**IN THE HIGH COURT OF DELHI AT NEW DELHI**

***Judgment delivered on: July 18, 2022***

\+ RFA 238/2020, CM APPLs. 23680/2020 & 22060/2021

HARJI ENGINEERING WORKS PRIVATE LIMITED

..... Appellant

Through: Dr. Amit George, Mr. Sahil Garg, Mr. P. Harold, Mr. Rayadurgam Bharata, Mr. Amol Acharya and Mr. Ankit Gupta, Advs.

versus

PUNJAB AND SIND BANK & ANR.

..... Respondents

Through: Mr. Rakesh Sinha and Ms. Shipra Ghose, Advs. for R-2

**CORAM:**
**HON'BLE MR. JUSTICE V. KAMESWAR RAO**

**J U D G M E N T**

**V. KAMESWAR RAO, J**

**CM No. 22060/2021**

This is an application filed by respondent No.2 for placing on record additional documents, i.e., (i) copy of Written Statement in Civil Suit No. 212/2018 and, (ii) copy of the order dated January 03, 2020, passed in Civil Suit No. 212/2018.

For the reasons stated in the application same is allowed and the additional documents are taken on record.

Application stands disposed of.

**RFA No. 238/2020**

1. This appeal has been filed by the appellant / plaintiff with the following prayers:

> *"In View of the aforesaid facts and circumstances, the appellant most humbly pray that this Hon'ble Court may graciously be pleased to:*
>
> *A. Allow the present appeal and thereby set-aside the Impugned Order and judgment dated 17.02.2020; and*
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> *B. Decree the Suit bearing CS No.9829/2016 filed by the Appellant/Plaintiff in its favour and against the Respondents and grant the reliefs prayed for in the Plaint of the Suit; and*
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> *C. Release the amount of Rs. 1,07,11,050/- deposited by the Appellant with the Registrar General vide Serial No. 408 and converted into TD No.15530310059128 in its favour; and*
>
> *D. Call for the trial court record in CS No.9829/2016; and*
>
> *E. Pass such other and further order[s] as this Hon'ble Court may deem fit and proper in the facts and the circumstances of the present case and in the interest of Justice."*

2. It is the case of the appellant / plaintiff, known for its work in construction, fabrication, and erection that it had been approached and requested by respondent No.2 / M/s Hindustan Steel Works Construction Ltd. (*hereinafter, 'HSCL'*) for help and collaboration in order to enable the respondent No.2 / HSCL to successfully bid for a tender floated by National Thermal Power Corporation Ltd. (*hereinafter, 'NTPC'*) for civil and structural works in Kahalgaon, Bihar. It is stated that because of the appellant / plaintiff collaboration, respondent No.2 / HSCL had been awarded the main contracts vide Letters of Award (*hereinafter, 'LOA'*)

dated July 31, 2003, and February 03, 2004, by NTPC and duly approved the sub-contracting of certain fabrication and erection of structural steelwork to be done by the appellant / plaintiff.

3. Thereafter, respondent No.2 / HSCL had bifurcated the entire work into civil works contract and structural works contract and awarded two sub-contracts of structural works in favour of the appellant / plaintiff vide letters dated March 03, 2004, and April 06, 2004.

4. On request of respondent No.2 / HSCL, the appellant / plaintiff had approached its bank i.e., respondent No.1 / Punjab & Sind Bank which issued two Bank Guarantees (*hereinafter, 'BG'*) No. 96 / 2005 and 97 / 2005 for ₹58 lakhs and ₹47 lakhs respectively, both dated January 13, 2006, in favour of the respondent No.2 / HSCL as per the terms and conditions stated in the said documents. It is stated by Dr. Amit George, learned counsel appearing on behalf of the appellant / plaintiff that both the BGs had similar Clauses, therefore, the relevant Clauses of the BG No. 97/2005 relied upon by Dr. George are reproduced as under:

> *"1……We, the Punjab & Sind Bank (hereinafter referred to as "the said bank" and having our registered office at 21, Rajender Place, New Delhi do hereby undertake and agree to indemnify and keep indemnified the owner from time to time to the extent of Rs.47,00,000/- (Rs. Forty Seven lakhs only) against any loss or damage, costs, charges and expenses caused to or suffered by or that may be caused to or suffered by the owner by reason of any breach or breaches by the said contractor of any of the terms and conditions contained in the said contract and to unconditionally pay the amount claimed by the owner on demand and without demure to the extent aforesaid.*

*2. We Punjab & Sind Bank further agree that the owner shall be the sole judge of and as to whether the said contractor has committed any breach or breaches of any of the terms and conditions of the said contract and the extent of laws, damage, cost, charges and expenses caused to or suffered by or that may be caused to or suffered by the Owner on account thereof and the decision of the Owner that the said Contract has committed such breach or breaches and as to the amount or amounts of loss, damage, costs charges and expenses caused to or suffered by or that may be caused to suffered by the Owner from time to time shall be final and binding on us.*

*3. We, the said bank further agree that the guarantee herein contained shall remain in full force and effect during the period that would be taken for the performance of the said contract and till all the dues of the Owner under the said contract or by virtue of any of the terms and conditions governing the said contract have been fully paid and its claim satisfied or discharged and till the Owner certifies that the terms and conditions of the said Contract have been fully and properly carried out by the said Contractor and accordingly discharges this guarantee subject however, that the Owner shall have no claim under the Guarantee after 90 (Ninety) days from the date of expiry of the Defects liability period as provided in the said contract or from the date of cancellation of the said contract, as the case may be, unless a notice of the claim under the Guarantee has been served on the Bank before the expiry of the said period in which case the same shall be enforceable against the Bank notwithstanding the fact that the same is enforced after the expiry of the said period.*

*4. The owner shall have the fullest liberty without affecting in any way the liability of the bank under this guarantee or indemnity from time to vary any of the terms and conditions of the said contract or to extend time of performance by the said Contractor or to postpone for any*

*time and from time to time any of the power exercisable by it against the said contractor and either to enforce or forbear from enforcing any of the terms and conditions governing the said Contract or securities available to owner and the said Bank shall not be released from its liability under these presents by any exercise by the owner of the liberty with reference to the matter aforesaid or by reason of time being given to the said contractor or any other forbearance act or omission, on the part of the owner any indulgence by the owner to the said Contractor or any other matter of thing whatsoever which under the law relating to sureties would but for this provision have effect of so releasing the Bank from its such liability.*

*5. It shall not be necessary for owner to proceed against the Contractor before proceeding against the Bank and the Guarantee herein contained shall be enforceable against the bank notwithstanding any security which the owner may have obtained or obtain from the Contractor shall at the time when proceedings are taken against the Bank hereunder be outstanding or unrealized.*

*6. We, the said bank lastly undertake not to revoke this guarantee during its currency except with the previous consent of the owner in writing and agree that any change in the constitution of the said Contractor or the said Bank shall not discharge out liability hereunder. If any further extension of this Guarantee is required the same shall be extended to such required periods on receiving instruction from M/s. Harji Engineering Works (P) Ltd., on whose behalf this guarantee is issued." (emphasis supplied)*

5. According to Dr. George, respondent No.2 / HSCL being first obligated to carry out preliminary civil works in pursuance of the main contracts with NTPC, had failed to do so, thus effectively disabling the appellant / plaintiff from carrying out its part / obligations detailed in the sub-contracts dated March 03, 2004, and April 06, 2004. He further

stated that due to the non-performance of work / obligations as detailed in the main contracts by respondent No.2 / HSCL, the remaining non-executed contracts awarded vide Award dated July 31, 2003, and February 03, 2004, were cancelled by NTPC in parts; and vide letter dated September 01, 2007, the entire balance of unexecuted work for the said contracts was cancelled.

6. Dr. George stated that respondent No.2 / HSCL had cancelled the sub-contracts in favour of the appellant / plaintiff vide letter dated September 05, 2007. The cancellation letter was never withdrawn / cancelled and had attained finality. He further stated that after the cancellation of the contract owing to the non-performance and fault of respondent No.2 / HSCL, the appellant / plaintiff started compiling its claims against respondent No.2 / HSCL for its wrongful and unilateral termination / cancellation of the two sub-contracts dated March 03, 2004, and April 06, 2004. Meanwhile, both the BGs were kept alive only with a view to facilitate any subsequent restoration of the sub-contracts.

