APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APL No. 188 OF 2022 & IA No. 599 OF 2022 & IA No. 2216 OF 2022 & IA No. 2217 OF 2022

Dated: 23rd February, 2023

Present: Hon`ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon`ble Mr. Sandesh Kumar Sharma, Technical Member

In the matter of:

North Karanpura Transmission Company Limited & Anr. .... Appellant(s)

Versus

Central Electricity Regulatory Commission & Ors. .... Respondent(s)

Counsel on record for the Appellant(s) : Mr. Buddy A. Ranganadhan
Mr. Hasan Murtaza
Mr. Nandini Tomar

Counsel on record for the Respondent(s) : Ms. Suparna Srivastava
Ms. Astha Jain for R-2

Mr. Anup Jain
Mr. Vyom Chaturvedi for R-3

Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Ashabari Thakur for R-7

Mr. Ravi Sharma for R-9

Mr. S. Vallinayagam for R-45, 50-55

ORDER

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

1. The main Appeal is preferred against the order of the Central Electricity Regulatory Commission ("CERC" for short) in Petition No. 40/MP/2019 dated 22.04.2022.

2. IA No. 599 of 2022 is filed by the Appellant herein for grant of *ex parte ad interim* stay of the order of the CERC dated 29.04.2022 in Petition No. 41/MP/2019 and 40/MP/2019. This Tribunal, in its order in IA No. 599 of 2022 dated 25.04.2022, noted that the Appellants were aggrieved primarily because on its petition, without there being any prayer by the opposite party, liberty had been granted to them for encashing the bank guarantee which the Applicant/Appellant apprehended might be abused; and, in the given facts and circumstances, that part of the impugned order whereby such liberty as noted, had been granted, should be kept in abeyance till the next date of hearing. Thereafter, by its order dated 25.05.2022, this Tribunal directed that the interim order shall continue till the applications under Order XXXIX Rules 1 and 2 CPC were decided.

3. Both the 7th and the 45th Respondents filed IA No. 2216 of 2022 and IA No. 2217 of 2022 on 19.12.2022 seeking vacation of the interim order passed by this Tribunal on 25.04.2022 and 20.05.2022.

4. Mr Buddy Ranganathan, Learned Counsel for the Appellant on the one hand, and Mr. Anand Ganeshan and Mr. Vallinayagam, Learned Counsel appearing on behalf of Respondents 7 & 45 on the other, put forth extensive oral submissions which was later supplemented by way of their written submissions. It is convenient to examine the rival contentions, urged by learned Counsel on either side, under different heads.

I. DOES THE RULE, AGAINST INTERFERENCE WITH INVOCATION OF AN UNCONDITIONAL BANK GUARANTEE, NOT APPLY TO CASES WHERE IT HAS BEEN FURNISHED WITH RESPECT TO THE LIQUIDATED DAMAGES STIPULATED IN THE UNDERLYING CONTRACT?

5. Relying on ***Gangotri Enterprises Limited v. Union of India (2016) 11 SCC 270***, Sri Buddy Ranganathan, Learned Counsel for the Appellant, would submit that the Bank Guarantees are threatened to be invoked only for the recovery of Liquidated Damages; and, hence, they cannot be invoked in the absence of proof of loss or legal injury being caused to the Respondents (LTTC's).

6. Sri Anand Ganesan, Learned Counsel for GUVNL, would submit that the issue is whether there can be any injunction on the encashment of the bank guarantee in the present case; the law on bank guarantee is well settled: (a) Bank guarantee is an independent contract between the bank and the beneficiary and the encashment is not dependent upon any dispute under the underlying contract; (b) the exceptions are Fraud of an egregious nature which vitiates the very foundation of the bank guarantee and irretrievable injustice of exceptional and irretrievable nature (special equities) that would make it impossible for reimbursement of the amount of bank guarantee; (c) There has to be specific pleading of such fraud of egregious nature coupled with special equities [**(a)** ***A.P. Pollution Control Board v. CCL Products (India) Ltd.*****, (2019) 20 SCC 669; (b)** ***Standard Chartered Bank –v- Heavy Engineering Corporation Limited and Another, (2020) 13 SCC 574*****; (c)** ***State of Maharashtra & Anr. -v- M/s National Construction Company, Bombay & Anr*** **(1996) 1 SCC 735; (d)** ***Ansal Engineering Projects Ltd -v Tehri Hydro Development Corporation Ltd and Anr*** **(1996) 5 SCC 450; (e)** ***Gujarat Maritime Board -v- L&T Infrastructure Development Projects Ltd and Another*** **(2016) 10 SCC 46; (f)** ***UP State Sugar Corporation –v- Sumac International Limited*** **(1997) 1 SCC 568; (g)** ***Vinitec Electronics Private Ltd -v- HCL Infosystems Ltd.,*** **(2008) 1 SCC 544; (h)** ***Himadri Chemicals***

Industries Ltd. -v- Coal Tar Refining Company, (2007) 8 SCC 110**;** and ***Arina Solar Private Limited v. Central Electricity Regulatory Commission and Ors. (Order in Appeal No. 378 of 2022*** **dated 22.12.2022).**

7. Sri S. Vallinayagam, Learned Counsel for TANGEDCO, would submit that the law on encashment of bank guarantee is well settled; courts restrain encashment of a bank guarantee only if the party, seeking stay of encashment, establishes fraud of an egregious nature which vitiates the very foundation of the bank guarantee or / and an irretrievable injustice of exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings ***(UP State Sugar Corporation vs Sumac International Limited:*** **(1997) 1 SCC 568);** and it is also settled law that existence of any dispute between the parties to the main contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantee **(*Ansal Engineering Projects Ltd vs Tehri Hydro Development Corporation Ltd and Anr:* (1996) 5 SCC 450).**

A. THE CONTRACT OF BANK GUARANTEE IS INDEPENDENT OF, AND DISTINCT FROM, THE UNDERLYING CONTRACT:

8. A bank guarantee is an independent and distinct contract, between the bank and the beneficiary, and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. Subject to limited exceptions, the beneficiary cannot be restrained from encashing the bank guarantee even if the dispute, between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in the performance of the contract. (**Ansal Engg. Projects Ltd. v. Tehri Hydro Development Corpn.**

Ltd., (1996) 5 SCC 450; Standard Chartered Bank -v- Heavy Engineering Corporation Limited and Anr, (2020) 13 SCC 574). Both the bank and the beneficiary are bound by, and its invocation should only be in accordance with, the terms of the bank guarantee. (**Standard Chartered Bank v. Heavy Engg. Corpn. Ltd., (2020) 13 SCC 574; Hindustan Construction Co. Ltd. v. State of Bihar, (1999) 8 SCC 436).**

