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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 5th January, 2021

Pronounced on: 12th January, 2021

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OMP (I) (COMM) 428/2020 & I.A. 12771/2020

SMS LIMITED

..... Petitioner

Through: Mr. Vikram Nankani, Sr. Adv.
with Mr. Naresh Thacker, Mr. Abhileen
Chaturvedi, Mr. Rohit Sharma and Mr.
Dhruv Jain, Advs.

versus

OIL & NATURAL GAS LIMITED

.... Respondent

Through: Mr. Abhimanyu Garg, Adv.

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGMENT

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(Video-Conferencing)

1. By this petition, under Section 9 of the Arbitration & Conciliation Act 1996 (hereinafter referred to as “the 1996 Act”), the petitioner SMS Ltd. prays for pre-arbitral injunction, restraining the respondent ONGC Ltd. from acting in furtherance of a letter dated 15th December, 2020, issued by the latter to the former. The letter reads thus:

**“OIL AND NATURAL GAS CORPORATION LIMITED Onshore
Engineering Services Materials Management Section 2nd Floor,
Tower -B Deendayal Urja Bhavan, 5, Nelson Mandela Road, Delhi-
110070**

Ref No. DLH/OES/MM/ETP-NADA & AF/X11PC11001/2011		Dated: 15.12.2020
From: Office of GGM (MM)- i/c MM, Onshore Engineering Services, DDU Bhawan, Delhi		
TO: M/s. SMS Limited (Formerly M/s. SMS Infrastructure Limited) (Consortium of M/s. SMS Limited, Nagpur, M/s. Zen Marketing & Technologies, Kolkata and M/s. Tolani Projects Pvt. Ltd., Ankleshwar) IT PARK. 20 S.T.P.I GAYATRI NAGAR, PARSODI, NAGPUR- 440022	Kind Attn: Shri Hemant Hathiwala, CEO	
Sub: Amendment No. 11 to the Contract No. DLH/OES/MM/ETP-NADA & AF/X11PC11001/2011 dtd. 27.06.2012 for the Project 'Construction of ETP at Nada, Additional Handling Facilities alongwith laying of associated Pipelines in Area-Nat Ankleshwar Asset (ETP- Nada & AF)'		

Dear Sir(s),

Please refer the Contract No. DLH/OES/MM/ETP-NADA & AF/X11PC11001/2011 dated 27.06.2012 for the Project for "Construction of ETP at Nada, Additional Handling Facilities alongwith laying of associated Pipelines in Area-IV at Ankleshwar Asset (ETP-Nada & AF)". ONGC hereby extends the scheduled completion period of the LSTK contract (Refer clause 6.3 of General conditions of contract for LSTK portion, Annexure-A, Part-A of the contract) from 31.07.2014 to 31.07.2018 with levy of 10 % Liquidated Damages amounting to Rs.12,09,83,122.10 as per the clause no.6.3.2 of General conditions of contract for LSTK portion, Annexure-A Part-A of the contract, plus GST thereon of Rs.2,17, 76,961.97 (as per GST legislation effective from 01.07.2017) totalling to Rs.14,27,60,084.00 as detailed below:

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Delay solely attributable to Consortium as on 18.07.2018	<p>a) 3 Years 5 Months and 12 days in completion of standalone facilities (at Padra, Dabka, Jambusar, North Gandhar, GGS-Nada and ETP-Nada)</p> <p>b) 3 Years 11 Months and 18 days in completion of GRE Pipelines.</p>
Liquidated Damages@ 0.5% per week & part thereof for the delay	10% (maximum)
Liquidated Damages amount	Rs.12,09,83,122.10
GST on Liquidated Damages amount @ 18%	Rs. 2,17,76,961.97
Total Liquidated Damages + GST	Rs. 14,27,60,084.00

Accordingly, ONGC hereby requests you to remit the amount of Rs. 14,27,60,084.00 towards Liquidated damages and GST thereon to ONGC by 22.12.2020.

In case the amount of Rs. 14,27,60,084.00 is not remitted to ONGC by 22.12.2020, then LD and GST shall be recovered by invoking and encashing the Bank Guarantees submitted by you towards Liquidated damages and GST thereon as per provisions of the contract, as detailed below:

Bank Guarantee particulars	<p>(i) Bank Guarantee No. 0713614BG0000139 for Rs.12,09,90,000.00 issued by SBI, Industrial Finance Branch, Nagpur.</p> <p>(ii) Bank Guarantee No. 3761ILG003620 for Rs.2,66,17,800.00 issued by Punjab National Bank, Dharmapeth, Nagpur.</p>
Total amount of bank	Rs.14,76,07,800.00 (i.e.

Guarantees	Rs.12,09,90,000.00 + Rs.2,66, 17,800.00)
GST@ 18% on the total amount of Bank Guarantees	Rs. 2,65,69,404.00
Balance available after deposit of GST to Government authorities which is equivalent to LD to be recovered.	Rs.12,10,38,396.00

All other terms and conditions of the contract shall remain unchanged.

Sd/- 15/12/20
(Sunil Bhatia)
GGM-i/c, MM, OES”

2. For the sake of convenience, the petitioner and the respondent would be referred to, hereinafter in this judgment, as “SMS” and “ONGC” respectively.

Facts

3. On 27th June 2012, a contract, for construction of an effluent treatment plant, was executed between a consortium led by SMS and ONGC, whereunder the consortium was to construct the plant for ONGC.

4. Mr. Vikram Nankani, learned Senior Counsel appearing for SMS, invited my attention to Clauses 2.2.2.1, 2.2.2.2, 3.1, 6.3.2 and 6.3.2.2 of the contract which may, therefore be reproduced thus:

“2.2.2.1 Access to Work Site

The Company’s Representative upon receipt of request from the Contractor intimating commencement of Erection/construction work at site shall give to the Contractor access to as much of the Site as may be necessary to enable

the Contractor to commence and proceed with the construction/erection of the Works in accordance with the program of Work in terms of Clause 2.3.4. Any reasonable proposal of the Contractor for access to Site to proceed with the construction/erection of work in accordance with the program of work in terms of Clause 2.3.4 will be considered for approval and shall not be unreasonably withheld by the Company. Such requests must be made to the Company's Representative in writing at least 7 days prior to start of the Work.

2.2.2.2 If the Company fails to give access to Site in accordance with the terms of this Section, resulting in delay or expenses for the Contractor, the Contractor shall subject to provision of Clause 5.19 be entitled to appropriate extension of time for completion of the Works.

3.1 Contract Price

The Company shall pay to the Leader of Consortium (as the contractor is consortium) (as per MOU between the parties) and as per the price break up given in the price bid, in consideration of satisfactory completion of all the works covered by the scope of under the contract price of

₹144,00,00,000.00 (Rupees One forty four crores only) [(LSTK-₹ 120,98,31,220.63 (Rupees One Hundred Twenty Crores Ninety Eight Lakhs Thirty One Thousand Two Hundred Twenty And Paise Sixty Three Only) and O&M ₹ 23,01,68,779.37 (Rupees Twenty Three Crores One Lakh Sixty Eight Thousand Seven Hundred Seventy Nine And Paise Thirty Seven Only)] as per the details and break-up of prices given in schedule of prices. The Contract price is a firm price and the Contractor shall be bound to keep the same firm and without escalation on any ground whatsoever until completion of entire works against this Contract. Unless otherwise specified in the Contract, cost of execution of Works on turnkey basis and test etc. as specified in Contract and all expenses, duties, taxes, fees charges in relation to or in connection therewith including insurance risk of weather, Constructional Plant and Equipment breakdown and Site conditions etc. as per provisions of the Contract, shall be deemed to be included in the Contract Price. Payment shall be made in the currency or currencies given in the schedule of prices for the work executed as per the procedure set forth in

Clause 3.2. Adjustment to Contract Price, if any, shall be made in accordance with provisions of Contract.

6.3.2 Liquidated Damages

Time is the essence of the contract. If the Contractor fails to complete the entire work by the schedule completion date, ONGC may without prejudice to any other right or remedy available to it as under the Contract/Law:

i) Recover from the Contractor as ascertained and agreed Liquidated Damages and not by way of penalty, sum equivalent to ½% percent of the Total Contract Price for each week of delay occurred or part thereof beyond the scheduled completion date subject to a maximum of 10% of the Total Contract Price even though ONGC may except delay in Completion of work after the expiry of the Scheduled completion date. However, if contractor has completed certain part of the work within the scheduled completion date and the said apart is ready for use and is accepted by ONGC pursuant to clause No 6.3.1, then in that event, Liquidated Damages shall be leviable only on the Contract Price for the balance work remaining incomplete as on the scheduled date of completion.

AND/OR

ii) Terminate the Contract or a portion or part of the Work thereof. ONGC shall give 14 days notice to the contractor of its intention to terminate the Contract and shall so terminate the contract unless during the 14 days notice period, the Contractor initiates remedial action acceptable to ONGC.

In case the Contractor is unable to complete the work by the schedule completion date, it may request ONGC before expiry of the scheduled completion date, to allow further time for performance of the contract, indicating its willingness to pay the LD amount as agreed at(i) above. ONGC may at its

discretion allow further time as requested by the Contractor with or without levy of LD.

The parties agree that the amount of LD provided herein is a genuine pre-estimate of the loss/damage which will be suffered on account of delay on the part of the Contractor and the said amount shall be payable on demand without there being any proof of the actual loss or damage caused by such delay/breach.