7. Furthermore, it is stated by Dr. George that on June 03, 2008, respondent No.2 / HSCL sought to wrongfully encash the BGs despite the fact that the sub-contracts were cancelled / terminated way back on September 05, 2007. The invocation of the BGs became subject matter of a challenge by the appellant by filing a suit for injunction initially in this Court being CS(OS) 1108/2009, which was later transferred to the District Court because of increase in pecuniary jurisdiction of this Court. The prayers made therein were the following:

*"In view of the aforesaid facts and circumstances, it is humbly prayed that this Hon'ble Court may most graciously be pleased to:*

*i) restrain, prevent and injunct the defendant No.1 by an order of permanent injunction, from paying any amount whatsoever under Bank Guarantee No.96/2005 dated 13.1.2006 for an amount of Rs.58,00,000/- to the owner (beneficiary) Hindustan Steelworks Construction Limited, Defendant No.2;*

*ii) restrain, prevent and injunct the defendant No.1 by an order of permanent injunction, from paying any amount whatsoever under Bank Guarantee No.97/2005 dated 13.1.2006 for an amount of Rs.47,00,000/- to the owner (beneficiary) Hindustan Steelworks Construction Limited, Defendant No.2;*

*iii) pass such other further orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case in favour of the plaintiff as against the defendants for furtherance of cause of justice."*

8. On the basis of the pleadings of the parties, the following issues were framed in the suit:

*"(1) Whether the bank guarantee has not been invoked by defendant no.2 within the validity period? OPD-1*

*(2) Whether the bank guarantee has been invoked in terms of bank guarantee? OPD-1 & 2.*

*(3) Whether this court has no territorial jurisdiction to entertain and try the suit? OPD-2*

*(4) Whether the plaintiff is entitled to a decree of permanent injunction as prayed for? OPP"*

9. The suit which was transferred to the Trial Court in the month of December 2016 was dismissed. It had also directed the release of the amount of ₹1,07,11,050/- deposited in this Court on the strength of the

order passed by this Court on June 13, 2009 in favour of the respondent No.2 who was directed to file an application before the Registrar General of this Court.

10. It is the submission of Dr. George that the BGs could not have been encashed after 90 days from said expiry, i.e., after December 04, 2007. Moreover, Clause 3 of the BGs provides for encashment within 90 days after the date of cancellation of the sub-contract. As in the present case, the contract was terminated by respondent No.2 / HSCL on September 05, 2007, therefore, the invocation of BGs on June 03, 2008, i.e., much beyond a period of 90 days from the date of termination, was impermissible and contrary to the express stipulation in the BGs.

11. Dr. George also submitted that the law is well settled that if an invocation is not made strictly in terms of the BG, then no payment can be claimed through the said demand and an injunction would legitimately follow. In this regard, Dr. George relied upon the Judgments in the cases of ***EMCO Limited vs. Malvika Steel Limited & Ors., (2012) SCC OnLine Del 5763***, and ***Satluj Jal Vidyut Nigam Limited vs. Jai Prakash Hyundai Consortium, (2006) 88 DRJ 332 (DB).***

12. According to Dr. George, respondent No.2 / HSCL has sought to set up an entirely new case before this Court that it was entitled to invoke the BGs within 90 days of the expiry of the defect liability period, and that the said period has not started till date and will purportedly not start till the NTPC completes the risk-and-cost contract against HSCL which is an indeterminate date in the future. In this regard, Dr. George submitted that the said argument of respondent No.2 / HSCL is not only a complete afterthought, the same is unmeritorious. He submitted that in

the present case the contract having been terminated, there arises no question whatsoever of any defect liability period.

13. According to him, in construction contracts, the defect liability period by its very nature begins after the work is completed. When a construction contract is terminated much prior to completion of the work, the defect liability period would not even begin to run. To support his view, he has relied upon the Judgments in the cases of ***National Highways Authority of India vs. Bridge & Roof Co. Ltd., (2017) SCC Online Del 7908***, and ***Harvinder Singh & Co. vs. National Projects Construction Corp. Ltd., (2017) SCC Online Del 9210***. In addition, he submitted that respondent No.2 / HSCL has neither averred about the existence of, nor placed on record, any contract clause in the present case between the parties that stipulates the contrary. Hence, from this perspective also, the argument of respondent No.2 / HSCL is unmerited.

14. Furthermore, it is submitted that the stand of respondent No.2 / HSCL is contrary to its own unequivocal position as taken by them in a judicial proceeding before this Court when it sought to secure an injunction against encashment of BGs tendered by them to NTPC. As the work awarded by respondent No.2 / HSCL to the appellant / plaintiff was on a back-to-back basis, it was subject to the identical contractual terms and conditions, as applicable between respondent No.2 / HSCL and NTPC, and accordingly, the BGs advanced by respondent No.2 / HSCL to the appellant / plaintiff. Moreover, in seeking to resist encashment of BGs by NTPC pursuant to the termination of the main contract between NTPC and respondent No.2 / HSCL, respondent No.2 / HSCL filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996

(*hereinafter, 'A&C Act, 1996'*) before this Court against NTPC. According to Dr. George, respondent No.2 / HSCL had itself contended that the BGs in question stood discharged by virtue of the fact that the 90-days period post the cancellation of the contract between respondent No.2 / HSCL and NTPC stood expired. It is stated that respondent No.2 / HSCL took a categorical position that the case fell under the second category i.e., of termination, and that there was no question of awaiting the expiry of any defect liability period. Therefore, respondent No.2 / HSCL's own interpretation of identically worded BGs in the context of termination of the contract has been that (i) the act of termination would trigger the 90 days period, (ii) that the BGs could not be encashed beyond the said 90-days period, and (iii) that in the event of termination, the defect liability period would be inconsequential and inapplicable. Respondent No.2 / HSCL evidently cannot be permitted to adopt a diametrically opposite stand in an identical factual scenario and identical BG terms *qua* the appellant / plaintiff. In this regard, Dr. George stated that it is trite law that a party cannot be permitted to approbate and reprobate at the same time, and the same is based on the principle of the doctrine of election. To support his stand, he has relied upon the Judgment in the case of ***Cauvery Coffee Traders, Mangalore vs. Hornor Resources (International) Co. Ltd., (2011) 10 SCC 420***.

15. Dr. George stated that respondent No.2 / HSCL's argument that the appellant / plaintiff had extended the tenure of the BGs and thus consented to an extended claim period is erroneous, as the BGs were extended without any change in terms i.e., the extended BGs also contained Clause 3 and the stipulation that the BGs could only be

invoked within 90 days period from the date of cancellation of the contract. The claim period under a BG is strictly controlled by the terms contained in the BG, and it cannot be argued that the right to invoke the BG continued beyond the express period for the same mentioned in the BG. In this regard, Dr. George relied upon the Judgment in the case of ***Makharia Brothers vs. State of Nagaland & Ors., (2000) 10 SCC 503***. Respondent No.2 / HSCL's argument is characterised by a mistaken equivalence between the expiry date of a BG and the claim period contained therein. However, the law is to the contrary. The expiry date of the BG is completely different from the claim-period validity, as both have completely different connotations in commercial law. To support his view, Dr. George has relied upon the Judgment in the case of ***Preeti Industries and Ors. vs. The Chairman, Himachal Pradesh State Electricity Board Ltd. and Ors., (2019) SCC OnLine HP 1344***. That apart, respondent No.1 / Punjab & Sind Bank (Issuing Bank) has categorically supported the interpretation of the claim period of the BGs as is being advanced by the appellant / plaintiff. The same is a material factor inasmuch as the issuing entity itself is categorical that the BGs could not have been invoked by respondent No.2 / HSCL in the manner in which it has sought to do so.

16. Dr. George contended that due to the illegal and arbitrary action of respondent No.2 / HSCL in seeking encashment of the BGs, the appellant / plaintiff had immediately approached this Court by way of O.M.P. No. 326 / 2008 seeking stay on the illegal encashment**.** This Court vide order dated June 16, 2008, was pleased to stay the encashment of the BGs. However, the aforesaid petition, being O.M.P. No. 326 /

2008 was dismissed on May 06, 2009, on merely technical grounds, i.e., the non-existence of an arbitration Clause for the resolution of disputes between the parties. It is stated by Dr. George that after the dismissal of the O.M.P. No. 326/2008, respondent No.2 / HSCL had vide its letter dated May 21, 2009, again sought to wrongfully encash the BGs.

17. Dr. George stated that as the very encashment of the BGs was wrongful and illegal, the appellant / plaintiff had immediately addressed a letter dated May 26, 2009, to respondent No.1 / Punjab & Sind Bank cautioning it to not encash the BGs as the very encashment was illegal in terms of the benevolent terms of the BGs.

