any part thereof only and only if we receive (if you serve upon us) a written claim or demand not later twelve months from the said expiry date i.e. 31.07.2021. Thereafter we shall be discharged from all liabilities under this Bank Guarantee irrespective of whether the original Bank Guarantee."

4. The case of the Petitioner in brief as per the averments made in the affidavit filed by the Petitioner in support of the present writ petition, is as under :

i) The petitioner is a registered company carrying out business of supply, erection, testing and commissioning of electrical overhead lines and railway overhead electrical (OHE) works. The 1st respondent is an Indian public sector bank and the 2nd respondent is a company engaged in the business of providing online service inter alia relating to B2B sale of raw materials, such as building and construction, mild steel, stainless steel, steel scrap and metallics, ferrous/ non-ferrous scrap.

ii) Thereafter, in January, 2021, the 2nd respondent represented to the petitioner that it would facilitate on-time delivery of the raw materials at various locations of the undergoing projects of the petitioner and for the same a purchase agreement was to be executed between the Petitioner and the 2nd respondent .

iii) The 2nd respondent however, requested the petitioner to furnish an irrevocable bank guarantee against the supply of the raw material, since the supply of raw material was

on credit basis. Based on the representation given by the 2nd respondent, the petitioner requested the 1st respondent to issue four (4) signed bank guarantees in favour of the 2nd respondent of Rs. 50 Lakhs each and the same were issued bearing numbers 02687IG210000002, 02687IG210000003 and 02687IG21000-0004, The period of bank guarantees and claim expiry period was 31.07.2021.

iv) Subsequently, another five (5) bank guarantees were executed by the 1st respondent in favour of the 2nd respondent at the request of the Petitioner. However, the 2nd respondent failed to execute the purchase agreement but insisted the Petitioner to keep the bank guarantees alive, by giving repeated assurances that the purchase agreement would be executed in due course of time.

v) Thereafter, the 2nd respondent, without executing the purchase agreement, had again proposed to furnish additional bank guarantees on the pretext that from the discussion, 2nd respondent had estimated that the Petitioner had considerable order size, and the Petitioner would be required to furnish additional security to secure the order size.

Likewise, the petitioner has extended the existing bank guarantees and two (2) additional bank guarantees in favour of the 2nd respondent for an amount of Rs. 1 crore each.

vi) It is the case of the petitioner that even after repeated requests, there were no steps being taken towards execution of purchase agreement and the Petitioner informed the 2nd Respondent that it will cancel the Bank Guarantees since the 2nd Respondent is neither interested in executing the purchase agreement nor making any supplies thereto and that considerable margin money was locked up due to the inaction of the 2nd Respondent. At this juncture the 2nd Respondent once again assured execution of purchase agreement and stated that as per the raw material requirements proposed by the Petitioner, the 2nd respondent would need additional bank guarantees.

vii) Again, upon the assurance by the 2nd Respondent, the Petitioner addressed two (2) letters dated 12.11.2021 to the 1st respondent requesting additional bank guarantees and the same were issued by the 1st respondent. However, even upon multiple requests the 2nd respondent failed to execute the purported purchase agreement and in view thereof, the

Petitioner did not renew the bank guarantees. But the 2nd respondent once again with an ulterior motive persuaded the Petitioner to renew the bank guarantees with a false promise to execute the purchase agreement.

viii) Subsequently, the 2nd respondent has addressed a letter to the 1st respondent inter alia invoking the bank guarantees. The present invocation of bank guarantees are illegal since invocation of bank guarantees were conditional upon the terms of the purchase agreement however, despite repeated requests no such purchase agreement was executed.

ix) Furthermore, the Petitioner had reached out to the 2nd respondent from time to time and apprised the 2nd respondent of its requirements at their project sites, however, the 2nd respondent neither executed the purchase agreement nor provided any services and thus, raised no invoices upon the Petitioner and no amount became due, let alone any kind of default which can be attributed to the Petitioner. The Petitioner does not have any claim against the 2nd respondent and vice versa. Thus, the bank guarantee invocation is unwarranted.

x) While the Bank Guarantees caused to be issued by the Petitioner earlier were to be incorporated into the purchase agreements that was supposed to be executed between Petitioner and the 2nd respondent however, no such purchase agreement was executed. Further, the 2nd Respondent is seeking to fraudulently invoke and en-cash the bank guarantees to further coerce the Petitioner. Hence, the present Writ Petition.