9. The dispute, between the beneficiary and the party at whose instance the bank has given the guarantee, is immaterial and is of no consequence. Ordinarily, the Court should not interfere with the invocation or encashment of the bank guarantee so long as the invocation is in terms of the bank guarantee. (**Standard Chartered Bank v. Heavy Engg. Corpn. Ltd., (2020) 13 SCC 574**). Since a bank guarantee is an independent and separate contract, and is absolute in nature, existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of the bank guarantee. (**Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co., (2007) 8 SCC 110; Adani Agri Fresh -v Mehboob Sharif and Ors, AIR 2016 14 SCC 517).**

10. Invocation of a bank guarantee does not depend on termination of the underlying contract. The bank guarantee is a separate contract, and is not qualified by the contract on performance of obligations. (**Gujarat Maritime Board -v- L&T Infrastructure Development Projects Ltd and Another, (2016) 10 SCC 46**). Whether the action of the beneficiary is legal and proper, and whether on the basis of such a decision, the bank guarantee could have been invoked, are not matters of inquiry. Between the Bank and the beneficiary, the moment there is a written demand for invoking the bank

guarantee, the Bank is bound to honour the payment under the guarantee. (**Gujarat Maritime Board -v- L&T Infrastructure Development Projects Ltd and Another, (2016) 10 SCC 46**).

11. If the bank guarantee furnished is unconditional and irrevocable, it is not open to the bank to raise any objection for payment of the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction from enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee, in terms of the agreement entered into between the parties, has not been fulfilled. The appellant cannot, merely because a dispute exists in terms of the underlying contract, prevent the respondents-beneficiaries from enforcing the bank guarantee by way of injunction save in exceptional circumstances (**Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engg. Coop. Ltd., (2007) 6 SCC 470; Adani Agri Fresh -v- Mehboob Sharif and Ors, AIR 2016 14 SCC 517; U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568; Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corpn. Ltd., (1996) 5 SCC 450).**

12. The duty of the bank under the guarantee is created by the document itself. Once the documents are in order, the bank giving the guarantee must, ordinarily, honour the same and make payment. (**U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568; State of Maharashtra v. National Construction Co. [(1996) 1 SCC 735**) Encashment of the amount specified in the bank guarantee does not depend upon the result of the decision in the dispute between the parties, in case of a breach. (**Ansal**

Engineering Projects Ltd. v. Tehri Hydro Development Corpn. Ltd., (1996) 5 SCC 450).

13. It is wholly unnecessary for us therefore, in order to decide this Interlocutory Application, to examine which of the rival contentions, on the merits of the Order under Appeal passed by the CERC as aforementioned, necessitate acceptance, since its validity would be subjected to examination when the main appeal is finally heard, and is of no consequence in considering the relief sought by the appellant in this I.A.

14. What arises for consideration, in this Interlocutory application, is only whether, pending disposal of the main appeal, this Tribunal would be justified in granting stay of invocation of the Bank Guarantee furnished in favour of the Respondents by the Bank at the Appellant's behest.

B. IS THE SUBJECT BANK GUARANTEE UNCONDITIONAL?

15. The terms of the bank guarantee are material. Since the bank guarantee represents an independent contract between the bank and the beneficiary, both the parties would be bound by its terms. The invocation, therefore, should be in accordance with the terms of the bank guarantee. (**Hindustan Construction Company Limited -v- State of Bihar, (1999) 8 SCC 436**; **SBI v. Mula Sahakari Sakhar Karkhana Ltd., (2006) 6 SCC 293; Standard Chartered Bank v. Heavy Engg. Corpn. Ltd., (2020) 13 SCC 574** On a careful analysis of the terms and conditions of the guarantee, it must be found whether or not the guarantee is unconditional. (**Vinitec Electronics (P) Ltd. v. HCL Infosystems Ltd., (2008) 1 SCC 544; Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engg. Coop. Ltd., (2007) 6 SCC 470;**

Adani Agri Fresh -v- Mehboob Sharif and Ors, AIR 2016 14 SCC 517). Bank guarantees, which are payable by the guarantor on demand, are considered unconditional bank guarantees. (**Vinitec Electronics (P) Ltd. v. HCL Infosystems Ltd., (2008) 1 SCC 544; Adani Agri Fresh -v- Mehboob Sharif and Ors, AIR 2016 14 SCC 517; U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568).**

16. In considering whether or not the bank guarantee, in the present case, is unconditional, it is necessary to note its contents. The bank guarantee issued by IDBI Bank, at the request of the Appellant, records that, in consideration of the Appellant agreeing to undertake obligations under the TSA dated 10.09.2009 and the Respondents agreeing to execute the Share Purchase Agreement regarding setting up of the project, the Bank agreed unequivocally, irrevocably and unconditionally to pay forthwith, on demand in writing from the Respondent or any Officer authorised by it, any amount upto and not exceeding the amount specified in the Bank Guarantee; the Bank Guarantee shall be valid and binding on the Guarantor Bank upto and including the date stipulated therein, and shall not be terminable by notice or any change in the constitution of the Bank or the term of the TSA or by any other reasons whatsoever; the Bank's liability shall not be impaired or discharged by any extension of time for variations or alternations made, given or agreed with or without the knowledge or the consent of the Bank, by or between the parties to the respective agreements; the Bank shall not require any proof in addition to the written demand, from the Long Term Transmission Customer, made in any format, raised at the address of the Guarantor Bank, in order to make payment to them; the Bank would make payment on first demand without restriction or conditions, and notwithstanding any objection by the Appellant or

any other person; the Bank would not require the LTTC to justify invocation of the Bank Guarantee nor shall it have any recourse against the LTTC in respect of any payment made in respect of the guarantee; the bank guarantee shall be the primary obligation of the Guarantor Bank, and the LTTC shall not be obliged, before enforcing the Bank Guarantee, to take any action in any court or arbitral proceedings against the Appellant or to make any claim against or raise any demand on the Appellant or to give any notice to the Appellant or to enforce any security held by the LTTC or to exercise, levying or enforcing any distress, diligence or other process against the Appellant; the Bank acknowledged that the Bank Guarantee was not personal to the LTTC and may be assigned, in whole or in part, by them to whomsoever the LTTC is entitled to assign its rights and obligations under the TSA; and the Bank agreed and acknowledged that the LTTC shall have the right to invoke the Bank Guarantee either in part or in full, as it may deem fit. It is evident from the contents of the aforesaid Bank Guarantee that it is unconditional. In any event, it is not even contended before us, by Mr. Buddy Ranganathan, that it is not.