18. Moreover, he contended that respondent No.1 / Punjab & Sind Bank had rightly addressed a letter dated May 28, 2009 to respondent No.2 / HSCL highlighting the fact that the BGs could not be encashed as the conditions subject to which the same could be encashed were not made out. He further contended that despite receiving the letter dated May 28, 2009, from respondent No.1 / Punjab & Sind Bank clearly providing that the BGs could not be encashed, respondent No.2 / HSCL issued yet another letter dated June 02, 2009, to respondent No.1 / Punjab & Sind Bank asking them to encash the BGs.

19. Thereafter, the appellant / plaintiff had instituted CS (OS) No. 1108 / 2009 on June 01, 2009, before this Court for the relief of permanent injunction restraining the respondent No.1/ Punjab & Sind Bank from paying the amounts under the BGs in question. The said suit came up for hearing on June 13, 2009, in which this Court directed the appellant / plaintiff to prepare and deposit a pay order for the sum of

₹1,07,11,050/- in the name of the Registrar General of this Court and deposit the same in a no lien account.

20. It was contended by Dr. George that the respondents had duly appeared in CS (OS) No. 1108 / 2009 and had placed their written statements to the suit of the appellant / plaintiff. He also stated that respondent No.1 / Punjab & Sind Bank had supported the case of the appellant / plaintiff and had duly highlighted that the encashment of the BGs was not in terms of the terms stipulated therein and therefore was bad in law.

21. Consequently, it was stated by Dr. George that respondent No.2 / HSCL had itself disputed the termination of contracts by NTPC, and accordingly the disputes arising out of LOA dated July 31, 2003, and February 03, 2004, were referred to arbitration under the Permanent Machinery of Arbitration (*hereinafter, 'PMA'*) guidelines issued by Department of Public Enterprises (*hereinafter, 'DPE'*), Ministry of Heavy Industries and Public Enterprises, Government of India. Respondent No.2 / HSCL had maintained its claim against NTPC for wrongful termination of the contracts awarded to it as against its claim in the suit that the contract was terminated due to non-performance by the appellant / plaintiff and has caused wrongful loss of ₹6,35,23,987/- to respondent No.2 / HSCL.

22. He also contended that the impugned order has failed to ignore the fact that the case of respondent No.2 / HSCL alleging recovery of ₹6,35,23,987/- from the appellant / plaintiff was completely falsified according to the Minutes of Meeting dated October 08, 2015 issued, signed and duly executed by respondent No.2 / HSCL. He further stated

that in so far as the claims of the appellant / plaintiff against respondent No.2 / HSCL for the wrongful termination of the two sub-contracts are concerned, the appellant / plaintiff and respondent No.2 / HSCL had duly executed the Minutes of Meeting dated October 08, 2015, wherein respondent No.2 / HSCL itself admitted that it had to pay ₹1685.43 lakhs with interest to the appellant / plaintiff. In addition, the appellant / plaintiff had filed a suit for recovery for the said amount i.e., ₹1685.43 lakhs before the Calcutta High Court, and the same is pending adjudication.

23. Dr. George further submitted that it is no longer *res integra* that the exception of special equities is a distinct circumstance and where special equities exist, a Court is within its powers to restrain invocation / encashment of a BG. The existence of special equities is a legitimate and actionable ground to injunct encashment of a BG. In this regard, Dr. George relied upon the Judgment in the case of ***State Trading Corporation of India Limited vs. State Bank of India and Ors., (2013) SCC OnLine Del 935***.

24. Moreover, Dr. George submitted that the following facts demonstrate special equities in favour of the appellant / plaintiff:

i. Vide Minutes of Meeting dated October 08, 2015, executed between respondent No.2 / HSCL, and the appellant / plaintiff, respondent No.2 / HSCL unequivocally acknowledged, admitted, and undertook to remit a sum of ₹1685.43 lakhs along with interest in favour of the appellant / plaintiff, upon realisation from NTPC. The Minutes of Meeting were signed at a stage when the Awards in favour of respondent No.2 / HSCL

against NTPC stood set aside, and respondent No.2 / HSCL was engaged in appellate remedies against the order setting aside the Awards. Therefore, the Minutes of Meeting demonstrate the solemn, considered, and unconditional admission on the part of respondent No.2 / HSCL of the amounts due to the appellant / plaintiff. In this regard, it is stated that in the face of an admitted liability of respondent No.2 / HSCL far in excess of the sum of the BGs, there arises no question of recovery of any dues from the appellant / plaintiff, much less by encashing the BGs furnished in *lieu* of security deposit. When large sums are in fact due from the party seeking to invoke the BG to the party that has furnished the BG and when the party seeking to invoke the BG has been the primary reason for non-execution of work and termination of the contract, then it would be a case of special equities deserving intervention by the Court. To support his view, he has relied upon the Judgment in the case of ***Synthetic Foams Limited vs. Simplex Concrete Piles (India) Pvt. Ltd., (1987) SCC OnLine Del 344***. He further stated that the Minutes of Meeting dated October 08, 2015, were duly placed on record before the Trial Court, and the witnesses of respondent No.2 / HSCL were also confronted with the same and the existence of the Minutes of Meeting dated October 08, 2015, have at no point been denied by respondent No.2 / HSCL, not even before this Court.

ii. The condition precedent for invocation of the BGs is any loss to be suffered by respondent No.2 / HSCL owing to any breach by

the appellant / plaintiff. The letters issued by respondent No.2 / HSCL seeking encashment do not state the loss suffered by them. In any case, the only loss pleaded by respondent No.2 / HSCL, as ascertained from its own stand is that by non-accounting of about 1950 MT of structural steel on the site by the appellant / plaintiff, respondent No.2 / HSCL suffered a loss of approximately ₹7.8 Crore. It is submitted that in the arbitration proceedings before the sole arbitrator under the PMA, respondent No.2 / HSCL itself blamed NTPC for wrongfully terminating its contract and claimed a refund of the Security Deposit besides other claims. In the said proceedings, NTPC had sought a counter-claim for a sum of ₹12.14 Crore from respondent No.2 / HSCL on account of recovery of amount against material issued and not returned / unaccounted at the site. The Trial Court had upheld the stand of respondent No.2 / HSCL therein that there was no unaccounted / missing material and rejected the counter-claim after observing that the material was lying unutilised at the site and was not missing. Hence, while seeking to blame the appellant / plaintiff (sub-contractor) for certain alleged missing material from the site in the present proceedings, it can be seen that respondent No.2 / HSCL (contractor) contested that the said fact against the NTPC (employer) in the arbitration proceedings and in fact succeeded in establishing that all material on-site was in fact accounted for. According to Dr. George, the fate of the Awards is presently *sub-judice* before the PMA pursuant to an order to

this effect passed by the Supreme Court on August 28, 2017. Dr. George stated that in any case, the stand of respondent No.2 / HSCL before the sole arbitrator, and as reflected in the awards, binds it in the present proceedings as well. However, respondent No.2 / HSCL has till date not instituted any case against the appellant / plaintiff seeking recovery of any alleged loss, and this fact according to Dr. George again demonstrates the untenable stand of respondent No.2 / HSCL.

iii. The work awarded by respondent No.2 / HSCL to the appellant / plaintiff was on a back-to-back basis, and was subject to the same terms and conditions, as applicable between respondent No.2 / HSCL and NTPC (Principal Employer) including the General Conditions of Contract for Civil Works (*hereinafter, 'GCC'*). Dr. George stated that the case of respondent No.2 / HSCL is that the BG was advanced in lieu of Security Deposit as contained in Schedule of GCC as appended to the contract between respondent No.2 / HSCL and NTPC. Respondent No.2 / HSCL had itself sought the release of Security Deposit from NTPC in the arbitration proceedings, therefore, respondent No.2 / HSCL cannot seek encashment of BGs of the appellant / plaintiff on the same set of facts.

iv. In the arbitration proceedings, respondent No.2 / HSCL itself blamed NTPC for wrongfully terminating the contract and put the blame for the delay in the work on the shoulders of NTPC. Therefore, respondent No.2 / HSCL cannot seek to assert that the appellant / plaintiff alleged defaults led to the termination of

the contract. Hence, the very basis of encashment of the BGs by respondent No.2 / HSCL disappears.

v. Respondent No.2 / HSCL has itself postulated a prohibition against encashment of the BGs on account of expiry of the claim period mentioned in the BGs. That apart, respondent No.1 / Punjab & Sind Bank (Issuing Bank) has supported the interpretation of the claim period of the BGs as is being advanced by the appellant / plaintiff.