5. The learned senior counsel Sri S.Ravi, appearing on behalf of the petitioner mainly puts-forth the following submissions :

(A) Because the Bank has agreed to honor an illegal invocation letter dated 09.10.2023 and encash valuable bank guarantees amounting to Rs. 13.5 crores for an entirely alien purpose/contract which was not contemplated in the Bank Guarantees, and admittedly not a single rupee is owed to the purported beneficiary and issuer of the invocation, Respondent No. 2.

(B) Because the Respondent No.1 has abandoned all banking norms and it is acting in an entirely arbitrary manner by agreeing to encash fraudulent invocation by the Respondent No. 1 towards liabilities that arise under the purchase agreements however, no such purchase agreement was either executed or the Respondent No.2

supplied any goods to the Petitioner under any agreement whatsoever.

(C) Because it is an established principle in law that a Bank Guarantee is a separate and independent document, and it has to be interpreted and invoked in own terms. The Respondent No. 2 in the present case has tried to invoke the current Bank Guarantee de hors the terms of the Bank Guarantee i.e., by looking into the terms of the purchase agreement.

(D) Because there has been no supply of construction material from the respondent No.2 or any of its suppliers/vendors to the petitioner, no invoice has been raised by the Respondent No.2 on the petitioner. Hence, no amount remains due and payable to the Respondent No.2.

(E) Because the Respondent No.2 has invoked the Bank Guarantees with the fraudulent intent to extort money from the Petitioner herein. Thus, such unjust enrichment is neither permitted under the law nor can it be allowed at the cost of undue loss to the petitioner.

(F) Because in the present case even the first tenet of meeting the terms of the Bank Guarantee for invocation of bank guarantee has also not been met. The Respondent No.1 Bank cannot encash the guarantee contrary to its own terms, irrespective of any disputes between the petitioner and Respondent No.2.

(G) Because the invocation letter dated 09.10.2023 is not in terms of the Bank Guarantee. The Bank Guarantees are clearly and specifically limited to breach of dues under the Purchase Agreement to be executed, however, the letter does not even claim or refer to any Purchase Agreement.

(H) Because the invocation letter dated 09.10.2023 does not even refer to the pending due amounts, and reasons as to why the encashment of BGs worth Rs.13.5 crores is being sought.

The learned senior counsel basing on the aforesaid submissions contends that the writ petition should be allowed as prayed for.

DISCUSSION AND CONCLUSION :

6. It is the specific case of the Petitioner that the Respondent No.1 had abandoned all banking norms by agreeing to encash fraudulent invocation by the Respondent No.1 towards liabilities that arise under the purchase agreement, however no such purchase agreement was neither executed nor the Respondent No.2 had supplied any goods to the Petitioner under any agreement and further the 2nd Respondent in the present case tried to invoke the subject Bank Guarantees de hors

the terms of the Bank Guarantees with a fraudulent intent to extort money from the Petitioner herein since there is no supply of construction material from the Respondent No.2 or any of its suppliers/vendors to the Petitioner and no invoice had been raised by the 2nd Respondent on the Petitioner and no amount remains due and payable to the Respondent No.2. Further the 2nd Respondent perpetrated the fraud *de hors* the terms of agreement between the parties and it is further contended by the Petitioner that the present writ petition falls within the territorial jurisdiction of High Court at Hyderabad as the concerned branch of Respondent No.1 is situated within its jurisdiction.