II. HAS A VIEW, CONTRARY TO THE LAW DECLARED IN THE AFORESAID LINE OF JUDGEMENTS, BEEN TAKEN IN ”GANGOTRI”?

17. In **BSES Ltd. v. Fenner India Ltd., (2006) 2 SCC 728,** the Supreme Court held that the general rule of non-interference against invocation of a bank guarantee, and its exceptions, had been reiterated in several of its judgments including **U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568; State of Maharashtra v. National Construction Co., (1996) 1 SCC 735; United Commercial Bank v. Bank of India, (1981) 2 SCC 766; and Centax (India) Ltd. v. Vinmar Impex Inc., (1986) 4 SCC 136;** and

that, in **U.P. State Sugar Corpn. v. Sumac International Ltd. [(1997) 1 SCC 568**, the Supreme Court had correctly declared that the law was **"settled".**

18. The questions which necessitate examination is whether **"GANGOTRI"** has taken a view contrary to the settled law, and if so which of these Judgements should this Tribunal follow?

19. The Appeal before the Supreme Court, in **Gangotri Enterprises Ltd. v. Union of India, (2016) 11 SCC 720**, was filed against the judgment of the Allahabad High Court upholding the order of the District Judge refusing to grant an interim injunction restraining encashment of the bank guarantee by the respondents. It is in this context that the Supreme Court held that the controversy was no more res integra and stood decided in **Union of India v. Raman Iron Foundry, (1974) 2 SCC 231;** the case at hand, being somewhat identical, had to be decided keeping in view the law laid down in **Raman Iron Foundry**; arbitration proceedings, in relation to the contract, were still pending; secondly, the sum claimed by the respondents from the appellant did not relate to the contract for which the bank guarantee had been furnished, but related to another contract for which no bank guarantee had been furnished; thirdly, the sum claimed by the respondents from the appellant was in the nature of damages, which was not yet adjudicated upon in arbitration proceedings; fourthly, the sum claimed was neither a sum due in praesenti nor a sum payable; in other words, the sum claimed by the respondents was neither an admitted sum nor a sum which stood adjudicated by any court of law in any judicial proceedings but was a disputed sum; and lastly, the bank guarantee in question, being in the nature of a performance guarantee furnished for execution work of the contract, and the work having

been completed to the satisfaction of the respondents, they had no right to encash the bank guarantee.

20. The Supreme Court observed that both the courts below had committed a jurisdictional error when they failed to take note of the law laid down in **Raman Iron Foundry** which governed the controversy, and had instead placed reliance on **Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co., (2007) 8 SCC 110** and **U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568** , which laid down general principle relating to bank guarantees; there could be no quarrel with the proposition laid down in those cases; however, every case had to be decided with reference to the facts involved therein; the case at hand was similar on facts with that of **Raman Iron Foundry,** and hence the law laid down in that case was applicable to this case; the District Judge, having decided the injunction application in the first instance in the appellant's favour, had erred in rejecting the application made by the appellant the second time; the respondents, despite having suffered the injunction order the first time, did not file any appeal against that order; the said order had thus attained finality and was, therefore, binding on the parties; the appellants had made out a prima facie case in their favour for grant of injunction against the respondents; they had also made out a case of balance of convenience and irreparable loss in their favour as held in **Raman Iron Foundry**; and they were, therefore, entitled to claim injunction against the respondent in relation to encashment of the Bank Guarantee. The appeal was allowed, the impugned Order was set aside, in consequence, the injunction application submitted by the appellant under Section 9 of the Arbitration Act was allowed, and injunction was granted in the appellant's favour restraining the respondent from encashing the Bank Guarantee.

A. HAS THE JUDGEMENT IN "*GANGOTRI ENTERPRISES*" BEEN HELD TO BE PER INCURIAM AND NOT BINDING?

21. Sri Anand Ganesan, Learned Counsel for GUVNL, would submit that the only contention raised by the Appellants are that injunction can be granted based on the disputes under the underlying contract, even in the absence of egregious fraud or special equities; this is relying on the decision of the Supreme Court in ***Gangotri Enterprises Limited v. Union of India, (2016) 11 SCC 270*** which in turn relies on ***Union of India v. Raman Iron Foundry, (1974) 2 SCC 231;*** the above decision of the Supreme Court neither reverses the position in law nor does it hold that, even in the absence of egregious fraud coupled with special equities, injunction can be granted; in any event, the above decision has been expressly held to be *per incuriam* by the Supreme Court in ***State of Gujarat v. Amber Builders (2020) 2 SCC 540*;** the decision in **Raman Iron Foundry,** relied on in **Gangotri,** was in fact reversed by the Supreme Court in ***HM Kamaluddin Ansari and Co. v. Union of India, (1983) 4 SCC 417*;** and the decision in **Gangotri** was therefore held to be per incuriam.

22. On the other hand, Sri Buddy Ranganathan, Learned Counsel for the Appellant, would submit that ***State of Gujarat v. Amber Builders*** **(2020) 2 SCC 540** suggests that ***Gangotri's*** Judgment is not good law; this is for the reason that ***Amber Builders*** holds that ***Gangotri's*** reliance on ***Union of India v. Raman Iron Foundry*** **[(1974) 2 SCC 231]** is misplaced, since ***Raman Iron Foundry*** had been set aside **in M/s H.M.** ***Kamaluddin Ansari and Co. V. Union of India [(1983) 4 SCC 417]*****;** ***Raman Iron Foundry*** **(**as also ***Gangotri***) dealt with two distinct issues, the first with the power to grant an injunction to restrain adjustment of dues in respect of one contract with another, and the

second with whether a claim for Liquidated damages was a debt *in presentii* till it is adjudicated by a competent Court or not; ***Kamaluddin Ansari*** set at naught ***Raman Iron Foundry*** only on the first issue and not on the second; ***Amber Builders',*** holding that ***Gangotri*** is not good law, should therefore be confined only to the first issue and not the second; hence ***Raman Iron Foundry,*** insofar as it held the principle of a claim for liquidated damages not being a debt in presentii, is still good law and *a-fortiori* **Gangotri's** reliance on **Raman Iron,** to restrain encashment of a Bank Guarantee for liquidated damages, is still good law; this distinction has been upheld by the Delhi High Court in ***Thar Camps Pvt. Ltd. V. Indus River Cruises Pvt. Ltd. & Ors [(2021) SCC Online Del 3150; Gangtori's*** reliance on ***Raman Iron Foundry,*** to restrain encashment of a Bank Guarantee, for recovery of liquidated damages, on the ground that a claim for liquidated damages is not a claim for a *debt in presentii* till it is adjudicated by a competent Court, is still good law; ***Gangotri's*** Judgment is not per incuriam of the oft quoted principle laid down by a large number of Judgments that encashment of a Bank Guarantee ought not to be restrained in the absence of fraud of irreparable injury; the same were cited and dealt with in Para 87 of the Judgment in **Gangotri**; and in **Standard Chartered Bank v, Heavy Engineering Corporation Limited & Anr [(2020) 13 SCC 574]**, while ***Gangotri's*** Judgment was cited before the Court, there is no finding on the said Judgment.