25. Dr. George submitted that it is settled law that the existence of special equities has to be determined with reference to the peculiar facts and circumstances as existing in the case before the Court. In this regard, Dr. George has relied upon the Judgment of this Court in the case of ***Technimont Private Limited and Ors. vs. ONGC Petro Additions Limited, (2020) SCC OnLine Del 653***. Furthermore, when the stand of the party seeking to invoke the BG is *ex-facie* and manifestly false, then it would be a case of special equities deserving intervention by the Court. To support his view, Dr. George has relied upon the Judgment of the Supreme Court in the case of ***Hindustan Construction Company Limited vs. State of Bihar and Ors., (1999) 8 SCC 436***.

26. That apart, Dr. George with respect to the arbitration between respondent No.2 / HSCL and NTPC, after the passing of the order dated February 11, 2015, NTPC had challenged the same by way of a writ petition in this Court. It is submitted that vide order dated May 30, 2016, this Court disposed of the writ petition and permitted respondent No.2 / HSCL to file appropriate proceedings under the A&C Act, 1996. Thereafter, respondent No.2 / HSCL had filed a petition under Section 34

of the A&C Act, 1996 wherein it was held that the Chairman-cum-Managing Director of NTPC was to decide as to whether the matter then should at all be sent to Arbitration. In an appeal against the said order, the Division Bench of this Court vide order dated May 30, 2017, appointed Justice Vijender Jain (Retd. Chief Justice, Punjab and Haryana High Court) as the sole arbitrator to adjudicate the disputes. However, the said order was also challenged before the Supreme Court, wherein, vide order dated August 28, 2017, the matter was referred to the bench of three Judges of the Court and meanwhile directed that the parties could go for decisions before the Cabinet Secretariat under the PMA in terms of the order dated December 07, 2015. Presently, the matter is pending adjudication before the Cabinet Secretariat of the Government of India.

27. The Trial Court vide the impugned Judgment / order dated February 17, 2020, has dismissed the suit of the appellant / plaintiff and passed the impugned Judgment/order in favour of respondent No.2 / HSCL and has further granted the release of the quantum of ₹1,07,11,050/- in favour of the respondent No.2 / HSCL [encompassed under two BGs in question which had been converted into TD No. 15530310059128 dated July 17, 2010, deposited vide serial No. 408 before the Registrar General of this Court] on moving of an application for release of the aforesaid funds before this Court by respondent No.2 / HSCL. It is further stated that the applicant has been served a copy of an application dated February 22, 2020, by respondent No.2 / HSCL for the release of the said funds.

28. Consequently, the application filed by respondent No.2 / HSCL for the release of money was listed before the Joint Registrar of this

Court on August 31, 2020. The appellant / plaintiff has been granted 10 days to file the instant appeal and obtain a stay on the effect and operation of the impugned order.

29. Dr. George argued that the impugned Judgment / order has been passed on the erroneous understanding of the law that the mere extension of performance BGs would novate / extend the original contract, which otherwise stood terminated / cancelled. The BG is an altogether separate contract having its own terms and conditions, the Trial Court erred in law in observing that the extension of performance BG would, in turn, extend the main contract. The Trial Court in holding that the original contract stood novated / extended, has ignored the fact that it was not even the case of the parties that the contract stood novated / extended and the factum of cancellation was never disputed.

30. Furthermore, Dr. George averred that the Trial Court has misdirected itself in not considering that a bare perusal of the said BGs reveal that they are not only conditional but further time-bound (paragraph 3 of the BGs) to the extent that they could only have been encashed within 90 days (which expired on December 04, 2007) from the date of termination of the main contracts between the respondent No.2 / HSCL and NTPC on September 05, 2007. It was also contended by Dr. George that the Trial Court has also made an error in not considering that the invocation by respondent No.2 / HSCL of the BGs in question, i.e., on May 21, 2009, after a delay of 371 days by respondent No.2 / HSCL, especially after the termination of the main contract, is *malafide* and fraudulent.

31. Dr. George contended that the impugned Judgment / order has been in disregard to the settled principles of law pertaining to the encashment of BGs. As the conditions of invocation of the BGs were not made out, the very encashment was *ex facie* fraudulent as per the Judgments in the cases of ***Larsen and Toubro Limited vs. Maharashtra State Electricity Board and Ors., 1995 6 SCC 68***; ***National Highway Authority of India vs. Punjab National Bank, F.A.O. (OS) (COMM) No.165/2017***, and ***Leighton India Contractors Private Limited vs. DLF Ltd. and Ors., O.M.P (I) (COMM) No. 109/2020***. In addition, Dr. George contended that as the encashment was fraudulent, resulting in irretrievable injury to the appellant / plaintiff, the same was covered by the Judgment of the Supreme Court in the case of ***UP State Sugar Corporation vs. Sumac International Ltd., (1997) 1 SCC 568***.

32. According to Dr. George, the Trial Court has further erred in passing the impugned Judgment / order as it failed to consider the submissions and well-settled Judgments relied upon by the appellant / plaintiff governing the wrongful invocation of BGs. In this regard, a reference has been drawn to the Judgment in the case of ***Hindustan Construction Company Limited (supra)*** wherein, the Apex Court had come to the conclusion that:

> *"……The bank guarantee thus could be invoked only in the circumstances referred to in clause 9 whereunder the amount would become payable only if the obligations are not fulfilled or there is misappropriation. That being so, the bank guarantee could not be said to be unconditional or unequivocal in terms so that the defendants could be said to have had an unfettered right to invoke that guarantee and demand immediate payment thereof from the Bank. This aspect of the matter was wholly*

*ignored by the High Court and it unnecessarily interfered with the order of injunction, granted by the Single Judge, by which the defendants were restrained from invoking the bank guarantee."*

33. According to Dr. George, the Trial Court has also failed to appreciate that it was the appellant / plaintiff who had suffered a loss due to the non-performance of the work by respondent No.2 / HSCL under the main contracts awarded to it by NTPC and its consequent cancellation of the sub-contracts on September 05, 2007, with the appellant / plaintiff. That apart, Dr. George contended that the Trial Court has also failed to consider that respondent No.2 / HSCL was trying to encash the BGs at the expense of the appellant / plaintiff and thus fraudulently take advantage of its own failure in effectively carrying out the preliminary civil works in pursuance of the main contracts with NTPC. The said act of respondent No.2 / HSCL had effectively, disabled the appellant / plaintiff from carrying out its part / obligations detailed in the sub-contracts dated March 03, 2004, and April 06, 2004, respectively, and had led to the withdrawal of the main contracts awarded vide LOA dated July 31, 2003, and February 03, 2004, by NTPC and the consequent termination of the sub-contracts in favour of the appellant / plaintiff on September 05, 2007.

34. Dr. George also stated that the Trial Court erred in law in not taking note of the aforementioned facts leading up to the date of the Judgment in the year 2020 i.e., approx 11 years after the date of institution of the suit. He further stated that the settled position of law on this behalf as reiterated by the Apex Court in the case of ***Rameshwar and Ors. vs. Jot Ram and Ors., (1976) 1 SCC 194***, has been ignored. In this

regard, he has relied upon the relevant extracts of the said Judgment as reproduced hereunder:

> *"Courts of justice may, when the compelling equities of a case oblige them, shape reliefs — cannot deny rights — to make them justly relevant in the updated circumstances. Where the relief is discretionary, courts may exercise this jurisdiction to avoid injustice. Likewise, where the right to the remedy depends, under the statute itself, on the presence or absence of certain basic facts at the time the relief is to be ultimately granted, the Court, even in appeal, can take note of such supervening facts with fundamental impact Venkateswarlu, read in its statutory setting, falls in this category."*

35. According to Dr. George, similarly, the Court in the case of ***Gaiv Dinshaw Irani and Ors. vs. Tehmtan Irani & Ors., (2014) 8 SCC 29***, has observed that the Court can take note of developments subsequent to the commencement of litigation and mould the relief suitably. In this regard, he relied upon the relevant extracts/paragraphs of the said Judgment reproduced as under:

> *"48. ……..However, in the interest of justice, a court including a court of appeal under Section 96 of the Code of Civil Procedure is not precluded from taking note of developments subsequent to the commencement of the litigation, when such events have a direct bearing on the relief claimed by a party or on the entire purpose of the suit, the courts taking note of the same should mould the relief accordingly.*
> *53. Thus, when the relief otherwise awardable on the date of commencement of the suit would become inappropriate in view of the changed circumstances, the courts may mould the relief in accordance with the changed circumstances for shortening the litigation or to do complete justice."*

36. Dr. George further contended the impugned Judgment / order failed to consider the submissions and Judgments relied upon by the

appellant / plaintiff on the grant of injunction against the invocation of the BGs in question. According to him the said impugned Judgment / order also failed to grant at least the statutory period of 90 days to the appellant / plaintiff to prefer the present appeal and to seek a stay of the release of the funds to respondent No.2 / HSCL in the aforesaid TD No.15530310059128 deposited before the Registrar General of this Court.