7. It is further the specific case of the Petitioner that the invocation letter dated 09.10.2023 does not even mention the pending due amount and reasons as to why the encashment of the Bank Guarantees worth Rs.13.5 crores is being sought. The Petitioner contends that the Respondent No.1 in collusion with Respondent No.2 played serious fraud on the Petitioner and caused wrongful loss to

the Petitioner since the Bank Guarantees were issued in favour of Respondent No.2 by Respondent No.1 on Petitioner's instructions wherein the claim period was conterminous with the expiry date of the Bank Guarantees, however after few renewals the Respondent No.1 unilaterally without any instructions from the Petitioner and/or its representatives enhanced the claim period by one year without putting the Petitioner to notice regarding such crucial modification in the terms and conditions of the Bank Guarantees. Initially, Bank Guarantee No. 02687IG210000002 was issued on 01.02.2021 with expiry date 31.07.2021 and claim expiry date 31.07.2021, however every renewal after 2022 onwards had the claim period extended beyond the date of expiry of the Bank Guarantee.

8. A bare perusal of the record indicates that the Bank Guarantee dated 01.02.2021 in respect of Bank Guarantee No. 02687IG210000002 at the 1st paragraph and last paragraph, it is observed as under:

“At the request of, M/s. Chaitanya Energy Pvt. Ltd., having its registered office at H No: 2-5-82/1, Beside E-seva center, Nakkalagutta, Hanamkonda - 506001. We Indian Bank, 100ft Road Branch, 35-6-823 (New), TV Tower Colony, Beside SPR School, Hanamkonda District Warangal having its Registered/Head Office at 254-260, Avvai Shanmugam Salai, Royapettah, Chennai - 600014 hereby issue Bank Guarantee No.02687ig210000002 in favor of OFB Tech Private Limited having Registered office at Shop No. G-22 C (UGF) D-1 (K-84) Green Park Main New Delhi South Delhi-110016 (hereinafter referred to as "Beneficiary" or "OFB") under the terms of the agreement (hereinafter referred to as the "Purchase Agreement") to supply and/or facilitate credit for supply of Material / Services from OFB or its Group of companies or its network of suppliers as per agreed credit terms of the Purchase Agreement.

3. We are liable to pay under this Bank Guarantee or any part thereof only and only if we receive (if you serve upon us) a written claim or demand not later than twelve months from the said expiry date i.e 31.07.2021, thereafter we shall be discharged from all liabilities under this Bank Guarantee irrespective of whether the original Bank guarantee is returned to us or not.

The Bank Guarantee shall be effective only when the BG message is transmitted by the issuing bank through SFMS to ICICI Bank, having IFSC code ICIC0000021 SWIFT code: 7037 OFB1234.”

9. A bare perusal of the subject Bank Guarantee and other Bank Guarantees on record clearly indicate that the Bank Guarantees in question are unconditional Bank Guarantees and not conditional Bank Guarantees but it is the specific plea of the Petitioner that they are conditional Bank Guarantees.

10. A bare perusal of the specific averments made by the Petitioner in the affidavit filed by the petitioner in support of the present writ petition clearly indicate that all these issues have to be adjudicated before a competent Civil Court since admittedly the same involve disputed questions of fact, since it is specifically pleaded and contended by the 1st Respondent at para 6 of the counter affidavit that the subject matter requires a detailed enquiry to find out whether the material is supplied by the Respondent No.2 and whether the Bank Guarantees are invoked in respect of the liability that has arisen out of the material supplied by the Respondent No.2 to the Petitioner.

11. This Court opines that in so far as the allegation of the Petitioner in the writ petition that the 1st Respondent

Bank extended the Bank Guarantee by 12 months, beyond the extension sought by the Petitioner colluding with the 2nd Respondent, it is pertinent to note that a standard Bank Guarantee would usually contain the following terms:

a. Expiry Period/Validity Period : A bank guarantee would prescribe a specific date by which a bank guarantee would expire. This is a time determined by the Principal Debtor and the Creditor. The right to invoke the bank guarantee is only for a default of the Principal Debtor which occurs during the validity period of the bank guarantee.

b. Claim Period : This is a time period contractually agreed between the Creditor and the Principal Debtor which provides a grace period beyond the validity period to make a demand on the bank for a default which has occurred during the validity period. A claim period may or may not exist in the bank guarantee. The guarantor again has no role to play.

c. Enforcement Period : The Enforcement Period is a time period within which the Creditor can enforce his accrued rights pursuant to a demand made by him within the validity period or the claim period before a competent court of law. This period, it is stated, is statutorily governed by section 28(b) read with Exception 3 to section 28 of the Contract Act. In the absence of any such

clause in the guarantee, the said period would be determined by the Limitation Act, 1963.”