6.3.2.2 Bank guarantee toward Liquidated Damages.

In case of delay in completion of the Project, if the Contractor so desires, then ONGC may accept a Bank Guarantee from the Contractor towards the maximum amount of LD applicable as per Clause No 6.3.2 & 6.3.2.1. The unconditional and irrevocable Bank Guarantee shall be drawn in favour of the ONGC from a Scheduled Bank as per the Performa given at Appendix B-17. The Bank Guarantee shall be initially valid from the date of submission upto a period of one year beyond the revised completion date and shall be kept valid till the final settlement is arrived either mutually or through Conciliation/Arbitration/Court. Upon submission of the Bank Guarantee and its acceptance by ONGC, the amount withheld on account of Liquidated Damages as per Clause No 6.3.2.1, shall be released to the Contractor. In case such Bank Guarantee has been issued by a foreign bank (the same should be issued from any of the banks indicated at Appendix A- 8 of Vol Part III of this bid document) the same shall be accepted only with collateral security/guarantee/ confirmation from any scheduled Indian Bank.

After final settlement of the issue regarding levy of LD as per the provisions of the contract, the application LD shall be remitted by the Contractor to ONGC, failing which the amount of LD shall be recovered by invoking the Bank Guarantee.

Note: For the purpose of LD only, the “total contract Price” in the clause 6.3.2.1 shall mean LSTK contract price (without O & M) including insurance and taxes { which is = A= Total (P.1+ P.2+B+C) amount as per Price Proforma (Annexure C)}.”

(Emphasis in original)

Mr. Nankani points out that Clause 6.3.2.2 entitled ONGC to accept the bank guarantee from SMS, towards the maximum liquidated damages (LD) applicable as per Clauses 6.3.2 and 6.3.2.1. Clause 6.3.2(i) entitled ONGC to charge LD upto a maximum of 10% of the total contract price. The note below Clause 6.3.2.2 clarified that, for the purpose of LD, the total contract price would be the LSTK contract price, without O & M.

5. Clause 3.1 stipulated the LSTK contract price to be ₹ 120,98,31,220.63. As such, Mr. Nankani submits that the bank guarantee, which could be sought from SMS under Clause 6.3.2.2 could not be for an amount in excess of ₹ 12.09 crores.

6. The scheduled completion date of the contract was 31st July, 2014. SMS alleges that ONGC failed to provide encumbered right of use and right of way to the work site to SMS and further, that there were various other disturbances on the site, which hindered SMS in performing its obligations under the contract. This, alleges SMS, contravened Clause 2.2.2.1 of the contract. Further, Mr. Nankani submits that there was delay in granting requisite approvals by ONGC, which amounted to non-compliance with the obligation of ONGC under Clause 5.1.8 of the contract, which read thus;

“5.1.8 Review Procedure

The following procedures will be utilized in Company's review:

- a) Contractor will forward copies of all

preliminary drawings and specifications in accordance with the correspondence schedule and procedure. Distribution of all documents etc. is the responsibility of the Contractor.

b) In the event that Contractor does not receive Company's comments on items within 10 working days [(excluding intervening Saturday(s) and Sunday(s)] from the date of receipt by the Company/Company's Consultant then it may be assumed that there are no comments and the items may be issued for construction.

c) Where marked up drawings or comments on drawings and specifications are returned, Contractor shall make the corrections and obtain Company's approval before issuing the same for construction, transmitting copies in accordance with the correspondence procedure.

d) Should any item shown on plans issued for construction be changed due to any reason whatsoever after the plans have been approved, new or corrected plans shall be made and new prints furnished for review and approval of Company. The above will also apply to site changes during fabrication and Erection."

7. On 2nd July, 2014, SMS wrote to ONGC, stating that owing to (i) slow rate of design and engineering progress, (ii) delay in handing over of encumbered free land of the requisite size and (iii) unprecedented rains, it would not be possible to complete the contract work by the stipulated date of completion, which was 31st July, 2014. Even so, SMS assured ONGC that work was continuing at full pace, and that 75% of the Design & Engineering works already stood completed. The remaining work, it was submitted, would require nine additional months' time to complete the project and that commissioning of the complete project was expected on 30th April,

2015. As such, the letter requested ONGC to grant extension of time, till 30th April, 2015, to complete the project.

8. On 8th July, 2014, the following communication was addressed by SMS to ONGC:

“Ref. No.: SMS/ONGC/20014-15/236

Date: 08/07/14

To,

Incharge MM-OES
M/s Oil & Natural Gas Corporation
Ltd., 10th Floor, Core-3, Scope Minar,
South Tower, Laxmi Nagar. Delhi-
110092

Sub.:- Request to Approve Bank Guarantee against LD Amount.

Ref.:- DLH/OES/MM/ETP-NADA & AF/XIIPCII001/2011
for Construction of ETP at Nada, Additional Handling
facilities along with lying of associated pipelines in
Area-IV at Ankleshwar Asset (ETP - NADA & AF)

R/Sir,

This is with reference to the above referred contract executed by us with Project completion Date of 31st July 2014. The Project is delayed in completion and we expect to get the project Completed by April 2014.

As per paragraph 11.0 of NOA and clause 2.2.1 of GCC the effective date of contract coming into force and the commencement of works is 01.05.2012. As per paragraph 5.0 of NOA and clause 6.3.1 of GCC the Schedule Project Completion for the LSTK portion is 31.07.2014 (27 months from issue of NOA). However, looking to the prevailing circumstances the completion of the work is expected to get completed by April 2015 and we have submitted the Time Extension Request and Reschedule vide Letter No.SMS/ONGC/2014-15/235 Dated 2 July 2014.

As per clause 6.3.2 “Liquidated Damages”, the extension of time may be granted with liquidated damage. In such case, as per clause 6.3.2.2 “Bank Guarantee towards Liquidated Damages”, the ONGC may accept the Unconditional Irrevocable Bank Guarantee from the contractor towards the maximum amount of LD applicable as per clause 6.3.2 & 6.3.2.1.

We propose to submit a Bank Guarantee of the amount equivalent to the applicable LD up to the period of proposed completion date. We request you to kindly accept the proposal and not to deduct the LD amount which will affect the cash flows of the project.

Thanking you,

Your's faithfully,
For SMS Infrastructure Ltd.,

Sd/-
B.P.Barbate”

9. As ONGC required corrections in the Bank Guarantee furnished by SMS towards the liquidated damages chargeable under the contract, SMS collected the original Bank Guarantee, from the bank, and replaced the Bank Guarantee after incorporating the changes suggested by the ONGC. This fact was intimated by SMS to ONGC *vide* letter dated 17th September, 2014.

10. On 22nd January, 2018, a meeting took place between ONGC and the consortium, in which SMS was represented by its Chief Executive Officer (CEO). The salient features of the discussions which took place during the said meeting, and the decision arrived at, as a result thereof, may be enumerated thus:

(i) The first item which was discussed was the status of the project. The project group of ONGC informed that the plant was “under 720 hours operation which (was) scheduled to be completed by 11.02.2018” and that all other facilities envisaged in the project had been commissioned. The project group further informed that, out of 67.6 km, 58.80 kms of the GRE pipeline had been laid, and that laying of the remaining 8.80 km of pipelines could not be completed due to non-availability of RoU and agitation by farmers.

(ii) The next aspect which was discussed was regarding short closing of the contract. ONGC informed that the issue of long delays in acquisition of RoU for the pipeline was discussed during project review in the 27th Project Review Committee (PRC) meeting, on 26th December, 2017. As, owing to non-availability of RoU, seven extensions had already been granted in the past, ONGC informed the PRC that no further extension was being considered, and that the project was required to be short closed after 31st January, 2018.

(iii) In view of the uncertainty in the time taken in obtaining the RoU, it was decided that the remaining length of the pipeline would be completed through other contractors as and when RoU became available.

11. After the aforesaid decision to short close the contract, ONGC, *vide* letter dated 31st January, 2018, granted further time to complete the remaining work till 31st July, 2018, reserving its right to levy

liquidated damages for the delay on the part of SMS in completing the works. The said letter reads thus:

“OIL AND NATURAL GAS CORPORATION LIMITED
Onshore Engineering Services Materials Management
Section 2nd Floor, Tower -B Deendayal Urja Bhavan, 5, Nelson
Mandela Road, Delhi-110070 Tel: +91-11-26752377, Fax:91-11-
26129091

No. DLH/OES/MM/ETP-NADA & AF/X11PC11001/2011		Dated: 31.1.2018
From: Office of GM (MM) - Incharge MM, Onshore Engineering Services, ONGC, Delhi		
TO:	Fax No.: 0712-6665100	
M/s. SMS Infrastructure Ltd. Email: balkrishna.barhate@ (Consortium of M/s SMS smsl.co.in Infrastructure Ltd. , Nagpur,	Nagpur,	
M/s. Zen Marketing & Technologies, Kolkata and M/s. Tolani Projects Pvt. Ltd., Ankleshwar) 267, Ganesh Phadnavis Bhavan, Nr. Traingular Park, Dharampeth, Nagpur- 440010, Maharashtra	Kind Attention: Mr. B.P. Barhate, VP	

Sub: 8th Provisional time extension on Contractual
Completion Period for "Construction of ETP at NADA,
Additional Handling Facilities along with laying of associated
Pipelines in Area-IV at Ankleshwar Asset (ETP-NADA &
AF) against Contract No. DLH/OES/MM/ETP-NADA &
AF/X11PC11001/2011 dated 27/06/2012

Ref: 1. Amendment No. VIII vide letter No.
DLH/OES/MM/ETP-NADA & AF/X11PC11001/2011 dated
29.11.2017

2. Your letter No. SMS/ONGC/2017-18/627 dtd. 30.01.2018

Amendment No. IX

Dear Sir(s),

1. You failed to complete the entire works within the extended contract completion period of 30.11.2017. In your letter under reference, you have asked for further extension of time for completion of the works. In view of the circumstances stated in your above referred letter, the time for completion of the works (LSTK portion) is extended from 31.01.2018 to 31.07.2018, reserving ONGC's right to levy liquidated damages from you for delay in the completion of works after the expiry of the works completion period as mentioned in clause 6.3 of GCC for the extended period, notwithstanding the grant of this extension.