37. It is submitted by Dr. George that the impugned Judgment / order dated February 17, 2020, caused serious injustice to the appellant / plaintiff. He seeks the prayers made in the appeal.

38. On the other hand, Mr. Rakesh Sinha, learned counsel appearing on behalf of respondent No.2 / HSCL contended that BGs have been duly invoked by respondent No.2 / HSCL in accordance with the provisions / clauses of the BGs.

39. Mr. Sinha submitted that the above-stated arguments is based on an incomplete and partial reading of Clause 3 and the other terms of the BG including the extension letters dated May 28, 2008, and November 26, 2008, respectively. The proper reading of Clause 3 of the BGs shows that the BG could be invoked either within 90 days of contract cancellation or expiry of the defect liability period. The words *"as the case may be"* in Clause 3 of the BGs vested discretion in respondent No.2 / HSCL as to when the BGs could be invoked so long such invocation was during the validity of the BGs. According to Mr. Sinha, the underlying contract was cancelled by the principal employer i.e., NTPC in parts lastly by their letters (Ref. No. Khs. 092: AGM (Pro.)/203 and Ref. No. Khs. 092: AGM (Pro.)/204) both dated

September 01, 2007, due to a delay in execution of the works. NTPC had put respondent No.2 / HSCL to notice that the works shall be completed through other agencies at their risk and cost. He further stated that as per the LOAs dated March 03, 2004, and April 06, 2004, the appellant / plaintiff was required to complete the subcontracted work respectively by March 31, 2006, and July 31, 2006. Consequently, respondent No.2 / HSCL had cancelled the subcontracts of the appellant / plaintiff from time to time and lastly by its letters (No. DGM/Klgn/HEW/07/751 and No. DGM/Klgn/HEW/07/752) both dated September 05, 2007. The GCC between NTPC and respondent No.2 / HSCL was incorporated by reference in the subcontracts between respondent No.2 / HSCL and the appellant / plaintiff. As per Condition No.33 of the GCC r/w Schedule A, the defect liability period was 12 months from the date of completion. The balance structural work was then yet to be completed by the agency appointed by NTPC and hence the defect liability period had not commenced. At that stage respondent No.2 / HSCL had made a tentative assessment of its losses which by far exceeded the BG amounts. Hence, respondent No.2 / HSCL was well within its rights to invoke the BG within its validity.

40. Mr. Sinha submitted that Clause 1 of the BGs provides that respondent No.1 / Punjab & Sind Bank shall indemnify respondent No.2 / HSCL (owner) and unconditionally pay the claim amount by the owner on demand and without any demur. Further, Clause 2 of the BGs makes the owner the sole judge of whether the contractor (appellant / plaintiff) had committed any breach and the extent of loss resulting from such breach and the decision of the owner is final and binding on the bank.

That apart, he submitted that as per Clause 4 of the BGs, the bank was not released of its liability even if the owner postpones enforcement or forbears from enforcing its rights against the contractor.

41. It is submitted by Mr. Sinha that a combined reading of the BG Clauses unequivocally demonstrates that respondent No.2 / HSCL had rightly invoked the BG in accordance with the BG terms. Respondent No.1 / Punjab & Sind Bank was required to honour their guarantee and pay on demand by respondent No.2 / HSCL without any demur regardless of the underlying disputes between respondent No.2 / HSCL and the appellant / plaintiff.

42. Moreover, Mr. Sinha submitted that the argument of the appellant / plaintiff further ought to be discarded in view of the extension of the BG from May 31, 2008, to May 28, 2009 by way of extension letters dated May 28, 2008, and November 26, 2008, respectively. According to the appellant / plaintiff, the BGs were invocable after December 04, 2007. However, the BG was extended even after December 2007 i.e., up to May 28, 2009, by way of extension letters issued by respondent No.1 / Punjab & Sind Bank at the request of the appellant / plaintiff. Mr. Sinha stated that had the contention of the appellant / plaintiff been correct, then there was no occasion for extending the BG beyond December 04, 2007. According to Mr. Sinha, it is inconceivable that respondent No.1 / Punjab & Sind Bank on behalf of the appellant / plaintiff had issued the said extension letters to respondent No.2 / HSCL merely as an empty and idle formality and they did not carry any meaning or create any rights / liabilities in favour of the parties.

43. Moreover, it is submitted by Mr. Sinha that it needs to be noted that by the 2nd paragraph of the extension letter dated November 26, 2008, respondent No.1 / Punjab & Sind Bank acknowledges its liability under the BG as valid up to November 30, 2008, if the demand or claims under the guarantee is made in writing on or before November 30, 2008. In this regard, Mr. Sinha relied upon the following relevant extract of the extension letter dated November 26, 2008:

> *"Our liability under this guarantee is restricted to Rs. 58,00,000.00 (Rs. Fifty eight lacs only) and valid upto 30- 11-2008. Unless a demand or claim under this guarantee is made on us in writing on or before 30-11-2008. All your rights under the said guarantee shall be forfeited and we shall be released and discharged from all liabilities thereunder."*

44. It is submitted by Mr. Sinha that the BGs were extended and valid up to May 28, 2009. The extension letters form part of the BG contract between the parties. It is thus clear that respondent No.1 / Punjab & Sind Bank was liable to pay the amounts under the BG upon the demand / claim made by respondent No.2 / HSCL on May 21, 2009, without any demur.

45. In addition, Mr. Sinha relied upon the Judgment in the case of ***M.O.H. Uduman and Ors. vs. M.O.H. Aslum, (1991) 1 SCC 412***, wherein the Supreme Court has held that a contract must be read as a whole and a harmonious construction of all the clauses must be adopted. That apart, he further relied upon the Judgment of the Apex Court in the case of ***Hindustan Steel Works Construction Ltd. vs. Tarapore & Co., (1996) 5 SCC 34***, wherein the Court held that the underlying disputes between the parties to the main contract are irrelevant to the commitments made by the bank to pay the bank guarantee amount on

demand by the beneficiary. Thus, the Trial Court has therefore correctly relied upon the similar proposition of law laid down by the Supreme Court in the case of ***Standard Chartered Bank vs. Heavy Engineering Corporation Ltd. & Anr., Civil Appeal No (s). 23430/2019***.

46. Moreover, Mr. Sinha submitted that the appellant / plaintiff's submissions based on the *ex parte ad interim* order dated September 28, 2010, passed by this Court in O.M.P. No. 567 / 2010 between respondent No.2 / HSCL and NTPC under Section 9 of the A&C Act, 1996, to support their argument that BG was not invokable beyond 90 days of contract cancellation is meritless. In this regard, Mr. Sinha submitted that the *ex parte ad interim* order dated September 28, 2010, cannot be treated as a binding precedent. This Court did not have the occasion to evaluate all the BG contractual terms or consider the counterparty arguments and form any binding opinion. According to Mr. Sinha, the proceedings under Section 9 of the A&C Act, 1996, came to be disposed of by final order dated October 19, 2010, passed by this Court in view of the fact that the invoked BG amounts were already paid to NTPC. Thereafter, respondent No.2 / HSCL initiated arbitration proceedings against NTPC which even after multiple and prolonged proceedings before the Courts remain inconclusive.

47. Mr. Sinha further stated that Dr. George's submission that BGs are not invocable on the ground of special equities by relying on the minutes of meeting dated October 08, 2015 is misplaced as the settlement recorded in the Minutes of Meeting was made conditional upon and subject to finalisation of the Awards and receipt of actual funds from the principal employer i.e., NTPC. He further submitted that the Minutes of

Meeting itself record the pendency of the review petition filed by respondent No.2 / HSCL before the Law Secretary at that point in time. The Awards dated April 10, 2012, and May 10, 2012, that were passed by the Joint Secretary, Sole Arbitrator in favour of respondent No.2 / HSCL and against NTPC had been set aside by the Law Secretary, Appellate Authority by his common order dated February 11, 2015.