23. In **Union of India v. Raman Iron Foundry, (1974) 2 SCC 231,** (which was followed in ***Gangotri Enterprises Limited***), the Supreme Court held that the damages which were claimed were liquidated damages; even if there is a stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by

him, the stipulated amount being merely the outside limit; such a claim does not give rise to a debt until the liability is adjudicated and damages assessed by an order of a Court or other adjudicatory authority; when there is a breach of contract, the party who commits the breach does not eo-instanti incur any pecuniary obligation, nor does the party complaining of the breach become entitled to a debt due from the other party; the only right which the party, aggrieved by the breach of the contract, has is the right to sue for damages; that is not an actionable claim; a claim for damages for breach of contract is, therefore, not a claim for a sum presently due and payable and the purchaser is not entitled to recover the amount of such claim by appropriating other sums due to the contractor; the appellant had no right or authority to appropriate the amounts of other pending bills of the respondent in or towards satisfaction of its claim for damages against the respondent; and the learned Judge was justified in issuing an interim injunction restraining the appellant from doing so.

24. Reliance was placed, in **State of Gujarat v. Amber Builders, (2020) 2 SCC 540**, on the judgment in **Gangotri Enterprises Ltd. v. Union of India, (2016) 11 SCC 720,** to submit that till the demand of the Government is crystallised or adjudicated upon, the Government cannot withhold the money of the contractor. The Supreme Court, in **Amber Builders**, examined the correctness of the view taken in **Gangotri Enterprises,** and observed that the said judgement was primarily based on the judgment of a two-Judge Bench, in **Union of India v. Raman Iron Foundry, (1974) 2 SCC 231,** wherein it was held that the Government had no right to appropriate the amount claimed without getting it first adjudicated; the judgment in **Raman Iron Foundry**, was specifically overruled on the issue in hand by a three-Judge Bench in **H.M. Kamaluddin Ansari & Co. v. Union of India, (1983) 4 SCC 417** wherein there

was a general condition which entitled the Government to recover the damages claimed by appropriating any sum which may become due to the contractor under other pending bills. The three judge bench, in **Kamaluddin Ansari,** disagreed with the findings in **Raman Iron Foundry** and held that, if an order injuncted a party from withholding the amount due to the other side under pending bills in other contracts, the order necessarily meant that the amount must be paid; if the amount was withheld there would be a defiance of the injunction order; it would be a contradiction in terms to say that a party is injuncted from withholding the amount and yet it can withhold the amount as of right; in any case, the subsequent observation of the court that the order of injunction being negative in form and substance, there was no direction to the respondent to pay the amount due to the appellant under pending bills of other contracts, was manifestly inconsistent with the proposition of law laid down by the Court in the same case; and an injunction order, restraining the respondents from withholding the amount due under other pending bills to the contractor, virtually amounted to a direction to pay the amount to the contractor appellant.

25. The Supreme Court, in **Amber Builders**, concluded holding that, in its opinion, the judgment in **Gangotri Enterprises Ltd,** was per incuriam as it relied upon **Raman Iron Foundry** which had been specifically overruled by the three-Judge Bench in **H.M. Kamaluddin Ansari.**

26. In **Thar Camps Pvt. Ltd. v. Indus River Cruises Pvt. Ltd., 2021 SCC OnLine Del 3150,** a petition was filed before the Delhi High Court, under Section 9 of the 1996 Act, alleging that efforts were being made by the respondents to forcibly take possession of the ships. The Delhi High Court relied on its earlier decision in **Intertoll ICS Cecons O&M Co. Pvt Ltd vs**

NHAI: ILR (2013) 2 Del 1018 and **Lanco Infratech Ltd vs Hindustan Construction Co. Ltd: (2010) 234 DLT 175**, wherein it was held that the decision in **Union of India v. Raman Iron Foundry, (1974) 2 SCC 231** was overruled in **H.M. Kamaluddin Ansari & Co. v. Union of India, (1983) 4 SCC 417** on another point "that the clause in the contract applied to a claim itself and not only to an amount due"; however, on the nature of the claim for damages, the decision in **Raman Iron Foundry** had not been overruled and is good law; the points on which **Kamaluddin Ansari** overruled **Raman Iron Foundry** were, according to **State of Gujarat v. Amber Builders, (2020) 2 SCC 540**, the right of the Government to withhold payments, stated to be due from the contractor, against dues of the contractor under other contracts, and the power of the Court to grant an injunction in that regard; and the findings in **Raman Iron Foundry** regarding the nature of liquidated and unliquidated damages, and the liability in that regard crystallising only when adjudicated by a court, continued to remain undisturbed.

B. RULE OF PER INCURIAM: ITS SCOPE:

27. "Incuria" literally means carelessness. Law declared is not that can be culled out, but that which is stated as the law to be accepted and applied. A conclusion, without reference to the relevant provision of law, is weaker than even casual observations. **(Synthetics and Chemicals Ltd.**).The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority'. (**Young v. Bristol Aeroplane Ltd:1944 I KB 718; Nirmal Jeet Kaur v. State of M.P., 2004 (2) ALD (Crl.) 651 (SC) : (2004) 7 SCC 558,STATE OF U.P. AND ANOTHER VS SYNTHETICS AND CHEMICALS LTD. AND ANOTHER, 1991 4 SCC 139).** The Latin expression "per incurium"

means through inadvertence. A decision can be said generally to be given per incurium when the Supreme Court has acted in ignorance of a previous decision of its own or when a High Court has acted in ignorance of a decision of the Supreme Court. **(Punjab Land Devl., & Reclamation Corpn. Ltd. v. Presiding Officer, Labour Court: (1990) 3 SCC 682; Commissioner of Income Tax v. B.R. Constructions, 1992 SCC OnLine AP 121).**

28. Halsbury's Laws of England, Fourth Edition, para 578 at page 297 states the rule of per incurium as follows:—

> *"A decision is given per incurium when the Court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covered the case before it, in which case it must decide which case to follow; or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force."*

29. Applying the "Per Incuriam" rule, a Full Bench of the Andhra Pradesh High Court, in **Commissioner of Income Tax v. B.R. Constructions, 1992 SCC OnLine AP 121,** held that a precedent ceases to be a binding precedent, among others, if it is reversed or over-ruled by a higher court or when it is affirmed or reversed on a different ground or when it is inconsistent with the earlier decisions of the same rank. If the ratio of the judgement of the Full Bench of the Andhra Pradesh High Court, in **B.R. Constructions,** were to be applied, the consequences of **"AMBER BUILDERS"** declaring **"GANGOTRI"** per incuriam would require **"GANGOTRI"** not to be followed, albeit its having been reversed on a different ground.