In the instant case, perusal of the record indicates that right from the time of extension of Bank Guarantee from 04.02.2021 the 1st Respondent Bank has consistently mentioned the validity period and the claim period to be 12 months after the validity period provided that the breach has arisen during the validity period and admittedly as borne on record the Petitioner had accepted the said position all through since 2021, but however, the said plea is raised in the present writ petition in October 2023. Hence this Court opines that the plea raised by the Petitioner in this regard is untenable.

12. The Apex Court in the judgment dated 28.09.2016 reported in (2016) 10 SCC 46 in Gujarat Maritime Board Vs. Larsen and Toubro Infrastructure Development Projects Ltd., & Another at paras, 1, 3, 9, 12, 13 and 69.2 observed as under :

“1. Leave Granted: Whether the High Court is justified in exercising its discretionary jurisdiction under Article 226 of the Constitution of India for restraining the appellant from invoking an unconditional bank guarantee executed by the first

respondent, is the main issue arising for consideration in this case.

3. On 07.05.2010, the first respondent requested for change of location from Sutrapada to Kachchigarh and the bank guarantee was extended. At the instance of the first respondent, the Yes Bank Limited furnished a bank guarantee to the appellant on 26.11.2011 for an amount of Rs.5 crores. The relevant conditions read as follows:

“(a) We, YES BANK Ltd. Do hereby guarantee and undertake to pay to GMB an amount not exceeding Rs 5,00,00,000/- (Rupees Five Crores only) as against breach by the Lead Promoter for the development of Kachchigarh Port. The decision of GMB as to any breach having been committed and loss/damages caused or suffered shall be absolute and binding on us.

(b) We, YES BANK Ltd, do hereby undertake to without any reference to the Lead Promoter or any other person and irrespective of the fact whether any dispute is pending between GMB and the Lead Promoter or any court of Tribunal or arbitrator relating thereto, pay the amount due and payable under this guarantee without any demur, merely on demand from GMB stating that the said Lead Promoter's failure to perform the covenants of the same. Any such written demand made by GMB on the Bank shall be conclusive, absolute and unequivocal as regards the amount due and payable by the Bank under this guarantee. However, Bank's liability under this guarantee shall be restricted to an amount not exceeding Rs 5,00,00,000/- (Rupees Five Crores only).”

9. Unfortunately, the High Court went wrong both in its analysis of facts and approach on law. A cursory reading of LoI would clearly show that it is not a case of forfeiture of security deposit “... if the contract had frustrated on account of impossibility...” but invocation of the performance bank guarantee. On law, the High Court ought to have noticed that the bank guarantee is an independent contract between the guarantor-bank and

the guarantee-appellant. The guarantee is unconditional. No doubt, the performance guarantee is against the breach by the lead promoter, viz., the first respondent. But between the bank and the appellant, the specific condition incorporated in the bank guarantee is that the decision of the appellant as to the breach is binding on the bank. The justifiability of the decision is a different matter between the appellant and the first respondent and it is not for the High Court in a proceeding under [Article 226](#) of the Constitution of India to go into that question since several disputed questions of fact are involved.

12. An injunction against the invocation of an absolute and an unconditional bank guarantee cannot be granted except in situations of egregious fraud or irretrievable injury to one of the parties concerned. This position also is no more res integra.

The Apex Court in the Judgment reported in 2007(8) SCC 110 in Himadri Chemicals Industries Limited v. Coal Tar Refining Company[2], at paragraph -14, observed as under:

"14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank guarantee or a letter of credit:

(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 realise 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.

(iii) The courts should be slow in granting an order of injunction to restrain the realisation 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."