48. Therefore, the basis on which special equities are claimed by the appellant / plaintiff does not exist. In addition, Mr. Sinha stated that the appellant / plaintiff themself has filed Civil Suit No. 212 / 2018 before the Calcutta High Court seeking a money decree against respondent No.2 / HSCL on the basis of conditional Minutes of the Meeting dated October 08, 2015. However, the suit is pending adjudication. He stated, this Court may further take judicial notice of the order dated January 03, 2020, that has been passed by the Calcutta High Court declining to entertain the appellant's / plaintiff application for Judgment upon admission. Thus, the appellant's / plaintiff claim on the basis of the Minutes of Meeting dated October 08, 2015, is not crystallised and forms the subject matter of pending proceedings before the Calcutta High Court.

49. Mr. Sinha further submitted that regarding the rule of admissibility of evidence, it is well established that in the absence of any pleading, no evidence produced by parties can be considered. In the present appeal, the plaint filed by the appellant / plaintiff does not contain any averment with regard to the Minutes of the Meeting dated October 08, 2015. This document was sought to be introduced by the witness of the appellant / plaintiff at the stage of evidence. Mr. Sinha stated that the

Supreme Court in the case of ***Ram Sarup Gupta (Dead) By Lrs vs. Bishun Narain Inter College & Ors., (1987) 2 SCC 555***, has held that in absence of any pleadings, evidence produced by parties cannot be considered. He further stated that the pleadings should be liberally constructed, however, in the present case, as there is no averment in the pleading with regard to the Minutes of Meeting, this Court ought to disregard the document in view of this principle.

50. Mr. Sinha stated that the appellant / plaintiff has cited ***State Trading Corporation of India Ltd. (supra)*** and ***Hindustan Construction Company Limited (supra)*** in support of their contention that the invocation of the BG must be in accordance with the terms of the BG. This general proposition of law is well established and does not require restatement. The invocation of the BGs in the present case passes the test as being in accordance with the terms/clauses of the BGs. That apart, the appellant / plaintiff further relied upon the Judgment in the cases of ***Makharia Brothers (supra)*** and ***Preeti Industries (supra)*** wherein the terms of the BGs had different demand / claim and validity periods. The terms of the BGs in those cases are not identical to the BG terms of the present case. Mr. Sinha also submitted that the BG terms as contained in the extension letters make it fairly explicit that both the demand / claim and validity periods were the same. Therefore, according to Mr. Sinha, the above-stated judgments relied upon by the appellant / plaintiff have no application in the present case.

51. Furthermore, Mr. Sinha stated that this Court may take note of Order XLI Rule 24 of the Code of Civil Procedure, 1908 which provides that the appellate Court can finally decide all the issues even though the

Trial Court may have delivered its Judgment on some other grounds. Hence, this Court may dismiss the present appeal with the direction to the Registrar General of this Court to release the BGs amount to respondent No.2 / HSCL.

**CONCLUSION**

52. Having heard the learned counsels for the parties, the issue which arises for consideration is whether respondent No.2 / HSCL is justified in invoking the two BGs as furnished by the appellant / plaintiff herein, i.e., of the value amounting to ₹58 lakhs and ₹47 lakhs respectively.

53. From the above it is noted that the appellant / plaintiff had entered into contracts with respondent No.2 / HSCL on back to back basis as HSCL was awarded a tender for civil and structural works in Kahalgaon, Bihar by the NTPC which was subsequently withdrawn from respondent No.2 / HSCL by the NTPC vide letters dated September 01, 2007.

54. The case of the appellant / plaintiff before the Trial Court was that the work of the appellant / plaintiff shall depend upon the completion of civil works by the respondent No.2 / HSCL and therefore the appellant / plaintiff could not execute its work detailed in the sub-contracts / LOA dated March 03, 2004, and April 06, 2004. However, despite this respondent No.2 / HSCL had sent a letter dated May 21, 2009, to respondent No.1 / Punjab & Sind Bank seeking the invocation of the two BGs. As stated above, the Trial Court has rejected the suit filed by the appellant / plaintiff and thereby upholding the invocation of the BGs by respondent No.2 / HSCL herein primarily on the following grounds that:

i. As per the Clauses / terms of the BGs, various rights have been given to respondent No.2 / HSCL to cancel / revoke / extent or invoke the BGs.

ii. As per Clause 3 of the BGs, the same shall remain in force till all the dues of the owner are paid or satisfied and till the owner certifies that the terms and conditions of the contract have been fully carried out by the appellant / plaintiff herein.

iii. The Clauses / terms of the BGs contemplate that the guarantee would be discharged when the owner i.e., respondent No.2 / HSCL shall have no claim under the guarantee after 90 days from the date of expiry of the defect liability period as provided in the contract.

iv. Another condition of the BGs contemplates that the guarantee is discharged from the date of cancellation of the contract unless a notice of claim has been served to the bank (respondent No.1) before the expiry of the period. The appellant / plaintiff has extended the period of BGs from time to time, which proves the novation of the existing contract from time to time.

v. The invocation letters sent by respondent No.2 / HSCL to respondent No.1 / Punjab & Sind Bank before the period of its expiry are also covered within the purview of the last condition of Clause 3 of the BGs which implies that the BGs subsisted and invoked by respondent No. 2 / HSCL was within its right which is further supported by Clause 2

of the BGs which gives its owner, i.e., respondent No. 2 / HSCL an absolute right to take a decision that the contractor has committed some breach(es) of the terms and conditions of the work contract.

vi. The decision of respondent No.2 / HSCL shall be final and binding upon the contractor (appellant/plaintiff) as well as the bank (respondent No.1). Thus, the claims and disputes as raised by the appellant / plaintiff with regard to the work contract cannot be the subject matter of the suit.

vii. As per Clause 4 of the BGs, respondent No.2 / HSCL can extend the time of performance of the contract or postpone it many times and as per Clause 6 of the BGs, the same can be extended by the appellant / plaintiff which has been done by the appellant / plaintiff at its peril from time to time.

55. Having noted the grounds on which the Trial Court has dismissed the suit filed by the appellant / plaintiff. The submission of Dr. George is that the invocation of the BGs was not in terms of the BGs itself. That apart, he has stated that the contract between the appellant / plaintiff and the respondent No.2 / HSCL was back-to-back to the contract between the respondent No.2 / HSCL and the NTPC with identical contractual terms and conditions as applicable to both the parties.

56. The contract between respondent No.2 / HSCL and NTPC was terminated by NTPC on September 01, 2007, and resultantly, the present contracts between respondent No.2/HSCL and the appellant/plaintiff were terminated by respondent No.2 / HSCL on September 05, 2007.

57. Concedingly, the terms of the BGs include that the owner shall have no claim after 90 days from the date of expiry of the defect liability period as provided in the contract or no claim after 90 days from the date of the cancellation of the said contract, as the case may be. However, the invocation of the BGs in the present case was done on May 21, 2009, i.e., much after the period of 90 days expiry period.

58. The stand of respondent No.2 / HSCL as contended by Mr. Sinha is that the appellant / plaintiff had extended the validity of the BGs from time to time and the last extension being valid till May 28, 2009, the HSCL was justified is invoking the BGs. The said plea is not appealing for the reason that it is one thing to say that the contract is terminated and other thing to say that the validity of the BGs has been extended. The intent of the terms of the BGs is that it needs to be invoked within 90 days of the cancellation of the contract which admittedly has not been done. Even the plea that the BGs could have been invoked within 90 days of the defect liability period and the work having not been completed with a new contractor appointed by the NTPC, the BGs could be invoked after that period is not appealing for more than one reason, (i) as stated by Dr. George, the contract has been terminated, there is no concept of defect liability period, and (ii) the contract does not contemplate expiry of the defect liability period after the final execution of the work by a third contractor appointed by NTPC. It is only when, the defect liability period had expired after the completion of the work, as assigned to the appellant / plaintiff by HSCL. Moreover, the parties herein have nothing to do either with the completion of work or with the

completion of the defect liability period. They are not involved in completion of the work as the contract was terminated.