2. The above extension of time for completion of works shall also be subject to the right of ONGC to claim a reduction in prices on account of reduction in statutory duties/taxes etc. which may take place during the extended period of works completion i.e. beyond original scheduled completion for works (31.07.2014). However, increase in prices during extended completion period on account of increase in statutory duties/taxes etc. admissible under Change in law clause of this contract shall be granted, only if extension is due to delay on the part of ONGC.

3. Please note that in accordance with the provisions under GST legislation implemented w.e.f. 01.07.2017, GST shall also be payable on the amount of transaction pertaining to recovery of LD, which shall be to the account of contractor.

Sd/-31/1/18
(Sunil Bhatia)
GM(MM)-1/c MM”

12. On 18th July, 2018, a joint statement was prepared, which concluded with the comment that “the delays for the period of 3 Years

5 Months and 12 days in completion of standalone facilities (at Padra, Dabka, Jambusar, North Gandhar, GGS-Nada and ETP-Nada) and delays for period of 3 years 11 Months and 18 days in completion of GRE Pipelines (were) *solely* attributable to the consortium”. This joint statement was signed by the CEO of SMS, on behalf of the consortium, after recording the reservations of SMS to the delay analysis prepared by ONGC. The caveat further stated that SMS was reiterating the contents of its earlier communications to ONGC, in which it had alleged that ONGC was responsible for the delays.

13. Under the cover of an email dated 21st September, 2018, SMS forwarded, to ONGC, its reply to the delay analysis statement prepared by ONGC, along with its own delay analysis statement dated 18th July, 2018, in which ONGC was alleged to be responsible for the delay in completion of the project.

14. On 4th April, 2019, the joint delay statement prepared by ONGC, containing at the foot thereof, the signature of CEO of SMS, with the caveat as already stated hereinabove, was emailed by SMS to ONGC under protest.

15. As a result, there were clear disputes and differences of opinion, between SMS and ONGC, with respect to the responsibility for the delay in completion of the project.

16. On 16th March, 2020, ONGC wrote to SMS, informing SMS that Goods and Service Tax (GST) was payable on liquidated damages

and that, as per revised guidelines of ONGC on this issue, SMS was required to submit a bank guarantee covering 1.22 times the applicable LD. As such, the bank guarantee of ₹ 12,09,90,000/-, furnished by SMS, was required to be revised ₹to 14,75,99,408/- . SMS was, therefore, requested to submit the revised bank guarantee, or additional bank guarantee for the differential amount.

17. SMS responded, on 17th March, 2020, complaining that the demand, of ONGC, for additional bank guarantee to cover GST on the LSTK contract price would have cascading tax effect and that, therefore, the request was not justified.

18. ONGC wrote back, on 17th March, 2020, clarifying that, as GST on LD was leviable at source and credit of the GST could be availed by SMS, the apprehension, of SMS, regarding cascading tax effect, was misguided. The request, to SMS, to furnish additional bank guarantee, was reiterated.

19. On 17th March, 2020, SMS addressed two e-mails to ONGC, raising further objections to the request of ONGC, to SMS, to furnish additional bank guarantee, resulting in ONGC again writing to SMS on 17th March, 2020, reiterating its request for additional bank guarantee, failing which it was stated the differential amount would have to be withheld from future invoices of SMS.

20. SMS responded, on 21st July, 2020, stating that it was increasing the value of the bank guarantee at the request of ONGC,

only to maintain “commercial terms”. However, in view of the difficulties that had arisen owing to the intervention of COVID pandemic, SMS submitted that renewal of the bank guarantee would take more than 15 days.

21. Further communications were addressed, by SMS to ONGC, expressing difficulty in furnishing the additional bank guarantee, on account of imposition of nationwide lockdown by the Government, in the wake of the COVID pandemic.

22. After the lockdown had been lifted, SMS wrote to ONGC on 18th May, 2020, stating that the enhanced bank guarantee would be submitted by 15th June, 2020. This was followed by a communication dated 29th July, 2020, stating that, as furnishing of fresh bank guarantee for a revised amount was proving to be difficult, SMS was arranging for an additional bank guarantee “against LD of ₹ 2,66,09,408.91”.

23. On 5th August, 2020, ONGC responded, informing SMS that the additional bank guarantee required to be submitted by SMS, had to be for ₹ 2,66,17,800/- .

24. SMS forwarded, *vide* courier dated 28th August, 2020, an additional bank guarantee for the said amount.

25. In view thereof, *vide* subsequent communication dated 28th August, 2020, SMS requested ONGC to release the payment of its 56th Running Account (RA) bill.

26. In this fashion, a second bank guarantee, for ₹2,66,17,800/- was furnished by SMS to ONGC.

27. The necessity of setting out, communication by communication, the correspondence between SMS and ONGC, leading upto the submission, by SMS, of the second Bank Guarantee of ₹ 2,66,17,800/- was necessitated on account of the submission, of Mr. Nankani, on behalf of SMS, that the said second Bank Guarantee was completely unjustified and contrary to the terms of the contract between SMS and ONGC.

28. Mr. Sandeep Sethi, learned Senior counsel for the ONGC, by referring to the aforesaid trail of communications, sought to demonstrate that these allegations were incorrect and that, in fact, though SMS had expressed certain reservations regarding the legitimacy of the request of ONGC for an additional bank guarantee, the additional Bank Guarantee, was finally, voluntarily furnished by SMS, as the contract required SMS to furnish an additional bank guarantee towards GST.

29. On 14th December, 2020, ONGC wrote to SMS, requiring SMS to extend the validity of the first Bank Guarantee for ₹ 12,09,90,000/-, furnished by it, up to 28th February, 2021. This, submits Mr. Nankani,

has been done and the first Bank Guarantee is, therefore, now valid up to 28th February, 2021, as required by ONGC.

30. It is in these circumstances that, on 15th December, 2020, ONGC addressed the impugned communication to SMS, essentially calling on SMS to remit ₹ 14,27,60,084/- towards liquidated damages and GST thereon, to ONGC, by 22nd December, 2020, failing which ONGC threatened to recover the liquidated damages and GST by encashing the Bank Guarantees submitted by SMS.

31. SMS, in these circumstances, has approached this Court, by means of the present petition under Section 9 of the 1996 Act, seeking pre-arbitral interim relief against ONGC, restraining ONGC from acting in furtherance of the impugned letter dated 15th December, 2020.

32. The arbitration clause, in the contract between SMS and ONGC (to the extent it is relevant), reads thus:

“1.3 Laws/Arbitration

1.3.1. Applicable laws

All questions, disputes or differences arising under, out of or in connection with this Contract shall be settled in accordance with laws of India (both procedural and substantive) from time to time in force and to the exclusive jurisdiction of the Courts in Delhi in India, subject to the provisions of clause 1.3.2

1.3.2 Arbitration

Arbitration (Applicable in case of supply orders/Contracts with firms, other than Public Sector Enterprises) (Not

applicable in cases valuing less than Rs 5 lakhs)

Except as otherwise provided elsewhere in the contract, if any dispute, difference, question or disagreement arises between the parties hereto or their respective representatives or assignees, in connection with construction, meaning, operation, effect interpretation of the contract or breach thereof which parties are unable to settle mutually, the same shall be referred to Arbitration as provided hereunder.

1. A party wishing to commence arbitration proceeding shall invoke Arbitration Clause by giving 60 days notice to the other party. The notice invoking arbitration shall specific all the points of disputes with details of the amount claimed to be referred to arbitration at the time of invocation of arbitration and not thereafter. If the claim is in foreign currency, the claimant shall indicate its value in Indian Rupee for the purpose of constitution of the arbitral tribunal.

12. The Arbitration shall be held at the place from where the contract has been awarded. However, parties to the contract can agree for a different place for the convenience of all concerned.

14. Subject to the aforesaid conditions, provisions of the Arbitration and Conciliation Act, 1996 and any statutory modifications or re-enactment thereof shall apply to the arbitration proceedings under this clause.”

33. Having addressed the impugned communication to SMS on 15th December, 2020, granting SMS time till 22nd December, 2020, to pay the demanded amount of ₹ 14,76,07,800/- ONGC wrote, to the State Bank of India (SBI) on 21st December, 2020, calling on SBI to honour the aforesaid Bank Guarantee furnished by SMS and credit the amounts covered thereby into the account of ONGC.

34. The present petition came up for hearing before this Court on 22nd December, 2020, on which date SMS vociferously objected to the very propriety of the aforesaid communication dated 21st December, 2020, from ONGC to SBI, even before the “deadline” of 22nd December, 2020.

35. Taking a view that the issuance of the communication dated 21st December, 2020 to SBI, by ONGC, even while ONGC had earlier granted time to SMS till 22nd December, 2020, was *ex facie* unfair and could also be treated as an attempt to overreach the court, I had restrained ONGC from acting on the basis of the said letter and had also directed ONGC to immediately write to SBI withdrawing the said instructions.

36. Happily, ONGC has complied with the said directions, and has, apparently, written to SBI withdrawing the earlier communication dated 21st December, 2020.