30. It is unnecessary for us to delve further on this aspect, and we shall proceed on the premise that the judgement in **"GANGOTRI"** is not per

incuriam on the contentions raised in these proceedings. It is, however, relevant to note that, in **Thar Camps Pvt. Ltd. v. Indus River Cruises Pvt. Ltd., 2021 SCC OnLine Del 3150,** (on which Mr. Buddy Ranganathan, Learned Counsel, relied in support of his submission that the judgement in **"GANGOTRI"** was not per incuriam), reliance was placed on the earlier decisions of the Delhi High Court in **Intertoll ICS Cecons O&M Co. Pvt Ltd vs NHAI: ILR (2013) 2 Del 1018** and **Lanco Infratech Ltd vs Hindustan Construction Co. Ltd: (2010) 234 DLT 175**.

31. The very same judge of the Delhi High Court, who delivered the judgements in **Intertoll** and **Lanco Infratech,** subsequently authored the opinion in **TRF Limited v. ENERGO Engineering Projects Limited, 2017 SCC OnLine Del 7011.**

32. In **TRF Limited,** reliance was placed on behalf of the Appellant, among others, on the judgement of the Supreme Court in ***Gangotri Enterprises Limited*** and the Delhi High Court in ***Satluj Jal Vidyut Nigam Limited* v. *Jai Prakash Hyundai Consortium*.** The Learned Judge, in **TRF Limited**, opined that, in ***Gangotri Enterprises Limited***, the facts were held to be more or less similar to the facts in ***Raman Iron Foundry***. In particular, in ***Gangotri Enterprises Limited***, certain circumstances were noticed which persuaded the Court to proceed to grant the injunction. These were noted in para 42 as under:

> *"42. On perusal of the record of the case, we find that firstly, arbitration proceedings in relation to the contract dated 22.08.2005 are still pending. Secondly, the sum claimed by the respondents from the appellant does not relate to the contract for which the Bank Guarantee had been furnished but it relates to another contract dated 22.08.2005 for which no bank guarantee had been furnished. Thirdly, the sum claimed by the*

> *respondents from the appellant is in the nature of damages, which is not yet adjudicated upon in arbitration proceedings. Fourthly, the sum claimed is neither a sum due in praesenti nor a sum payable. In other words, the sum claimed by the respondents is neither an admitted sum and nor a sum which stood adjudicated by any Court of law in any judicial proceedings but it is a disputed sum and lastly, the Bank Guarantee in question being in the nature of a performance guarantee furnished for execution work of contract dated 14.07.2006 (Anand Vihar works) and the work having been completed to the satisfaction of the respondents, they had no right to encash the Bank Guarantee."*

33. The Learned Judge, in **TRF Limited,** then held that none of the factors, referred to in Para 42 of the judgement in **GANGOTRI**, could be said to exist in the present case; the fact that the beneficiary may have already recovered much of the amounts secured by the BG was not relevant in deciding whether an injunction should be granted against invocation of such BG, particularly when it is unconditional; in other words, an unconditional BG has always been considered on a different footing by the Court; even where a BG is wrongly invoked and encashed by a party, the remedy for the other party, where the BG is unconditional, is only to seek to make a claim against such allegedly unlawful invocation and encashment of the BG; it may not be a good ground to require the Court to injunct the encashment of the BG; and the Court was, therefore, not satisfied that a case had been made out of applicability of either of the exceptions to the normal rule that an unconditional BG must be honoured on its terms and should not be interdicted by a Court. The earlier interim order, staying encashment of the BGs in question, was vacated.

C. SHOULD "GANGOTRI" BE UNDERSTOOD AS HAVING CARVED OUT A NEW EXCEPTION, TO THE RULE APPLICABLE TO INVOCATION OF BANK GUARANTEES, IN CASES WHERE IT IS FURNISHED TOWARDS LIQUIDATED DAMAGES STIPULATED IN THE UNDERLYING CONTRACT?

34. As noted hereinabove, the law is well settled, by a series of judgements of the Supreme Court, including the three judge bench judgements in **Ansal Engg. Projects Ltd. v. Tehri Hydro Development Corpn. Ltd., (1996) 5 SCC 450** and **Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineerings Works (P) Ltd, (1997) 6 SCC 450**, referred to hereinabove, that a bank guarantee is an independent and distinct contract between the bank and the beneficiary; it is not qualified by the underlying transaction or the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary; and, save fraud or special equities, the beneficiary cannot be restrained from encashing the bank guarantee even if the dispute between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in performance of the contract or execution of the works undertaken in furtherance thereof. It would hardly matter, therefore, whether the Bank Guarantee is furnished as security for the liquidated damages stipulated in the underlying contract or for performance of the underlying contract or for fulfilment of any other requirement in terms of the underlying contract.

35. The submission of Mr. Buddy Ranganathan, Learned Counsel for the Appellant, in effect, is that, in the light of the Judgement in **"GANGOTRI",** the respondents should be restrained from encashing the subject guarantees till their entitlement for liquidated damages, in terms of the underlying contract, is adjudicated in the main appeal. Does **"GANGOTRI"** declare that to be the law, is the question which necessitates examination?

36. As noted hereinabove, the Supreme Court in **"GANGOTRI"** noticed two of its earlier judgements, relating to the rule applicable to cases where bank

guarantees are sought to be invoked, ie **Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co., (2007) 8 SCC 110** and **U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568,** and observed that these two judgements laid down general principles relating to bank guarantee; there could be no quarrel with the proposition laid down in those cases; however, every case had to be decided with reference to the facts involved therein.