59. It is also a settled proposition of law that the invocation of the BG will have to be in accordance with the terms of the BG, or else, the invocation itself would be bad as observed in the case of ***Standard Chartered Bank (supra)***. The relevant paragraphs of the said Judgment are reproduced as under:

> *"20. A bank guarantee constitutes an independent contract. In* ***Hindustan Construction Co. Ltd. Vs. State of Bihar and Others*** *(supra), a two Judge Bench of this Court formulated the condition upon which the invocation of the bank guarantee depends in the following terms:-*
>
> > *"**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."*
>
> *21. The same principle was followed in* ***State Bank of India and Another Vs. Mula Sahakari Sakhar Karkhana Ltd.,*** *2006 (6) SCC 293, wherein a two-Judge Bench held thus:-*
>
> > *"**33.** It is beyond any cavil that a bank guarantee must be construed on its own terms. It is considered to be a separate transaction.*

> ***34.*** *If a construction, as was suggested by Mr Naphade, is to be accepted, it would also be open to a banker to put forward a case that absolute and unequivocal bank guarantee should be read as a conditional one having regard to circumstances attending thereto. It is, to our mind, impermissible in law."*

*22. Taking note of the exposition of law on the subject in* ***Himadri Chemicals Industries Limited Vs. Coal Tar Refining Co.****, 2007 (8) SCC 110, a two-Judge Bench of this Court in* ***Gujarat Maritime Board Vs. Larsen & Toubro Infrastructure Development Projects Limited and Another****, 2016 (10) SCC 46, has laid down the principles for grant or refusal for invocation of bank guarantee or a letter of credit. The relevant paragraph is as under:-*

> *"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 realization of a bank guarantee or a letter of credit.*

*(iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.*

*(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.*

*(vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned."*

*xxxxx xxxxx xxxxx*

*26. In our considered view, once the demand was made in due compliance of bank guarantees, it was not open for the appellant Bank to determine as to whether the invocation of the bank guarantee was justified so long as the invocation was in terms of the bank guarantee. The demand once made would oblige the bank to pay under the terms of the bank guarantee and it is not the case of the appellant Bank that its defence falls in any of the exception to the rule of case of fraud, irretrievable injustice and special equities. In absence thereof, it is not even open for the Court to interfere with the invocation and encashment of the bank guarantee so long as the invocation was in terms of the bank guarantee and this what has been observed by the Division Bench of the High Court in the impugned judgment and that reflected the correct legal position."*

60. As per the findings of the Trial Court in the impugned Judgment / order dated February 17, 2020, the extension of the BGs time to time by the appellant / plaintiff proves novation of the existing

contract. This finding of the Trial Court was in the context that the validity period of BGs having been extended, despite the contract being terminated hence, the contract of BGs would stand novated. This finding is overlooking the fact even the terms of the renewed BGs vide letters dated May 28, 2008, and November 26, 2008, clearly state that: *"Other terms and conditions specified in the original bank guarantee will remain unchanged"*. The relevant part of the extension letters in this regard is reproduced as under:-

> *"At the request of the party and on demand by your goodself, we hereby extend the validity of the captioned guarantee upto 30.11.2008. The amount of the Bank Guarantee is Rs.58,00,000.00 (Rs. Fifty eight lacs only). Other terms and conditions specified in the original bank guarantee will remain unchanged."*
>
> *"At the request of the party and on demand by your goodself, we hereby extend the validity of the captioned guarantee upto 30.11.2008. The amount of the Bank Guarantee is Rs.47,00,000.00 (Rs. Forty seven lacs only). Other terms and conditions specified in the original bank guarantee will remain unchanged."*

61. It means, the terms of the BGs that the invocation of the BGs shall be within 90 days from the date of expiry of the defect liability period or from the date of cancellation of the contract remained as it is. Admittedly, the notice of demand or claim as per the BGs was not served on the bank (respondent No.1) within 90 days from the date of cancellation of the contract, i.e., September 05, 2007. Hence, the plea of Mr. Sinha that the BGs terms as contained in the extension letters make it fairly explicit that both demand / claim and validity period were same, is

without any merit. Though the validity of the BGs was extended till May 28, 2009, still the demand / claim / invocation of BGs had to be made on or before the expiry of 90 days period from the date of cancellation of the contract, i.e., September 05, 2007 or from the date of expiry of the defect liability period.

62. This conclusion of mine clearly demonstrates that the invocation of the BGs is contrary to the Clauses / terms of the BGs. Dr. George is justified in relying upon the Judgment in the case of ***EMCO Limited (supra)*** wherein this Court has held as under:

> *"20. Learned Counsel appearing on behalf of the defendants has contended that in the general conditions of contract appended to the agreement between the HCCL and the State of Bihar, the word "employer" has been defined to mean the Governor of Bihar acting through the Chief Engineer or his authorised representatives. The word "Engineer Incharge" or "Engineer" has been defined separately to mean Superintending Engineer or the Engineer appointed from time to time by the "employer" and notified in writing to the contractor to act as Engineer, It is contended that Executive Engineer who has invoked the guarantee would be covered not only by the definition of "employer" but also by the definition of "Engineer Incharge" or "Engineer" as set out in the general conditions of contract. We are not prepared to accept this contention.*
>
> *21. As pointed out above, Bank Guarantee constitutes a separate, distinct and independent contract. This contract is between the Bank and the defendants. It is independent of the main contract between the HCCL and the defendants. Since the Bank Guarantee was furnished to the Chief Engineer and there is no definition of "Chief Engineer" in the Bank Guarantee nor is it provided therein that "Chief Engineer" would also include Executive Engineer, the Bank Guarantee could be invoked by none except the Chief Engineer. The invocation was thus wholly*

*wrong and the Bank was under no obligation to pay the amount covered by the "Performance Guarantee" to the Executive Engineer." (underlining added)*

*22. (i). When we look at the language of the subject bank guarantee, it is clear that the bank guarantee could only have been paid when the demand states that the sum or sums have become due to the defendant no. 2 on account of the plaintiff's/seller's failure to fulfill its obligations under the contract.*
*(ii). A reference to the language of the letters Ex.P-3 and Ex.P-4 shows that there is no language contained in these documents that there is any failure of the plaintiff/supplier in fulfilling the obligations under the contract. The demand therefore made vide Ex.P-3 and Ex.P-4, does not contain the requisite language as required by the terms of the bank guarantee. In view of the judgments stated above which require that the demand must be strictly made in accordance with the bank guarantee, I have no option but to hold that the plaintiff would be entitled to injunction against the defendant no. 2 and 3 from claiming and making payment under the subject bank guarantee dated 24.4.1998 for Rs. 25,50,000/-. No doubt, the law in this regard is technical but in view of the judgments of this Court and also of the Supreme Court, the plaintiff will be entitled to necessary injunction."* *(emphasis supplied)*

63. Similarly, in the case of ***Satluj Jal Vidyut Nigam Limited (supra)*** this Court on a similar proposition has held as under:

*"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 unconscienable and would lack in bona fides. The sum and substance of the argument 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 against encashment of bank guarantees in question."*

*(emphasis supplied)*

64. Even the Supreme Court in the case of ***U.P. State Sugar Corporation (supra)*** way back in 1996 has held as under:

> *"11. The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The Courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The Courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned.*
>
> *xxx xxx xxx*
>
> *15. Clearly, therefore, the existence of any dispute between the parties to the contract is not a ground for issuing an injunction to restrain the enforcement of batik guarantees. There must be a fraud in connection with the bank guarantee. In the present case we fail to see any such fraud. The High Court seems to have come to the conclusion that the termination of the contract by the Appellant and his claim that the time was of the essence of the contract, are not based on the terms of the contract and therefore, there is a fraud in the invocation of the bank guarantee. This is an erroneous view. The disputes between the parties relating to the termination of the contract cannot make invocation of the bank guarantees fraudulent. The High Court has also referred to the conduct of the Appellant in invoking the bank guarantees on an earlier occasion on 12th of April, 1992*

*and subsequently withdrawing such invocation. The Court has used this circumstance in aid of its view that the time was not of the essence of the contract. We fail to see how an earlier invocation of the bank guarantee and subsequent withdrawal of this invocation make the bunk guarantees or their invocation tainted with fraud in any manner. Under the terms of the contract it is stipulated that the Respondent is required to give unconditional bank guarantees against advance payments as also a similar bank guarantee for due delivery of the contracted plant within the stipulated period. In the absence of any fraud the Appellant is entitled to realise the bank guarantees."*

65. That apart, Dr. George is justified in relying upon the Judgment in the case of ***National Highways Authority of India (supra)*** wherein it is stated that in a construction contract, the defect liability period by its very nature begins after the work is completed. However, in the present case, the work having been terminated, there is no question of the expiry of the defect liability period for invocation of the BGs.