13. The guarantee given by the bank to the appellant contains only the condition that in case of breach by the lead promoter, viz., the first respondent of the conditions of Lol, the appellant is free to invoke the bank guarantee and the bank should honour it ... "without any demur, merely on a demand from GMB (appellant) stating that the said lead promoter failed to perform the covenants...". It has also been undertaken by the bank that such written demand from the appellant on the bank shall be ... "conclusive, absolute and unequivocal as regards the amount due and payable by the bank under this guarantee". Between the appellant and the first respondent, in the event of failure to perform the obligations under the Lol dated 06.02.2008, the appellant was entitled to cancel the Lol and invoke the bank guarantee. On being satisfied that the first respondent has failed to perform its obligations as covenanted, the appellant cancelled the Lol and resultantly invoked the bank guarantee. **Whether the cancellation is legal**

and proper, and whether on such cancellation, the bank guarantee could have been invoked on the extreme situation of the first respondent justifying its inability to perform its obligations under the LoL, etc., are not within the purview of an inquiry under Article 226 of the Constitution of India. Between the bank and the appellant, the moment there is a written demand for invoking the bank guarantee pursuant to breach of the covenants between the appellant and the first respondent, as satisfied by the appellant, the bank is bound to honour the payment under the guarantee.

13. The Apex Court in the judgment dated 08.10.1999, reported in (1999) 8 SCC 436 in Hindustan Construction Company Ltd., Vs. State of Bihar & Others at Paras 3, 7 and 9 observed as under :

"3. Both the Bank Guarantees were invoked by the defendants and it was, at this stage, that HCCL filed a suit on 21.10.1992 in the Bombay High Court against State bank of India, State bank of Patiala and Indian Bank (defendants 1 to 3) and the State of Bihar and its officers (defendants 4 to 6) for various reliefs, including principal relief that defendants 1 to 3 may be restrained from making payment of the amount covered by the aforesaid Bank Guarantees to defendants 4 to 6. An interim order was passed by the Single Judge in the suit on 27.10.1992 and under this interim order, the defendants were restrained from invoking the Bank Guarantees and the Banks were restrained from making payment of the amount covered by the Bank Guarantees to the defendants. The interim order was confirmed on 9.2.1996.

7. The defendants have filed a separate appeal against that part of the order by which the injunction order in respect of the "Performance Guarantee" has been upheld by the Division Bench. It is contended on their behalf that the "Performance Guarantee", which constituted a

separate and distinct contract between the defendants and the Bank, was unconditional and unequivocal and since the Bank had undertaken to pay the amount covered by that Guarantee to the defendants on their demand, the injunction order, granted by the High Court, was liable to be set aside.

9. What is important, therefore, is that the Bank Guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the Bank Guarantee or the person on whose behalf the Guarantee was furnished. **The terms of the Bank Guarantee are, therefore, extremely material. Since the Bank Guarantee represents an independent contract between the Bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the Bank Guarantee; or else, the invocation itself would be bad.**

14. A bare perusal of the terms of the subject Bank Guarantees clearly indicate that the Bank Guarantees had been issued by the Petitioner in favour of the 2nd Respondent in relation to supply of materials and services or from any of its network suppliers referred to as beneficiary which shall mean to include its successors, administrators, attorneys and assignees and further that the Bank Guarantees are for the supply of material by 2nd Respondent herein to the Petitioner herein and in the event of any breach of Agreement by

the Petitioner the beneficiary shall have all the rights to recover the overdue amounts including interest and all other charges if any through the invocation of the guarantee. It is however, Petitioner's plea that since the Petitioner's contract with Respondent No.2 was for supply of goods and since the Respondent No.2 failed to supply the goods to the Petitioner, there cannot be any invocation of Bank Guarantee.

15. This Court opines that as stated in the Counter Affidavit filed by the 1st Respondent at para 6 the subject issue requires a detailed enquiry to find out whether the material is supplied by the Respondent No.2 and whether the Bank Guarantees are invoked in respect of the liability that has arisen out of the material supplied by the Respondent No.2 to the Petitioner. This Court takes note that the dispute between the Petitioner and the 2nd Respondent is purely commercial in nature and the Agreement between the parties is contractual in nature and the appropriate remedy available to the Petitioner is to approach the Court of competent jurisdiction for appropriate relief for Breach of Contract as per Sec.2(c)(i) of the Commercial Courts Act, 2015.