37. It however held that the case at hand was similar on facts with that of **Raman Iron Foundry,** and hence the law laid down in that case was applicable to the case before it. It is useful to note that **Raman Iron Foundry** was not a case where a bank guarantee was sought to be encashed but related, among others, to a claim for liquidated damages simplicitor.

38. No view, contrary to the law laid down in **Himadri Chemicals Industries** and **Sumac International Ltd**, has been declared by the subsequent co-ordinate Bench in **"Gangotri"**. It is only because **"Gangotri"** related to a bank guarantee, furnished towards the liquidated damages stipulated in the underlying contract, that it is contended by Mr. Buddy Ranganathan, Learned Counsel, that we should likewise injunct the Respondents herein from encashing the Bank Guarantee.

D. RULE OF BINDING PRECEDENTS: ITS SCOPE:

39. It must be borne in mind that it is only the principle underlying the decision which would be binding as a precedent in a case which comes up for decision subsequently. Hence, while applying the decision to a later case, the Court, which is dealing with it, should carefully try to ascertain the true principle

laid down by the previous decision. A decision often takes its colour from the questions involved in the case in which it is rendered. The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation. **(Shah Prakash Amichand vs State of Gujarat: AIR 1986 SC 468).**

40. As a judgement is only an authority for what it actually decides, it cannot be quoted for a proposition that may seem to follow logically from it. It is not a profitable task to extract a sentence here and there from a judgment and to build up on it. What is of the essence in a decision is its ratio. (**State of Orissa v. Sudhansu Sekhar Misra; Quinn v. Leathem, AIR 1968 SC 647**). Judgments ought not to be read as statutes. (**Sri. Konaseema Cooperative Central Bank Ltd. v. N. Seetharama Raju, AIR 1990 AP 171**) (**Kanwar Amninder Singh v. High Court of Uttarakhand and another, 2018 SCC OnLine UTT 1026).**

41. A decision is available as a precedent only if it decides a question of law **(STATE OF PUNJAB AND OTHERS VS SURINDER KUMAR AND OTHERS, 1992 1 SCC 489),** and cannot be relied upon in support of a proposition that it did not decide. **(MITTAL ENGINEERING WORKS(P) LTD VERSUS COLLECTOR OF CENTRAL EXCISE, MEERUT, 1997 1 SCC 203).** A judgment delivered without argument is not binding. (**Municipal Corporation of Delhi v. Gurnam Kaur, (1989) 1 SCC 101.** A decision, which is neither founded on reasons nor it proceeds on a consideration of an issue, cannot be deemed to be a law declared to have a binding effect. That which escapes in the judgment without any occasion is not the ratio decidendi. Any declaration or conclusion arrived at, preceded without any reason, cannot be deemed to

be the declaration of law or authority of a general nature binding as a precedent. (**Jaisri Sahu v. Rajdewan Dubey, AIR 1962 SC 83 ; Municipal Corporation of Delhi v. Gurnam Kaur, (1989) 1 SCC 101 ; B. Shama Rao v. Union Territory of Pondicherry, AIR 1967 SC 1480; State of Uttar Pradesh v. Synthetics and Chemicals Ltd. (1991) 4 SCC 139**).

42. A decision which is not express and is not founded on reasons nor it proceeds on consideration of an issue cannot be deemed to be a declaration of law or authority of a general nature binding as a precedent. **(STATE OF U.P. AND ANOTHER VS SYNTHETICS AND CHEMICALS LTD. AND ANOTHER, 1991 4 SCC 139).** Where by obvious inadvertence or oversight a judgment fails to notice an obligatory authority running counter to the reasoning and result reached, it may not have the sway of a binding precedent. (**Mamleshwar v. Kanahaiya Lal, (1975) 2 SCC 232; Morelle v. Wakeling, (1955) 1 All E.R. 708**).**(Somprakash v. State of Uttarakhand, 2019 SCC OnLineUtt 648)**

43. Since **"GANGOTRI"** did not so specifically hold, reliance placed thereupon to contend that, as a rule, bank guarantees furnished towards liquidated damages should not be permitted to be encashed, till the claim of the beneficiary, for payment of the specified liquidated damages towards breach of the contract, is adjudicated by this Tribunal, is wholly misplaced.

44. Following the decision of the Constitution Bench, in **Union of *India v. Raghubir Singh (Dead) By Lrs* (1989) 2 SCC 754*,*** the subsequent Constitution Bench of the Supreme Court, in **Central Board of Dawoodi Bohra Community v. State of Maharashtra (2005) 2 SCC 754**, held that, in case of doubt all that the Bench of a co-equal or lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed

for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration; and it will be open only for a Bench of co-equal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of co-equal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.

45. The very fact that the two judge bench in **"GANGOTRI"** did not refer the matter to a larger bench also goes to show that they did not doubt the correctness of the earlier view taken in **Himadri Chemicals Industries** and **Sumac International Ltd**.

E. THE ATTENTION OF THE TWO JUDGE BENCH IN "GANGOTRI" WAS NOT DRAWN EITHER TO THE EARLIER LARGER, OR TO SEVERAL OTHER CO-ORDINATE BENCH, JUDGEMENTS OF THE SUPREME COURT:

46. While the attention of the two judge bench, in **Gangotri Enterprises Ltd. v. Union of India, (2016) 11 SCC 720**, was no doubt drawn to the earlier co-ordinate bench judgements in **Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co., (2007) 8 SCC 110** and **U.P. State Sugar Corpn. v. Sumac International Ltd,** none of the other judgements, in the long list of cases where Courts/Tribunals were called upon to exercise restraint against interference with invocation of bank guarantees (ie in **(1) U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd., (1988) 1 SCC 174; (2) United Commercial Bank v. Bank of India, (1981) 2 SCC 766; (3) Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineerings Works (P) Ltd, (1997) 6 SCC 450; (4) SBI v. Mula Sahakari Sakhar Karkhana Ltd.,**

(2006) 6 SCC 293; (5) State of Maharashtra & Anr. -v- M/s National Construction Company, Bombay & Anr (1996) 1 SCC 735; (6) Ansal Engineering Projects Ltd -v Tehri Hydro Development Corporation Ltd and Anr (1996) 5 SCC 450; (7) BSES Ltd. v. Fenner India Ltd, (2006) 2 SCC 728; (8) Gujarat Maritime Board -v- L&T Infrastructure Development Projects Ltd and Another (2016) 10 SCC 46; (9) Vinitec Electronics Private Ltd -v- HCL Infosystems Ltd., (2008) 1 SCC 544; (10) Adani Agri Fresh -v- Mehboob Sharif and Ors, AIR 2016 14 SCC 517) etc were even brought to the notice of the two judge bench of the Supreme Court in **Gangotri Enterprises Ltd**.