66. Similarly, in the case of ***Harvinder Singh & Co. (supra)***, this Court has inter-alia held that when a construction contract is terminated much prior to the completion of the work, the defect liability period would not have begun to run.

67. Furthermore, Dr. George has also highlighted the following facts:

i. The stand of the respondent No.2 / HSCL is contrary to its unequivocal position as taken by them in judicial proceedings before this Court when it sought to secure an injunction against encashment of BGs tendered by them to NTPC.

ii. The appellant / plaintiff has filed a suit for recovery of ₹1685.43 lakhs before the Calcutta High Court and the same is pending adjudication.

iii. It is not the case of the respondent No.2 / HSCL that it has made a counter-claim in those proceedings initiated by the appellant / plaintiff herein. Hence, no amount is due / payable by the appellant / plaintiff under the contract, which stands terminated.

68. Mr. Sinha has relied upon the Judgment in the case of ***M.O.H. Uduman and Ors. (supra)*** to contend that the Supreme Court has held that a contract must be read as a whole and a harmonious construction of all the clauses must be adopted. There is no dispute on the said proposition of law. In fact, by making the position of law applicable to the facts of this case, the only conclusion that can be arrived at is the one which this Court has arrived at in the above paragraphs, inasmuch as even though the validity of the BGs has been extended till February 28, 2009, there is no change / variation with regard to the period within which the BGs could be invoked, i.e., on or before the expiry of 90 days period from the date of cancellation of the contract, i.e., September 05, 2007. Similarly, the Judgement in the case of ***Hindustan Steel Works Construction Ltd. (supra)*** relied upon by Mr. Sinha to contend that the underlying disputes between the parties to the main contract are irrelevant to the commitments made by the bank to pay the BG amount on demand by the beneficiary cannot be disputed but the fact remains that the BGs clearly stipulate the commitment made by the bank that the BGs can be invoked within / before the 90 days of expiry period after the

cancellation of the contract which admittedly has not been done in the present case.

69. Reliance has also been placed by Mr. Sinha on the judgment of ***Standard Chartered Bank (supra)*** to contend that the Court ordinarily should not interfere with the invocation or encashment of the BGs so long as the invocation is in terms of the BGs. Though there is no dispute on the proposition of law, the fact remains that the Trial Court has failed to see the facts in the present case in proper perspective and has only decided the case in terms of the provisions of the BGs and by only relying upon the terms of the BGs that it can be invoked within / before 90 days from the date of expiry of defect liability period and the defect liability period would arise only after the completion of work by the appellant / plaintiff whereas in the instant case, the work has not been performed by the appellant / plaintiff.

70. That apart, in the present appeal the case of special equities has been clearly established, inasmuch as the respondent No.2 / HSCL has also sought to secure an injunction against the encashment of BGs tendered by it to the NTPC on the same grounds which are sought to be opposed by it in these proceedings. The appellant / plaintiff has filed a suit for recovery of ₹1685.43 Lakhs before the Calcutta High Court on the basis of the minutes of meeting dated October 8, 2015 and no counter claim has been made by the respondent No.2 / HSCL in those proceedings which means that no amount is being claimed by the respondent No.2 / HSCL from the appellant / plaintiff for it to justify the invocation of the BGs. In this regard, a reference is made to the Judgment of this Court in the case of ***Technimont Private Limited and Ors.***

***(supra)***, more specifically paragraphs 72 and 73, which are reproduced as under:-

> *"72. In the case in hand, the following facts also cumulatively demonstrate special equities in favour of the petitioners:*
>
> *i. The petitioners have an arbitral Award in its favor;*
>
> *ii. The counter-claims have been dismissed;*
>
> *iii. The respondent did not secure any order with regard to extension of the bank guarantees;*
>
> *iv. It is the case of the petitioners that advance bank guarantees were furnished against mobilization advance given by the respondent which have since been recovered by the respondent through running account bills, the said aspect has not been denied by the respondent in Para 27 and 29 of its reply to the petition;*
>
> *v. The bank guarantees given during the contract cannot be said to have been given in perpetuity even for the period, after the adjudication of claims/counter-claims, between the parties;*
>
> *vi. There is no sum due in praesenti or sum payable to the respondent;*
>
> *vii. Even if the respondent succeeds in its challenge to the Award under Section 34, it has to resort to fresh arbitration proceedings with regard to the counter-claims and;*
>
> *viii. That after invocation/encashment of the bank guarantees by the respondent, the petitioners have to resort to the process of arbitration to claim the amount.*
>
> *73. In fact, I also rely on a Coordinate Bench judgment of this Court in Mukti Credits Pvt. Ltd. (supra), wherein the Court has restrained the respondent therein from invoking a bank guarantee, post an arbitral award on the ground that no sum was*

*due to the respondent and the objections of both the parties to arbitral award under Section 34 were pending. The plea of Mr. Dewan on the non-applicability of this judgment is misplaced."*

71. Further, I note, the Trial Court despite concluding that the contracts have been cancelled on September 05, 2007 by respondent No.2 / HSCL, has also held that the contract was not put to an end. It is not known on what basis such a conclusion has been drawn by the Trial Court inasmuch as the cancellation letters dated September 05, 2007, issued by respondent No. 2 / HSCL clearly read as under:

*"No. DGM/Klgn/HEW/07/751* *Date: 5.9.2007*

*To*
*M/s Harji Engineer Works Pvt. Ltd.*
*……*
*……*
*……*

*Sub: Cancellation of balance structural works of Main Plant Civil Works Package Stage – II, Phase-II of Khalgaon STPP.*
*Ref: 1. NTPC LOA NO. CS-4231-322-9-CS-4283 dt. 3.2.2004.*
*2. HSCL's LOA No. GGM (EZ)/122/Co-ordn/04/1135 dt. 31.05.04*

*Dear Sir,*
*In continuation to our letter NO. HSCL/KLGN/Str/07/608 dt. 19.7.07 enclosed find herewith a copy of letter No. Khs:092: AGM(Pro.)/203 dt. 1.9.07 received from A.G.M. (Project), NTPC/KhSTPP regarding withdrawal of balance structural works of Main Plant Civil Works Package with effect from the date of issue of NTPC's above letter, which is self-explanatory.*

*Please note that the letter of cancellation of the above contract is issued to you without prejudice to other rights and*

*contentions of HSCL/NTPC Ltd. in this regard which shall be communicated to you in due course……..”*

*“No. DGM/Klgn/HEW/07/752 Date: 5.9.2007*

*To*
*M/s Harji Engineer Works Pvt. Ltd.*
*……*
*……*
*…….*

*Sub: Cancellation of balance structural work of S.G. Area Civil Works Package Stage – II, Phase-I of Khalgaon STPP.*
*Ref: 1. NTPC LOA NO. CS-4230-323-9-CS-LOA-4230 dt. 31.7.2003.*
*2. HSCL’s LOA No. GGM (EZ)/122/Co-ordn/04/1242 dt. 3.3.04.*

*Dear Sir,*
*In continuation to our letter NO. HSCL/KLGN/Str/07/608 dt. 19.7.07 enclosed please find herewith a copy of letter No. Khs:092:AGM(Pro.)/204 dt. 1.9.07 received from A.G.M. (Project), NTPC/KhSTPP regarding withdrawal of balance structural works of S.G. Area Civil Works Package with effect from the date of issue of NTPC’s above letter, which is self-explanatory.*

*Please note that the letter of cancellation of the above contract is issued to you without prejudice to other rights and contentions of HSCL/NTPC Ltd. in this regard which shall be communicated to you in due course……..”*

72. From the above, it is clear that the letters dated September 05, 2007, are cancellation letters and this aspect is not contested by respondent No.2 / HSCL.

73. In view of my above discussion, the present appeal needs to be allowed and the impugned Judgment / decree dated February 17, 2020, of

the Trial Court, is set aside. The suit filed by the appellant/plaintiff being CS 9829/2016 is decreed. The amount deposited before the Registrar General of this Court vide FDR/TD No.15530310059128 (with accrued interest) in terms of the order dated June 13, 2009 in CS (OS) No.1108/2009 shall be released in favour of the appellant/plaintiff. Decree sheet be drawn accordingly.

**CM No. 23680/2020 (for grant of stay)**

In view of the order passed in the appeal, the present application has become infructuous and is dismissed as such.

**V. KAMESWAR RAO, J**

**JULY 18, 2022***/aky/jg*