37. That, however, puts the clock back to the stage when the impugned letter dated 15th December, 2020 was issued.

Rival Contentions

38. I have heard, at length, Mr. Vikram Nankani, learned Senior Counsel for the petitioner and Mr. Sandeep Sethi, learned Senior Counsel for the respondent.

39. Before advertizing to the contentions advanced by learned Senior Counsel, it would be appropriate to set out the opening paras 1 and 2 of the Bank Guarantees dated 21st August, 2014 and 21st August, 2020, thus:

Bank guarantee dated 21st August, 2014

“1. In consideration of Oil and Natural Gas Corporation Ltd. incorporated under the Companies Act 1956 having its registered office at JeevanBharati, Tower-II, 124 Indira Chowk, New Delhi - 110 001, India its Onshore Engineering Service Office located at 8th Floor, Scope Minar, Core-3, laxminagar New Delhi 110092 (India) and its office located at ONGC Ankleshwar-393Q10 Dist Bharuch Gujrat (hereinafter referred to as “Company” which expression shall unless repugnant to the context or meaning thereof includes all its successors, administrators, executors and assigns) having entered into a Contract No. DLH/OES/MM/ETP-NADA&AF/XII PC11001/201I dated 27-06-2012 (hereinafter called “The Contract” which expression shall include all the amendments thereto) with **M/s SMS Infrastructure Ltd,** having its registered head office at **267, Ganesh Phadnavis Bhavan, Near Triangular Park, Dharampeth, Nagpur** (hereinafter referred to as “The Contractor which expression shall unless repugnant to the context or meaning thereof include all its successors, administrators, executors and assigns) and Company having agreed that the Contractor shall furnish to Company a bank guarantee for Indian

Rs.12,09,90,000/- (Rupees twelve Crore Nine lac Ninety Thousand Only) *to cover the amount of liquidated Damages as per clause 6.3.2 and 6.3.3 of the Contract. [Suitable clause nos. to be indicated by the work center]*

2. We, **State Bank of India Industrial Finance Branch, Sai Complex, Bharat Nagar, Nagpur** (name of the Bank) registered under the laws of India (name of the country) having head/registered office at Nariman Point Mumbai (hereinafter referred to as “The Bank” which expression shall, unless repugnant to the context or meaning thereof include all its successors, administrators, executors and permitted assigns) do hereby guarantee and undertake to pay immediately on first demand in writing and any/all

money(ies) to the extent of **Indian Rs.12,09,90,000/- (Rupees Twelve Crore Nine Lac Ninety Thousand Only)** without any demur, reservation, context or protest and/or without any reference to the Contractor. Any such demand made by Company on the Bank by serving a written notice shall be conclusive and binding, without any proof, on the bank as regards the amount due and payable, notwithstanding any dispute(s) pending before any Court, Tribunal, Arbitrator or any other authority and/or any other matter or things whatsoever, as liability under these presents being absolute and unequivocal. We agree that the guarantee herein contained shall be irrevocable. This guarantee shall not be determined, discharged or affected by the liquidation, winding up, dissolution or insolvency of the Contractor and shall remain valid, binding and operative against the Bank.”

(Emphasis supplied)

Bank guarantee dated 21st August, 2020

In consideration of Oil and Natural Gas Corporation Ltd. incorporated under the Companies Act 1956 having its registered office at **Deendayal Urja Bhawan 5, Nelson Mandela Marg , Vasant Kunj , Delhi – 110070 (India)** its Onshore Engineering Service Office located at **Deendayal Urja Bhawan 5, Nelson Mandela Marg ,Vasant Kunj, Delhi- 110070 (India)** and its Asset office located at ONGC Ankleshwar-393010 Dist Bharuch, Gujrat (hereinafter referred to as "Company" which expression shall unless repugnant to the context or meaning thereof includes all its successors, administrators, executors and assigns), having entered into a Contract No. DLH/OES/MM/ETP-NADA&AF/X11 PC11001 /2011 dated 27-06-2012 (hereinafter called "The Contract" which expression shall include all the amendments thereto) with Consortium of **M/s SMS Limited.** (Leader of the consortium), a company established and existing under the law of India, having its registered office at **IT Park, 20 S.T.P.I Gayatri Nagar, Parsodi, Nagpur;** **M/s Zen Marketing & Technologies,** a dealer established and existing under the law of India having its registered office at **Mrinalini Apartment. Block A, 46, New Ballygaunge Road, Kolkata-700039** and **M/s Tolani Projects Pvt Ltd** a company established and existing under the law of India, having its registered office at **Tolani House,**

New Meghna Petrol Pump, Chautanaka, Ankleshwar-393001 (hereinafter referred to as 'Contractor'), which expression shall, unless repugnant to the context or meaning thereof include all its successors, administrators, executors and assigns) and Company having agreed that the Contractor shall furnish to Company a bank guarantee for Indian Rs.

2,66,17,800/- (Rupees Two Crore Sixty Six Lac Seventeen Thousand Eight Hundred Only) *to cover the amount of Liquidated Damages as per clause 6.3.2 and 6.3.3 of the Contract. (Suitable clause nos. to be indicated by the work center)*

We, **PUNJAB NATIONAL BANK, 290 Nashine Enclave, Dharampeth Extn, WHC Road, Nagpur** (name of the Bank) registered under the laws of India (name of the country) having head/registered office at **7, Bhikaji Cama Place, Africa Avenue, New Delhi – 110066** (hereinafter referred to as “The Bank”, which expression shall, unless repugnant to the context or meaning thereof include all its successors, administrators, executors and permitted assigns) do hereby guarantee and undertake to pay *immediately on first demand in writing* and any/all money(ies) to the extent of Indian **Rs.2,66,17,800/ - (Rupees Two Crore Sixty Six Lac Seventeen Thousand Eight Hundred Only)** *without any demur, reservation, contest or protest and/or without any reference to the Contractor. Any such demand made by Company on the Bank by serving a written notice shall be conclusive and binding, without any proof, on the bank as regards the amount due and payable, notwithstanding any dispute(s) pending before any Court, Tribunal, Arbitrator or any other authority and/or any other matter or things whatsoever, as liability under these presents being absolute and unequivocal. We agree that the guarantee herein contained shall be irrevocable. This guarantee shall not be determined, discharged or affected by the liquidation, winding up, dissolution or insolvency of the Contractor and shall remain valid, binding and operative against the Bank.”*

(Italics supplied)

40. Mr. Nankani prayed for issuance of notice in the petition and for grant of *ad interim* relief, staying operation of the impugned letter dated 15th December, 2020.

41. Mr. Sandeep Sethi, learned Senior counsel for the respondent, submits that there was no merit, whatsoever, in the petition which deserves to be dismissed outright, especially in view of the well settled law regarding judicial restraints on invocation of unconditional bank guarantees which, according to him, may well be treated as fossilized by this point in time.

42. The submissions of Mr. Nankani may be enumerated as under:

(i) The facts, as recited hereinabove, reveal that the delay, in execution of the contract, was, admittedly, owing to default on the part of ONGC, in providing RoU, and in containing the agitation of farmers.

(ii) The joint statement dated 18th July, 2018 was clearly incorrect in attributing blame on SMS, for delay in completion of the work, as was apparent from the position emanating from the minutes of the earlier meeting held on 22nd January, 2018.

(iii) In any event, the request of ONGC, to SMS, for the additional Bank Guarantee of ₹ 2,66,17,800.00, was completely unjustified, as the contract did not contemplate the furnishing of any additional bank guarantee.

43. Mr. Nankani submitted, further, that, while he was well

conscious of the restraints, placed by various decisions of the Supreme Court on interdiction of invocation of unconditional bank guarantees by courts, these restraints would not inhibit grant of relief as sought in the present case by the petitioner. This, he submits, is essentially owing to the following two reasons:

(i) The Bank Guarantees are not unconditional. Mr. Nankani has invited my attention, for this submission, to the concluding recital in the first paragraph to each of the aforesaid two Bank Guarantees, to the effect (in the case of the first Bank Guarantee) that SMS had agreed that “the contractor shall furnish to Company a bank guarantee for Indian ₹ 2,66,17,800/- (Rupees Two Crore Sixty Six Lac Seventeen Thousand Eight Hundred Only) to cover the amount of Liquidated Damages as per clause 6.3.2 and 6.3.3 of the Contract”. This, according to Mr. Nankani, resulted in incorporation, by reference, of clauses 6.3.2 and 6.3.3 of the contract into the aforesaid Bank Guarantees. He submits that this understanding was also reflected in the communications from ONGC to SMS. Even *de hors* the said communications, Mr. Nankani submits that, in view of the aforesaid avowal, which forms the concluding recital in the opening paragraph in each of the two Bank Guarantees under consideration, the Bank Guarantees could not be treated as unconditional in nature, and ONGC could not, therefore, straightway invoke the Bank Guarantees. In view of the incorporation of the condition of infraction, by SMS, of clauses 6.3.2 and 6.3.3 of the contract, as a *sine qua non* for

invocation of the Bank Guarantees, in the body of the Bank Guarantees themselves – as Mr. Nankani would seek to contend – Mr. Nankani submits that the well recognized restraints against grant of stay of invocation of unconditional bank guarantees would not apply in the present case. Mr. Nankani placed reliance, in this context, on the judgment of the Supreme Court in *Hindustan Construction Company Ltd. v. State of Bihar*¹, specifically on para 9 thereof, which read thus:

“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.”