16. This Court opines that to restrain invocation of Bank Guarantee the following grounds must be made out:

- a) *There should be a serious dispute.*
- b) *There should be good prima-facie case of fraud.*
- c) *Special equities in form of preventing irretrievable injustice has to be established.*
- d) *Fraud should be in connection with such Bank Guarantee.*
- e) *Irretrievable harm or injustice to one party has to be established.*

17. In the present case the Petitioner failed to establish any of the grounds 'a' to 'e' referred to above and hence this Court is of firm opinion that *"existence of any dispute between the parties to the contract is not a ground to restrain enforcement of bank guarantee"*.

18. The Apex Court in Rajasthan State Industrial Development & Investment Corporation Vs. Diamond and Gem Development Corporation Ltd., held as follows :

"There can be no dispute to the settled legal proposition that matters/disputes relating to contract cannot be agitated nor terms of the contract can be enforced through writ jurisdiction"

under Article 226 of the Constitution. Thus, writ court cannot be a forum to seek any relief based on terms and conditions incorporated in the agreement by the parties”.

19. The Apex Court in Kerala State Electricity Board Vs. Kurien Ekalathil reported in (2000) 6 SCC 293 laid down the dicta relating to the maintainability of a writ petition which in effect seeks the interpretation of a contract and the Apex Court at para 10 and 11 observed as under :

“10. We find that there is a merit in the first contention of Mr Raval. Learned counsel has rightly questioned the maintainability of the writ petition. The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract. If a term of a contract is violated, ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observations statutory. Clearly, the High Court fell into an error in coming to the conclusion that the contract in question was statutory in nature.

11. A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The

fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. In the present case, it has not been shown how the contract is statutory. The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil court or in arbitration if provided for in the contract. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition. The contractor should have relegated to other remedies.

It is borne on record that the present case is not a case of statutory contract and it is purely a private contract. This Court opines that the present petition is in the exclusive domain of the private law since the subject issue involved is purely a private contract.

20. The Apex Court in the judgment reported in (2021) 10 SCC 690 in Union of India Vs. Puna Hinda while accepting the jurisdiction of High Court to be wide, held in paragraph No.24, that in respect of pure contractual matters in the field of private law, where the dispute has no statutory flavour, the issues are better left to be adjudicated outside the scope of Article 226 of the Constitution of India.

21. The Apex Court in the judgment in ABL International Ltd., Vs. Export Credit Guarantee Corporation of India Ltd., reported in (2004) 3 SCC 553 at para 28 observed as under :

“28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power [See: Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai & Ors. [1998 (8) SCC 1]. And this plenary right of the High

Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the court thinks it necessary to exercise the said jurisdiction.

22. In the State of Bihar Vs. Jain Plastics & Chemicals Ltd., reported in (2002) 1 SCC 216, the Apex Court was to adjudicate upon the issue whether the High Court ought not to have exercised its jurisdiction under Article 226 of the Constitution of India for granting relief in case of alleged breach of contract. The Apex court held that the writ petition under Article 226 of the Constitution of India is not the proper proceeding for adjudicating such disputes. Under the law, it was open to the Respondent therein, to approach the Court of competent jurisdiction for appropriate relief for breach of contract. It is settled law that when an alternative and equally efficacious remedy is available to a litigant, he should be required to pursue that remedy and not invoke the writ jurisdiction of the High Court. Equally, the existence of an alternative remedy does not affect the jurisdiction of the Court to

issue a writ, but ordinarily, that would be a good ground in refusing to exercise the discretion under Article 226 of the Constitution of India.

23. In *Joshi Technologies International Inc., Vs. Union of India* reported in (2015) 7 SCC 728, para 65 to 69, the Apex Court held that if the entirety of the matter is governed by a contract and falls under Contract Law, the matter cannot be decided by a Writ Court.