47. Further both the judgements, in **Ansal Engg. Projects Ltd. v. Tehri Hydro Development Corpn. Ltd., (1996) 5 SCC 450** and **Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineerings Works (P) Ltd, (1997) 6 SCC 450,** were rendered by a three-Judge Bench of the Supreme Court, and were therefore binding on the two judge bench which decided **Gangotri Enterprises Ltd**.

48. In ***Ansal Engg. Projects Ltd.*** **v.** ***Tehri Hydro Development Corpn. Ltd.*****, (1996) 5 SCC 450** a three-Judge Bench of the Supreme Court held that it is settled law that a bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction or the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary; unless fraud or special equity exists, is pleaded and prima facie established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if the dispute between the beneficiary and

the person at whose instance the bank guarantee was given by the bank, had arisen in performance of the contract or execution of the works undertaken in furtherance thereof; and the settled legal position which had emerged from the precedents of the Supreme Court was that, absent a case of fraud, irretrievable injustice and special equities, the Court should not interfere with the invocation or encashment of a bank guarantee so long as the invocation was in terms of the bank guarantee.

49. Another three judge bench of the Supreme Court, in ***Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd.*****, (1997) 6 SCC 450,** noted that numerous decisions of the Supreme Court, rendered over a span of nearly two decades, had laid down and reiterated the principles which Courts must apply while considering the question whether to grant an injunction which has the effect of restraining encashment of a bank guarantee. While considering it unnecessary to burden its judgment by referring to all of them, the Supreme Court opined that some of the more recent pronouncements on this point, where the earlier decisions have been considered and reiterated, were ***Svenska Handelsbanken*** **v.** ***Indian Charge Chrome*** **[(1994) 1 SCC 502] ,** ***Larsen & Toubro Ltd.*** **v.** ***Maharashtra SEB*** **[(1995) 6 SCC 68] ,** ***Hindustan Steel Workers Construction Ltd.*** **v.** ***G.S. Atwal & Co. (Engineers) (P) Ltd.*** **[(1995) 6 SCC 76] and State of Gujarat v. Amber Builders, (2020) 2 SCC 540.** It then held that the general principle, which was laid down by the Supreme Court, had been summarised in ***U.P. State Sugar Corpn.*** **[(1997) 1 SCC 568]** wherein it was held that the law relating to invocation of bank guarantees was 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; courts should be slow in granting an injunction to restrain realization of such a bank guarantee; courts have carved out only two exceptions ie a fraud in connection with such a bank guarantee which would vitiate the very foundation of such a bank guarantee; 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; and 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.

F. LARGER BENCH JUDGEMENTS BINDING ON SMALLER BENCHES OF THE SUPREME COURT:

50. Although the Supreme Court sits in divisions of two and three Judges for the sake of convenience, it would nonetheless be inappropriate for a Division Bench of two Judges to overrule the decisions of Division Benches of three. To do so would be detrimental not only to the rule of discipline and the doctrine of binding precedents but it will also lead to inconsistency in decisions on points of law. Consistency and certainty in the development of law and its contemporary status — both would be the immediate casualty. The law laid down by the Supreme Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength A Bench of lesser quorum cannot disagree or dissent from the view of the law

taken by a Bench of a larger quorum. (**Central Board of Dawoodi Bohra Community v. State of Maharashtra (2005) 2 SCC 754**; **Union of *India v. Raghubir Singh (Dead) By Lrs* (1989) 2 SCC 754**; **Trimurthi Fragrances (P) Ltd *Versus* Government of N.C.T. of Delhi, 2022 SCC OnLine SC 1247).**

51. The practice is to regard the precedent of a larger Bench as having greater efficacy and binding authority than the precedent of a Bench consisting of a smaller number of Judges. When a Bench consists of a larger number of Judges, then the decision is not merely of a greater number of Judges, but it is one arising from out of the joint deliberations and discussions of a greater number of Judges, and this fact may give to the decision of a Bench consisting of a larger number of Judges a greater binding authority than that of a Bench consisting of a smaller number of Judges. The decision of a larger Bench should be followed in preference to the decision of a smaller Bench. **(Trimurthi Fragrances (P) Ltd *Versus* Government of N.C.T. of Delhi, 2022 SCC OnLine SC 1247)**

52. It is in order to guard against the possibility of inconsistent decisions on points of law by different Division Benches, that the Rule has been evolved, in order to promote consistency and certainty in the development of the law and its contemporary status, that the statement of law by a Division Bench is considered binding on a Division Bench of the same or lesser number of Judges, and in order that such decision be binding, it is not necessary that it should be a decision rendered by a Constitution Bench. **(Union of India v. Raghubir Singh, (1989) 2 SCC 754).** All subsequent decisions have to be read in the light of the Larger Bench decision since they are decisions by

Benches comprised of lesser number of Judges. **(N. MEERA RANI VERSUS GOVERNMENT OF TAMIL NADU AND ANOTHER, 1989 4 SCC 418).**

53. When a smaller Bench of the Supreme Court lays down a proposition contrary to and without noticing the ratio decidendi of the earlier larger Benches, such a decision will not become the law declared by the Supreme Court so as to have a binding effect under Article 141 of the Constitution on all the courts within the country. **(Sakinala Harinath v. State of A.P., 1993 SCC OnLine AP 195 (FB)).** A decision by a Bench of more strength cannot be overlooked to treat a later decision by a Bench of lesser strength as of a binding authority more so, when the attention of the Judges deciding the latter case was not invited to the earlier decisions available. **(N.S. Giri v. Corpn. of City of Mangalore, (1999) 4 SCC 697).**

54. The proper course for a High Court (or subordinate courts/tribunals) is to follow the opinion expressed by larger benches of the Supreme Court in preference to those expressed by smaller benches of the Supreme Court. This practice has now crystallized into a rule of law declared by the Supreme Court. **(UNION OF INDIA & ANR VS K.S. SUBRAMANIAN, AIR 1976 SC 2433).**

55. We must, therefore, follow the opinion expressed by the three judge bench of the Supreme Court in **Ansal Engg. Projects Ltd. v. Tehri Hydro Development Corpn. Ltd., (1996) 5 SCC 450** and **Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineerings Works (P) Ltd, (1997) 6 SCC 450**, in preference to those expressed by the two judge bench in **Gangotri Enterprises Ltd,** more so as the attention of the latter bench was not drawn to the former two.