(ii) The second ground, on which Mr. Nankani seeks to dispute the applicability, to the present case, of the law relating to stay of invocation of bank guarantees, is that, according to him, SMS is not, in a sense, seeking stay of invocation of the Bank Guarantee, furnished by it to ONGC. He submits that the prayer in the petition is not for stay of invocation of the Bank Guarantees by ONGC, but for a restraint against ONGC from acting in furtherance of the letter dated 15th December, 2020.

¹ (1999) 8 SCC 436

Mr. Nankani submits that the impugned letter dated 15th December, 2020, properly read, reveals this to be in a nature of demand, by ONGC, against SMS, with invocation of the Bank Guarantees furnished by SMS being merely held out as a threat, in the event of non-compliance, by SMS, with the – allegedly unjustified – demand of ONGC. The justifiability of the demand made by ONGC on SMS, submits Mr Nankani, was required to be adjudicated in arbitration, as there was counter-charges by SMS and ONGC against each other. Mr. Nankani submits that a case, such as the present, would be governed by the principles of grant of interlocutory injunction i.e. existence of a *prima facie case*, balance of convenience, and irreparable loss, as enunciated in *American Cyanamid Company v. Ethicon Ltd.*², and not by the principles which govern prayers for stay of unconditional bank guarantees.

44. In any event, submits Mr. Nankani, this is not a case which can be dismissed outright, but that affidavits ought to be requisitioned from the bank, so as to ascertain whether the bank regards the Bank Guarantees as conditional or unconditional.

45. Responding to the submissions of Mr. Nankani, Mr. Sandeep Sethi, learned Senior Counsel for the ONGC, submits that the present case is entirely covered by the judgment of the Division Bench of this Court in *CRSC Research & Design Institute Group Co. Ltd. v.*

² (1975) AC 396

*Dedicated Freight Corridor Corporation of India Ltd.*³, which upheld the judgment (authored by me) in *CRSC Research & Design Institute Group Co. Ltd. v. Dedicated Freight Corridor Corporation of India Ltd.*⁴

46. He submits, in the first instance, that the Bank Guarantees forming subject matter of consideration in the present case are not conditional, but are unconditional Bank Guarantees, invocable on demand.

47. He, therefore, submits that all the proscriptions, which apply to grant of restraint on invocation of unconditional bank guarantees, would apply *mutatis mutandis* in the present case. He relies, apart from the decision in *CRSC Research & Design Institute Group Co. Ltd.*³, in this context, on the judgment of the Supreme Court in *U.P.*

*Cooperative Federation Ltd. v. Singh Consultants & Engineers*⁵, specifically drawing my attention to para 21 of the said report, which reads thus:

“21. In the instant case, the learned Judge has proceeded on the basis that this was not an injunction sought against the bank but this was the injunction sought against the appellant. But the net effect of the injunction is to restrain the bank from performing the bank guarantee. That cannot be done. One cannot do indirectly what one is not free to do directly. But a maltreated man in such circumstances is not remedyless. The respondent was not to suffer any injustice which was irretrievable. The respondent can sue the appellant for damages. In this case, there cannot be any basis for apprehension that irretrievable damages would be caused if

³ 2020 SCC OnLine Del 1526

⁴ MANU/DE/1803/2020

⁵ (1988) 1 SCC 174

any. I am of the opinion that this is not a case in which injunction should be granted. An irrevocable commitment either in the form of confirmed bank guarantee or irrevocable letter of credit cannot be interfered with except in case of fraud or in case of question of apprehension of irretrievable injustice has been made out. This is the well settled principle of the law in England. This is also a well settled principle of law in India, as I shall presently notice from some of the decisions of the High Court and decisions of this Court.”

48. Mr. Sandeep Sethi disputes the applicability, to the present case, of the principles laid down in *American Cyanamid*², pointing out that, in *BSES Ltd. v. Fenner India Ltd.*⁶, the Supreme Court has clearly held that the law in other jurisdictions is irrelevant, when examining a prayer for stay of invocation of unconditional bank guarantees in our country. He submits that, after 1998, when the judgment in *UP Cooperative Federation Ltd.*⁵ was rendered by the Supreme Court, there has, till date, not been a single instance in which the Supreme Court has interfered with, or approved the interference with, invocation of unconditional bank guarantees and that, in the sole instance in which such restraint was approved, the bank guarantee was conditional.

49. Mr. Sethi submits that, even in law, there are only two circumstances in which invocation of an unconditional bank guarantee can be restrained, i.e. existence of egregious fraud or special equities which result in the perpetration of irretrievable injustice on the applicant seeking stay. Neither of the said circumstances, submits Mr. Sethi, obtains in the present case, as would justify grant of the prayer of the petitioner.

50. Mr. Sethi has also drawn my attention to paras 23 to 26 of the petition, which sets out the grounds on which the petition seeks a restraint against ONGC taking action on the basis of the impugned letter dated 15th December, 2020, and points out that these paragraphs do not, at any point, allege either fraud, or plead the existence of special equities or irretrievable injustice resulting to SMS, were stay, as sought, not granted.

51. With respect to the second Bank Guarantee, dated 21st August, 2020, Mr. Sethi, while drawing my attention to the series of communications between SMS and ONGC, to press the point that the Bank Guarantee was voluntarily tendered in accordance with the terms of the contract, also points out that there is no plea, in the petition, that the second Bank Guarantee was submitted in excess of the contract, or beyond the requirement thereof. In fact, submits Mr. Sethi, it is specifically acknowledged, even in the body of the second Bank Guarantee, that the Bank Guarantee was covering the amount of liquidated damages payable to ONGC by SMS.

52. Insofar as the allegation of SMS, that the joint statement of delay, as forwarded by ONGC, was signed by the CEO of SMS under coercion, Mr. Sethi submits that this is a question of fact, which cannot be decided in a proceeding under Section 9 of the 1996 Act, but would have to be adjudicated in arbitral proceedings.

53. The judgment in *Hindustan Construction Company*¹, on which Mr. Nankani placed reliance, points out Mr. Sethi, has been distinguished by the Supreme Court itself in *Vinitec Electronics Pvt. Ltd. v. HCL Infosystems Ltd.*⁷, and cannot, therefore, enure in favour of SMS in the present case.

54. Mr. Sethi finally places reliance on the judgment of the Supreme Court in *O.N.G.C. v. S.B.I.*⁸, in which he submits that, the Supreme Court not only set aside the order of the High Court, restraining the invocation of the bank guarantee, furnished by the contractor in that case, by ONGC, but went ahead, effectively, to decree the suit, from which the appeal to the Supreme Court emanated.

Analysis and conclusion

55. Having heard learned counsel for both parties at length, I am of the opinion that, in view of the well-settled law regarding the interdiction of invocation of unconditional bank guarantees, the prayer, in this petition, cannot possibly be granted. In fact, the Division Bench of this Court, in its recent decision in *CRSC Research*², has critically commented on such issues being repeatedly raised, despite the law in that regard, having been conclusively settled by the Supreme Court time and again. The appeal, in that case, was dismissed by the Division Bench with costs of ₹ 5 lakhs.

⁷(2008) 1 SCC 544

⁸(2000) 6 SCC 385

56. Having noted this, it must be said that Mr. Nankani, with the candour and fairness for which he is known, did not seek to question the position, in law, that the scope for grant stay of invocation of unconditional bank guarantees was heavily circumscribed, and would be governed by the judgement in *U.P. State Sugar Corpn. v. Sumac International Ltd.*⁹ and its sequelae. There are only two submissions, essentially, on the basis of which Mr. Nankani would submit that the principles regarding stay of invocation of bank guarantees would not be attracted in the present case. These are, firstly, that the petitioner is not seeking stay of invocation of the bank guarantees *per se*, but is, instead, seeking stay of taking of any action in furtherance of the impugned letter dated 15th December, 2020, and, secondly, that the bank guarantees, forming subject matter of the present petition are not unconditional, but conditional.

57. It would be appropriate, at the outset, to consider these two submissions of Mr. Nankani.

58. The impugned letter dated 15th December, 2020, specifically states that, in case SMS does not pay, to ONGC, ₹ 14,27,60,084/- by 22nd December, 2020, LD and GST “shall be recovered by invoking and encashing the bank guarantees submitted” by SMS. Undisputedly, the impugned letter threatens invocation of the bank guarantees submitted by SMS only in the event of failure, on the part of SMS, to make payment by 22nd December, 2020.

⁹ (1997) 1 SCC 568

59. Any restraint, against ONGC, from acting in furtherance of this letter, would result in two consequences. Firstly, the requirement of SMS of paying ₹ 14,27,60,084/-, would stand stayed. Secondly, ONGC would be enjoined from invoking/encashing the Bank Guarantees dated 21st August, 2014 and 21st August, 2020 submitted by SMS.

60. It would be facile, therefore, to seek to treat the prayer, in the present petition, as distinct from a prayer for stay of invocation of the Bank Guarantees. The inevitable consequence of grant of the prayer, sought by the petitioner, would be a stay on ONGC from invoking the Bank Guarantees furnished by SMS.

61. If the law does not permit the court to grant stay of invocation of the Bank Guarantees furnished by SMS, equally, the law cannot permit the court to stay the operation of the impugned letter dated 15th December, 2020. If the consequence of grant of stay of the impugned letter 15th December, 2020 would be a restraint against ONGC from invoking/encashing the Bank Guarantees furnished by SMS, and if such stay of the invocation of the Bank Guarantees cannot be granted in view of the extant legal position, it would be totally impermissible for the court to stay the enforcement of the impugned letter dated 15th December, 2020. A court cannot pass an order which results in grant of a relief which the court is not empowered to grant, in law. It is trite, in law, that a court cannot grant, indirectly, that which the law does

not permit it to grant directly.¹⁰

62. The matter may also be viewed more simplistically. The prayer, in the petition, is for a restraint against ONGC from “acting in furtherance of” the impugned letter dated 15th December, 2020.