24. As per the observations of the Apex Court in judgment dated 20.04.2021 reported in (2021) 6 SCC 771 in *M/s. Radhakrishnan Industries Vs. State of Himachal Pradesh*, which referred to *Whirlpool Corporation Vs. Registrar of Trade Marks* reported in (1998) 8 SCC 1 and the said view had been reiterated in a recent full bench judgment reported in 2021 SCC Online SC 801 in "*Magadh Sugar & Energy Ltd. Vs. State of Bihar and others*". The principles governing the exercise of writ jurisdiction by the High Court in the presence of an alternate remedy had been summarized in the said Judgment at para 28 and the same is extracted hereunder:

“28. The principles of law which emerge are that:

(i) The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well;

(ii) The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person;

(iii) Exceptions to the rule of alternate remedy arise where (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged;

(iv) An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law;

(v) When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion; and

(vi) In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ

jurisdiction, such a view would not readily be interfered with.”

25. In the present case this Court opines that the case of the Petitioner falls in Clause (ii), (iv), (v) and (vi) and does not fit in any of the exceptions to the Doctrine of Alternate Remedy and the purported irretrievable injustice alleged by the Petitioner is not an injustice but a consequence specifically agreed upon by the Petitioner in terms of the Bank Guarantees.

26. Taking into consideration:

- (a) The aforesaid facts and circumstances of the case,
- (b) The observations and the view of the Apex Court in the various judgements i.e., (1) (2016) 10 SCC 46 in “Gujarat Maritime Board Vs. Larsen and Toubro Infrastructure Development Projects Ltd., and another, (2) (1999) 8 SC 436 in Hindustan Construction Company Ltd., Vs. State of Bihar & others, (3) (2000) 6 SCC 293 in Kerala State Electricity Board Vs. Kurien Ekalathil, (4) (2021) 10 SCC 690 in Union of India Vs. Puna Hinda, (5) (2004) 3 SCC 553 in ABL International Ltd., Vs. Export Credit Guarantee Corporation of India Ltd., (6) (2002) 1

SCC 216 in State of Bihar Vs. Jain Plastics & Chemicals Ltd., (7) (2015) 7 SCC 728 in Joshi Technologies International Inc., Vs. Union of India, (8) (2021) 6 SCC 771 in M/s. Radhakrishnan Industries Vs. State of Himachal Pradesh, (9) (1998) 8 SCC 1 in Whirlpool Corporation Vs. Registrar of Trade Marks, (10) 2021 SCC Online SC 801 in "Magadh Sugar & Energy Ltd., Vs. State of Bihar and others, (referred to and extracted above),

(c) Duly considering the averments made in the counter affidavit filed on behalf of 1st and 2nd respondent (referred to and extracted above),

(d) Duly considering clause (3) of the bank guarantee,

this Court opines that the writ petitioner is not entitled for the relief as prayed for in the present writ petition and the interim order dated 12.10.2023 passed in W.P.No.28781 of 2023 stands vacated and the writ petition is dismissed.

27. It is however observed that nothing in this judgment shall be construed as having expressed any opinion on the merits of the dispute. The Petitioner is at liberty to take recourse to appropriate remedy, in

accordance to law. This Court passed interim orders in favour of the Petitioner on 12.10.2023 directing the Respondent No.1 or their Agents, Assigns, Associates, Authorized Representatives not to encash the Bank Guarantees bearing numbers 02687IG210000002, 02687IG210000003, 02687IG210000004, 02687IG210000005, 02687IG210000006, 02687IG210000007, 02687IG210000008, 02687IG210000010, 02687IG210000011, 02687IG210000055, 02687IG210000056, 02687IG210000057, 02687IG210000058, 02687IG210000059, 02687IG210000060, 02687IG210000061, 02687IG210000062, 02687IG210000063, 02687IG210000064, 02687IG210000065, 02687IG210000066, 02687IG210000067, 02687IG210000068, 02687IG210000033 AND 02687IG210000034, and the said orders are in force till the date of pronouncement of the judgement, but however, considering the peculiar facts and circumstances, let the same order remain in force for a period of (04) four weeks from the date of receipt of the copy of the order to enable the Petitioner

**to take appropriate remedy, in accordance with the law.
However, there shall be no order as to costs.**

Miscellaneous petitions, if any, pending in this Writ
Petition, shall stand closed.

SUREPALLI NANDA,J

Dated: 03.06.2024

Note: L.R. copy to be marked
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