63. As such, the submission of Mr. Nankani, that the prayer in the petition is not a prayer for stay of invocation of Bank Guarantees, but a prayer for a restraint against ONGC from acting in furtherance of the impugned letter dated 15th December, 2020, is, with respect, essentially an exercise in semantics, and, is rejected.

64. The second submission of Mr. Nankani is that the Bank Guarantees, forming subject matter of the present proceedings, are not unconditional Bank Guarantees but conditional Bank Guarantees. In this context, Mr. Nankani has placed reliance on the first two paragraphs, which are identical, in both the Bank Guarantees, and which already stands reproduced here in above.

65. Mr. Nankani has sought to capitalise on the recital, in the concluding sentence of the first paragraph of the Bank Guarantees, which, (in the case of the first bank guarantee dated 21st August, 2014) states that “the contractor shall furnish to company a bank guarantee of Indian Rs. 12,09,90,000/- (Rupees Twelve Crore Nine Lac Ninety Thousand Only) to cover the amount of liquidated damages as per

¹⁰ Shiv Kumar Sharma v. Santosh Kumari (2007) 8 SCC 600; Mohd. Alauddin v. Karam Thamarjit Singh (2010) 7 SCC 530; Teyma India Pvt. Ltd. v. JITF Water Infrastructure Pvt. Ltd., 2017 SCC OnLine Del 6580 (SLP against which dismissed).

clauses 6.3.2 and 6.3.3 of the contract”. This, according to Mr. Nankani amounts to incorporation into the Bank Guarantees, by reference, of clauses 6.3.2 and 6.3.3 of the contract, which, consequently, results in the exigencies, contemplated in these clauses, being transmuted as conditions for invocation of the Bank Guarantees. As such, submits Mr. Nankani, the issue of whether clauses 6.3.2 and 6.3.3 of the contract call for invocation, or not, becomes a material consideration, while examining whether the Bank Guarantees could legitimately be invoked.

66. I regret my inability to agree.

67. Incorporation by reference, in contractual instruments is, as Mr Nankani correctly asserts, a well known phenomenon, in contractual conveyancing. Incorporation by reference of the covenants of an earlier contract into a later contract should not, however, be held to have taken place, “unless such conclusion is inevitable”, as held in *C. Rudra v. France Indian Pharmaceuticals Ltd*¹¹. Any conclusion that the covenants of one contract have been incorporated, by reference, into another, would have to be preceded by material evidencing, unequivocally, *intent* to so incorporate. Contracts are intended, as a rule, to be self-contained, and the phenomenon of incorporation by reference is normally encountered where multiple contracts are executed, between the same parties, in cognate transactions forming part of an integrated whole, *inter alia* to ensure clarity and avoid prolixity. Covenants, which are not to be found in contracts, cannot

¹¹ (2000) ILR 2 Cal 179 (DB) [per S.B. Sinha, J. (as he then was)]

readily be read thereinto, by applying the principle of incorporation by reference. One of the principal considerations which would militate *against* any such conclusion of incorporation by reference would be where the incorporation results in conflict, or even disharmony, *vis-a-vis* other covenants in the contract.

68. A statutory example of incorporation, by reference, is to be found in Section 7(5) of the 1996 Act itself, which reads thus:

“7. Arbitration Agreement. –

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing *and the reference is such as to make that arbitration clause part of the contract.*”

(Emphasis supplied)

Though we are not, in the present case, concerned with incorporation of the arbitration clause in one contract, into another, by reference, the italicized words in Section 7(5) amount to a statutory recognition of the guiding philosophy behind the principle of incorporation, by reference, of the covenants of one contract into another. To reiterate, the reference, to merit a conclusion of such incorporation, has to be such as to make the incorporated clause – unequivocally – a part of the later contract.

69. As to when such incorporation may be said to have taken place, albeit in the context of Section 7(5), the very first test, as postulated by the Supreme Court, in *M. R. Engineers & Contractors Pvt Ltd. v.*

Som Datt Builders Ltd.¹², was the following:

“An arbitration clause in another document, would get incorporated into a contract by reference, if the following conditions are fulfilled : (i) The contract should contain a clear reference to the documents containing arbitration clause, (ii) *the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract*, (iii) *The arbitration clause should be appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract.*”

This test, though prescribed in the context in Section 7(5), in my opinion, underscores two of the fundamental principles governing the answer to any question regarding incorporation, by reference, of the covenants of one contract into another, viz., firstly, that *intent to incorporate* must be apparent from the face of the later contract, and, secondly, that *such incorporation should not result in repugnancy vis-a-vis any other covenant of the later contract.*

70. In my view, no such incorporation, of Clauses 6.3.2 and 6.3.3 of the contract between ONGC and SMS can be said to have taken place in the Bank Guarantees furnished by SMS. Any submission of such “bodily incorporation”, as advanced by Mr Nankani, stands discredited even by a conjoint reading of the first two paragraphs of the Bank Guarantees. The afore-extracted recital, at the conclusion of the first paragraph of the Bank Guarantee, merely sets out the purpose for which the Bank Guarantees were being issued, and is fundamentally clarificatory in nature. By no stretch of imagination, in my view, can the recital, that the Bank Guarantees were being

¹² (2009) 7 SCC 696

furnished by SMS to cover the liquidated damages contemplated by Clauses 6.3.2 and 6.3.3 of the contract, result in the said clauses becoming conditions, to be borne by the bank while honouring the Bank Guarantees.

71. Rather, as is usually the case in Bank Guarantees, the pre-conditions for invoking Bank Guarantees are to be found in para 2, rather than para 1 thereof. For ready reference, para 2 of the subject Bank Guarantees dated 21st August, 2014 and 21st August, 2020, are reproduced, at the cost of repetition thus:

“Bank guarantee dated 21st August, 2014

2. We, **State Bank of India Industrial Finance Branch, Sai Complex, Bharat Nagar, Nagpur** (name of the Bank) registered under the laws of India (name of the country) having head/registered office at Nariman Point Mumbai (hereinafter referred to as “The Bank” which expression shall, unless repugnant to the context or meaning thereof include all its successors, administrators, executors and permitted assigns) do hereby guarantee and undertake to pay immediately *on first demand in writing* and any/all money(ies) to the extent of Indian **Rs.12,09,90,000/- (Rupees Twelve Crore Nine Lac Ninety Thousand Only)** *without any demur, reservation, context or protest and/or without any reference to the Contractor. Any such demand made by Company on the Bank by serving a written notice shall be conclusive and binding, without any proof, on the bank as regards the amount due and payable, notwithstanding any dispute(s) pending before any Court, Tribunal, Arbitrator or any other authority and/or any other matter or things whatsoever, as liability under these presents being absolute and unequivocal. We agree that the guarantee herein contained shall be irrevocable.* This guarantee shall not be determined, discharged or affected by the liquidation, winding up, dissolution or insolvency of the Contractor and shall remain valid, binding and operative against the Bank.”

(Emphasis supplied)

“Bank guarantee dated 21st August, 2020

We, **PUNJAB NATIONAL BANK, 290 Nashine Enclave, Dharampeth Extn, WHC Road, Nagpur** (name of the Bank) registered under the laws of India (name of the country) having head/registered office at **7, Bhikaji Cama Place, Africa Avenue, New Delhi – 110066** (hereinafter referred to as “The Bank”, which expression shall, unless repugnant to the context or meaning thereof include all its successors, administrators, executors and permitted assigns) do hereby guarantee and undertake to pay *immediately on first demand in writing* and any/all money(ies) to the extent of Indian **Rs.2,66,17,800/ - (Rupees Two Crore Sixty Six Lac Seventeen Thousand Eight Hundred Only)** *without any demur, reservation, contest or protest and/or without any reference to the Contractor. Any such demand made by Company on the Bank by serving a written notice shall be conclusive and binding, without any proof, on the bank as regards the amount due and payable, notwithstanding any dispute(s) pending before any Court, Tribunal, Arbitrator or any other authority and/or any other matter or things whatsoever, as liability under these presents being absolute and unequivocal. We agree that the guarantee herein contained shall be irrevocable.* This guarantee shall not be determined, discharged or affected by the liquidation, winding up, dissolution or insolvency of the Contractor and shall remain valid, binding and operative against the Bank.”

(Emphasis in original)

72. A bare reading of para 2 of the Bank Guarantees makes it clear that the bank has obligated itself to pay, to ONGC, the amounts covered by the Bank Guarantees,

- (i) “immediately on first demand in writing”,
- (ii) “without any demur, reservation, contest or protest”,
- (iii) “without any reference to the Contractor”,

and has further covenanted that any such demand served, on the bank by ONGC by a written notice,

- (i) “shall be conclusive and binding, without any proof”,
- (ii) “notwithstanding any dispute/disputes pending before any Court, Tribunal, Arbitrator or any other authority and/or any other matter or things whatsoever”,

and that the liability of the bank in that regard is absolute and unequivocal.

73. In the face of this recital, to which SMS has been a willing signatory, it can hardly be contended that the Bank Guarantees are conditional. The only conditions, subject to which the banks are required to honour the Bank Guarantees, as is contained in para 2, have already been set out hereinabove. The specific stipulation to the effect that the Bank Guarantees would be honoured “without any reference to the Contractor” is particularly reflective of the intent, of the Bank Guarantees, to remain totally aloof from the *inter se* dispute between ONGC and SMS.

74. The recital, at the conclusion of para 1 of the Bank Guarantees, to the effect that guarantees were being furnished by SMS to cover the liquidated damages, as per Clauses 6.3.2 and 6.3.3 of the contract, in my view, can, therefore, neither result in incorporation, by reference, bodily or otherwise, of the said Clauses in the Bank Guarantees, nor result in the exigencies, contemplated under the said Clauses, becoming conditions of the Bank Guarantees, fulfilment of which is necessary before the Bank Guarantees can be invoked. The Bank Guarantees furnished by SMS are therefore, in my view, absolute and unconditional, making the Bank liable to pay “immediately and on

demand” by ONGC, without equivocation and “without any reference to the contractor”.

75. Once these submissions of Mr. Nankani are found to be devoid of merit, the legal position hardly requires recapitulation. The authorities on the point have been exhaustively noted and analyzed in the judgments, both of the Single Bench as well as the Division Bench of this Court in ***CRSC Research & Design Institute Group Co. Ltd.***² and I do not deem it necessary to burden this decision therewith. These authorities make it clear that

- (i) Bank Guarantees are essentially contracts between the bank and the beneficiary,
- (ii) their invocation is not conditional on the merits of the disputes between the parties in the main contract, *unless and until those conditions are specifically incorporated as conditions, subject to which the bank guarantee would be honoured* (which as I have already opined hereinabove, is not the position in the present case),
- (iii) the Bank is not concerned with the *inter se* dispute between the parties,
- (iv) it is not open to a party, who has furnished the bank guarantee, to seek restraint of invocation thereof, on the ground that the invocation is in contravention of the covenants of the contract whereunder the bank guarantee was furnished or that the appropriate stage for invocation of the bank guarantee, as per the covenants of the said contract, has not been reached and
- (v) Courts are required to be mindful of the effect of unchecked interdiction, by Courts, on Banks from honouring

unconditional bank guarantees, and that grant of such prayers would result in loss of faith, in the public, on the banking system, and/or guarantees provided by banks, which seriously affects public interest, as well as the dynamics of the country's economy.

76. The Bank Guarantees, in the present case, are, therefore, unconditional Bank Guarantees. The impugned letter calls upon SMS to pay to ONGC an amount of ₹ 14,27,60,084/-, failing which ONGC has the right for invocation of Bank Guarantees furnished by SMS. There can be no restraint, against ONGC, from invoking the Bank Guarantees, in view of the position, in law, noted hereinabove. In case the Bank Guarantees are invoked without due justification, the remedy with SMS would be to seek relief in arbitral proceedings, or otherwise in accordance with law, and not to seek injunction against the Bank from invoking the Bank Guarantees. Grant of the relief sought in the petition would necessarily have the effect of restraining ONGC from invoking the Bank Guarantees furnished by SMS.

77. The attempt of Mr. Nankani, to divide the impugned letter into two parts, one containing a demand against SMS, and the other relating to the threat of invocation of Bank Guarantees, is, in my view, too hyperfine a contention to pass serious muster. ONGC has stated that, in the event of non-payment, by SMS, of the amount demanded in the letter, the Bank Guarantees would be invoked. Whether SMS is, or is not, bound to pay the amount claimed by ONGC, is not an issue which this Court can adjudicate upon, in a petition under Section

9 of the 1996 Act, as it relates to a pure demand of money. In case, the demand is unjustified, SMS would have to seek appropriate relief in the arbitral proceedings, which are yet to commence. To reiterate, there can be no stay against ONGC from invoking the Bank Guarantees furnished by SMS.

78. *Hindustan Construction Company*¹, in my view, cannot help SMS. In fact, para 9 of the report in the said case is conclusive, of the present controversy, *against* the petitioner. The opening sentence of para 9 of the judgment of the Supreme Court states that “what is important, therefore, is that the bank guarantee should be 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”. This is, effectively, what para 2 of the bank guarantees, in the present case, state.

79. In so far as the facts in ***Hindustan Construction Company*¹** were concerned, the opening paragraph of the bank guarantee forming subject matter of the consideration therein, as reproduced in para 12 of the report, read thus:

“In accordance with the provisions of the conditions of contract, clause 9 (advance mobilisation loan) of the above-mentioned contract, Hindustan Construction Co. Ltd., incorporated in Bombay under the Companies Act, 1956, and having their registered office at Construction House, Walchand Hirachand Marg, Ballard Estate, Bombay-400 038 (hereinafter called ‘the contractor’) shall deposit with the Executive Engineer, Kharkai Dam Division II, Icha,

Chaliama, Post Kesargarhia, District Singhbhum, Bihar, a bank guarantee to guarantee their proper and faithful performance under the said clause of the contract in an amount of Rs 10,00,000 (Rupees ten lakhs only).

We, State Bank of India, incorporated under the State Bank of India Act, 1955, and having one of our branches at Nyayamurti C.N. Vaidya Marg, Fort, Bombay-400 023 (hereinafter referred to as 'the said Bank'), as instructed by the contractor, agree unconditionally and irrevocably to guarantee as primary obligator and not as surety merely, the payment of the Executive Engineer, Kharkai Dam Division II, Icha, Chaliama, Post Kesargarhia, District Singhbhum, Bihar, on his first demand without whatsoever right of objection on our part and without his first claim to the contractor, in the amount not exceeding Rs 10,00,000 (Rupees ten lakhs only) *in the event that the obligations expressed in the said clause of the above-mentioned contract have not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the advance mobilisation loan from the contractor under the contract."*

(Italicised in original)

80. The conditions for invocation of the bank guarantee forming subject matter of consideration in ***Hindustan Construction Co. Ltd.***¹ are clearly distinct from those governing invocation of the bank guarantees forming subject matter of the present dispute. In ***Hindustan Construction Co. Ltd.***¹, non-fulfilment of his contractual obligations, by the contractor, resulting in a right, on the employer, to claim recovery of the advanced mobilization loan, in whole or in part, *had expressly been incorporated as a condition for invocation of the bank guarantee*. No such condition is required to precede invocation of the bank guarantees in the present case. Paras 13 and 14 of the report highlight this distinction and read thus:

“13. The Bank, in the above guarantee, no doubt, has used the expression “agree unconditionally and irrevocably” to guarantee payment to the Executive Engineer on his first demand without any right of objection, *but these expressions are immediately qualified by following:*

“... in the event that the obligations expressed in the said clause of the above-mentioned contract have not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the advance mobilisation loan from the contractor under the contract.”

14. *This condition clearly refers to the original contract between HCCL and the defendants and postulates that if the obligations, expressed in the contract, are not fulfilled by HCCL giving to the defendants the right to claim recovery of the whole or part of the “advance mobilisation loan”, then the Bank would pay the amount due under the guarantee to the Executive Engineer. By referring specifically to clause 9, the Bank has qualified its liability to pay the amount covered by the guarantee relating to “advance mobilisation loan” to the Executive Engineer only if the obligations under the contract were not fulfilled by HCCL or HCCL has misappropriated any portion of the “advance mobilisation loan”. It is in these circumstances that the aforesaid clause would operate and the whole of the amount covered by the “mobilisation advance” would become payable on demand. 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.”*

(Emphasis supplied)

The judgment in *Hindustan Construction Company*¹, therefore, in

effect, discountenances, rather than supports, the case being sought to be set up by SMS.

81. For the sake of the record, though it is not particularly relevant, it may be noted that *Hindustan Construction Company*¹ also adjudicated on a second appeal, dealing with a “performance guarantee”, and set aside the invocation thereof, on the ground that, the bank guarantee was invoked by an officer not competent to do so. No such controversy arises in the present case; accordingly, no further reference need be made thereto.

82. Suffice it to state that, in view of the above, the judgment of the Supreme Court in *Hindustan Construction Company*¹ cannot enure to the benefit of SMS.

83. Mr. Sandeep Sethi has also pointed out that *Hindustan Construction Company*¹ stands distinguished by the Supreme Court in *Vinitec Electronics (P). Ltd.*⁶ The said decision neatly encapsulates the distinction between conditional and unconditional bank guarantees, in para 11 of the report, which reads thus:

“11. The law relating to invocation of bank guarantees is by now well settled by a catena of decisions of this Court. The bank guarantees which provided that they are payable by the guarantor on demand is considered to be an unconditional bank guarantee. When in the course of commercial dealings, unconditional guarantees have been given or accepted the beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes. In *U.P. State Sugar Corpn. v. Sumac International Ltd, (1997) 1 SCC 568*, this Court observed that: (SCC p. 574, para 12)

“12. The law relating to invocation of such bank guarantees is by now well settled. *When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realise 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 realisation of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases.*”

(Emphasis supplied)

84. The facts in *Vintec Electronics (P). Ltd.*⁶ are interesting and, in the backdrop of the contentions of Mr. Nankani in the present case, illuminating.

85. The relevant clause, obligating the bank to honour the bank guarantee in the said case, originally read thus:

“Therefore, we, the Bank, hereby affirm that we are guarantors and responsible on behalf of the supplier up to a

total of Rs 16,81,238.50 (Rupees sixteen lakhs eighty-one thousand two hundred thirty-eight and paise fifty only) and we undertake to pay any sum or sums within the limit of Rs 16,81,238.50 (Rupees sixteen lakhs eighty-one thousand two hundred thirty-eight and paise fifty only) as aforesaid upon receipt of written demand from the purchaser and Company within the validity of this bank guarantee *establishing the supplier to be in default for the performance of their warranty obligations under the contract.*”

(Emphasis supplied)

This clause was, later, substituted to read thus:

“Therefore, we, the Bank, hereby affirm that we are guarantors and responsible on behalf of the supplier up to a total of Rs 16,81,238.50 (Rupees sixteen lakhs eighty-one thousand two hundred thirty-eight and paise fifty only) and we undertake to pay any sum or sums within the limit of Rs 16,81,238.50 (Rupees sixteen lakhs eighty-one thousand two hundred thirty-eight and paise fifty only) as aforesaid *upon receipt of written demand from the Company within the validity of this bank guarantee.*”

(Emphasis in original)

86. The Supreme Court held that this substitution made a material difference to the merits of the case of the petitioner before it. The obligating covenant, as it originally read, by the use of the word “establishing the supplier to be in default for the performance of their warranty obligations under the contract”, initially envisaged default on the part of the supplier, of its warranty obligations under the contract, to be a *sine qua non* for the bank to honour the bank guarantee. In case the supplier was not in default of its warranty obligation under the contract, therefore, the bank was not required to honour the bank guarantee.

87. By amending the aforesaid clause, this pre-requisite was done away with. In the amended clause, the obligation of the bank to honour the bank guarantee arose merely on receipt of a written demand taken from the company, within the validity period of the bank guarantee. The presence, or absence, of default on the part of the contractor, in complying with its warranty obligation under the contract became, therefore, immaterial as a consideration, to be borne in mind by the bank while deciding whether or not to honour the bank guarantee.

88. This distinction has been specifically noted in para 19 of the report, which reads as under:

19. In the unamended bank guarantee the Bank affirmed that they are guarantors and responsible on behalf of the supplier up to a total of Rs 16,81,238.50 (Rupees sixteen lakhs eighty-one thousand two hundred thirty-eight and paise fifty only) and had undertaken to pay any sum or sums within that limit upon receipt of written demand from the purchaser within the validity of bank guarantee provided it is established that *the supplier be in default for the performance of their warranty obligations under the contract. This makes it abundantly clear that what was furnished was a conditional bank guarantee and the bankers were liable to pay the amounts only upon establishing the fact that the supplier was in default for the performance of their warranty obligations under the contract. But by the subsequent letter dated 20-8-2001, the relevant clause in bank guarantee was amended whereunder the Bank stood as guarantor and responsible on behalf of the supplier up to a total of Rs 16,81,238.50 (Rupees sixteen lakhs eighty-one thousand two hundred thirty-eight and paise fifty only) and had undertaken to pay any sum or sums within that limit "upon receipt of written demand from the Company within the validity of this bank guarantee". This amended clause makes it abundantly clear that the Bank had undertaken to pay amounts up to a total of Rs 16,81,238.50. The condition that the amounts shall be paid only upon establishing the supplier to be in default for the performance*

of their warranty obligation under the contract has been specifically deleted. In our considered opinion, the bank guarantee as amended replacing Para 4 of the original bank guarantee makes the bank guarantee furnished as unconditional one. The bankers are bound to honour and pay the amounts at once upon receipt of written demand from the respondent.”

(Emphasis supplied)

89. Thereafter, paras 20 to 23 of the report in **Vinitec Electronics Pvt. Ltd.**⁶ proceeded to distinguish the judgment in **Hindustan Construction Company Ltd.**¹, which reads thus:

“20. The learned Senior Counsel, however, relying upon the decision of this Court in **Hindustan Construction Co. Ltd. v. State of Bihar, (1999) 8 SCC 436** contended that the bank guarantee could not be said to be unconditional or unequivocal in terms so that the respondent could claim any unfettered right to invoke the bank guarantee and demand immediate payment thereof from the Bank. We find no substance in the submission so made by the learned Senior Counsel on behalf of the appellant.

21. In **Hindustan Construction**, the appellant Company was awarded a contract by the State of Bihar for construction of a dam. Clause 9 of the contract between the parties provided that the State would make an advance loan to the Company for the costs of mobilisation in respect of the works on furnishing of a bank guarantee by the appellant for an amount equal to the advance loan. The advance loan was required to be used exclusively for mobilisation expenditure. In case of misappropriation of the advance loan the loan at once shall become due and payable immediately. In terms of this clause bank guarantee was furnished by the bank agreeing unconditionally and irrevocably to guarantee payment on demand without any objection *but with the qualification that such payment shall be only in the event the obligations expressed in Clause 9 of the original contract have not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the advance mobilisation loan. Clause 9 of the main contract was thus incorporated and made part of the bank guarantee furnished*

by the banker. It is under those circumstances this Court took the view that the bank guarantee furnished was not an unconditional one. Clause 9 in the bank guarantee refers to the terms and conditions of the contract between the parties. The bank guarantee thus could be invoked only in the circumstances referred to in Clause 9 wherein the amount would become payable only if the obligations are not fulfilled or there is misappropriation.

22. In the present case the amended clause does not refer to any of the clauses specifically as such but on the other hand the Bank had undertaken responsibility to pay any sum or sums within the guaranteed limit upon receipt of written demand from the Company. The operative portion of the bank guarantee furnished by the Bank does not refer to any of the conditions for payment under the bank guarantee. It is true that the bank guarantee furnished makes a reference to the principal agreement between the parties in its preamble. Mere fact that the bank guarantee refers to the principal agreement in the preamble of the deed of guarantee does not make the guarantee furnished by the Bank to be a conditional one unless any particular clause of the agreement has been made part of the deed of guarantee.

23. The recitals in the preamble in the deed of guarantee do not control the operative part of the deed. After careful analysis of the terms of the guarantee we find the guarantee to be an unconditional one. The appellant, therefore, cannot be allowed to raise any dispute and prevent the respondent from encashing the bank guarantee.”

(Emphasis and underscoring supplied)

90. The underscored words, in the afore-extracted passage from *Vinitec Electronics Pvt. Ltd.*⁶ also serve to discountenance, definitively, the ground of “incorporation by reference”, urged by Mr. Nankani.

91. In view of the law laid down by the Supreme Court in *Vinitec Electronics Pvt. Ltd.*⁶, nothing really survives for consideration in this

matter. The decision, clearly, covers the present case on all fours. The mere recital in the preambular paragraph of the Bank Guarantees, to the effect that the Bank Guarantees were being furnished to cover the liquidated damages envisaged in clauses 6.3.2 and 6.3.3 of the contract, do not render the circumstances, contemplated in the said clauses, as conditions which have necessarily to precede honouring, by the Bank, of the Bank Guarantees. Rather, para 2 of the Bank Guarantees made it clear that the Bank was bound to honour the Bank Guarantees, on demand being made by the ONGC.

92. Mr. Nankani has not seriously argued the existence of any egregious fraud, special equities or irretrievable injustice to SMS, were the bank guarantees to be invoked and encashed. Indeed, in the facts of the present case, no such allegations can be raised.

93. *Prima facie*, no case of fraud, egregious or otherwise, is made out.

94. Mr. Sandeep Sethi has correctly pointed out that “special equities” in order to constitute a legitimate ground to stay invocation of a bank guarantee, have to be such as result in irretrievable injustice and injury to the party. In other words, the considerations of special equities and irretrievable injury are not independent and distinct considerations, but are inextricably intertwined.

95. I entirely agree. It is only if irretrievable injustice – or something to like effect – is found to result where stay of invocation

of the bank guarantee not granted, that the existence of “special equities” can be inferred. This principle finds authoritative enunciation in para 10 of the report in *B.S.E.S. Ltd v. Fenner India Ltd.*⁶, which reads thus:

“10. There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. *The second exception to the general rule of non-intervention is when there are ‘special equities’ in favour of injunction, such as when ‘irretrievable injury’ or ‘irretrievable injustice’ would occur if such an injunction were not granted.* The general rule and its exceptions has been reiterated in so many judgments of this Court, that in *U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568* this Court, correctly declared that the law was ‘settled’.”

(Emphasis supplied)

96. Even if the Bank Guarantees were to be enforced in the present case, SMS would, were it to succeed in arbitral proceedings, be in a position to recover the monies. It is not – and cannot be – the contention of SMS that ONGC is in financial doldrums, or that, were the Bank Guarantees to be enforced and encashed, the arbitral proceedings would stand frustrated. No “irretrievable injustice” would, therefore, ensue to SMS, were the Bank Guarantees furnished by it invoked by ONGC.

97. None of the considerations which, therefore, govern grant of interim protection, under Section 9 of the 1996 Act, can, therefore, be said to exist in the present case.

98. In the above discussion, it is not possible to accede to the prayer, in the present petition, to restrain ONGC from acting in furtherance of the impugned letter dated 15th December, 2020. The only action, which the impugned letter envisages ONGC as taking, is invocation of the Bank Guarantees furnished by SMS, in the event of SMS not complying with the request, of ONGC, to pay the demanded amount. The prayer in the petition, therefore, as much as directly seeks an interdiction against such invocation of the Bank Guarantees by ONGC. To contend otherwise would, in my view, miss the wood for the trees.

99. The Division Bench of this Court, in **CRSC Research & Design Institute Group Co. Ltd.**², has already observed that such challenges, in the face of the well established law on the subject, should not be allowed to consume valuable court time. No occasion, in my view, therefore arises for this Court to seek any affidavit from the bank, or from ONGC which has, through Mr Sandeep Sethi, learned Senior Counsel, unequivocally made its stand known. No justification for keeping the present proceedings pending, or for calling for counter affidavit, arises either.

100. In view thereof, the present petition, along with the applications filed therewith, is dismissed *in limine*, with no orders as to costs.

C. HARI SHANKAR, J.

JANUARY 12, 2021

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