G. A VIEW SIMILAR TO "GANGOTRI" BEING TAKEN BY HIGH COURTS: ITS EFFECT:

56. Sri Buddy Ranganathan, Learned Counsel for the Appellant, would submit that the principle that encashment of a Bank Guarantee to recover liquidated damages ought to be restrained, especially when a Court/Arbitrator has permitted such encashment, without a finding that loss or injury is caused to the beneficiary, has been upheld in several judgments, (i) **Mahanagar Telephone Nigam Limited v. Finolex Cables (2017 SCC Online Del 10497**; (ii) **Saisudhir Energy Ltd. v. NTPC Vidyut Vyapar Nigam Ltd. 2016 SCC Online Del 5093;** (iii) the order passed by the Single Judge in **Saisudhir Energy** was taken in Appeal before the DB viz. **NTPC v. M/s Saisudhir Energy Limited (DB): (2018) SCC Online Del 13477**; the Division Bench partly allowed the Appeal particularly on the finding as to whether actual loss needed to have been proved or not for the purpose of claiming liquidated damages; the Division bench also modified the quantum of liquidated damages and permitted encashment of the Bank Gaurantee to that extent; the Supreme Court, in the Special Leave Petition (C) filed thereagainst, issued notice and granted stay of invocation of the bank guarantee; (iv) **Satluj Jal Vidyut Nigam Limited v. Jai Prakash Hyundai Consortium (2006 (88) DRJ 332), Para 12, 23, 24, 26);** and (v) **Continental Transport Organisation Vs ONGC 2015 SCC Online Bombay 4918 Paras 77 to 82**.

57. (i) In ***Satluj Jal Vidyut Nigam Ltd. v. Jai Prakash Hyundai Corsortium*, 2006 SCC OnLine Del 339,** the appeal before the Division Bench of the Delhi High Court was preferred by Satluj Jal Vitran Nigam Ltd. ('SJVN') against the order of the learned Single Judge restraining them from invoking the existing Bank Guarantee given by the respondent towards performance

security and retention money for the purpose of recovery of outstanding ad hoc amount. The Respondent had filed a petition under Section 9 of the Arbitration & Conciliation Act, 1996 for grant of an interim order restraining SJVN from encashing the Bank Guarantee, i.e. Performance guarantees and guarantees in lieu of the retention money till their claims were finally settled in accordance with the modified Clause 67 of the General Conditions of the contract.

58. On behalf of SJVN, reliance was placed on ***Daewoo Motors India Ltd.*** **v.** ***Union of India*****, (2003) 4 SCC 690,** ***Federal Bank Ltd.*** **v.** ***V.M. Jog Engineering Ltd.*****, (2001) 1 SCC 663,** ***Dwarikesh Sugar Industries Ltd.*** **v.** ***Prem Heavy Engineering Works (I) Ltd.*****, (1997) 6 SCC 450,** ***Hindustan Steel Works Construction Ltd.*** **v.** ***Tarapore & Co.*****, (1996) 5 SCC 34, and** ***Larsen & Toubro Ltd.*** **v.** ***MSEB*****, (1995) 6 SCC 68.**

59. While expressing its complete agreement with the law relating to invocation of bank guarantee, as it emerged from the judgments cited on behalf of the appellant, the Division Bench extracted a portion of the judgements in ***U.P. State Sugar Corporation*** **v.** ***Sumac International Ltd.*****, (1997) 1 SCC 568,** and ***Dwarikesh Sugar Industries's*** *case*, and, after scrutininsing the facts pleaded by the parties in respect of the subject bank guarantees, opined that they were, prima-facie, of the opinion that the respondent was entitled to an interim protection by the Court by way of injunction against encashment of bank guarantees as they found that SJVN never laid any claim for breach of contract against the respondent during the validity of the bank guarantee, and thereby the said bank guarantees had outlived its purpose; SJVN had not invoked the said guarantees till the Respondent had moved the court, under Section 9 of the Arbitration and Conciliation Act, 1996, for an injunction order

against encashment of the bank guarantees till a final arbitral award was passed; and it appeared that the appellant had no grievance against performance of the contract, and was therefore not justified in threatening invocation of the bank guarantee allegedly on the ground that the Respondent did not agree to renew the said guarantees.

60. While holding that faith and reliance upon the integrity of standby payment was vital for international as well as national commercial activities and, therefore, a non-interventionist approach had been adopted by Courts, the Division Bench opined that the question was what should be the approach if the issuer was about to make payment to the beneficiary in circumstances where the beneficiary had no ground to make a documentary demand or was doing so in contravention of its agreement with the third party contained in the underlying transaction. The Division Bench then referred to ***TTI Team Telecom International Ltd.*** **v.** ***Hutchison:*** **[2003] 1 All ER (Comm) 914,** and held that a performance guarantee which was sought to be invoked not in terms of the agreement, but for something which was alien to the agreement, would be unconscionable and lack bona fides; they agreed with the submission, made on behalf of the respondent, that the call was made in bad faith; and hence the impugned order, to the extent it related to passing an injunction order against encashment of the bank guarantees, was being upheld.

61. It is relevant to note that, in the subsequent judgement in **TRF Limited v. ENERGO Engineering Projects Limited, 2017 SCC OnLine Del 7011,** the Delhi High Court opined that the decision, in ***Satluj Jal Vidyut Nigam Limited*** **v.** ***Jai Prakash Hyundai Consortium*****,** when carefully

examined bring out the distinguishing features as far as the facts are concerned; and they also have to be reconciled with the law repeatedly stressed by the Supreme Court in several of its judgments ie in **U.P. State Sugar Corporation v. Sumac International Limited; Svenska Handelsbanken v. Indian Charge Chrome (1994) 1 SCC 502, Itek Corporation v. First National Bank of Boston 566 Fed Supp. 1210. U.P. Coop. Federation Limited v. Singh Consultants & Engineers (P) Ltd. (1988) 1 SCC 174, BSES Limited v. Fenner India Limited, Himadri Chemicals Industries Limited v. Coal Tar Refining Company (2007) 8 SCC 110, Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engineering Coop. Ltd. (2007) 6 SCC 470, Vinitec Electronics Private Limited v. HCL Infosystems Limited, Gujarat Maritime Board v. Larsen and Toubro Infrastructure Development Projects Limited (2016) 10 SCC 46 and Adani Agri Fresh Limited v. Mahaboob Sharif.**

62. What the Division Bench of the Delhi High Court, in ***Satluj Jal Vidyut Nigam Limited***, failed to consider was that the Supreme Court, in several of the judgements cited hereinabove (a few of which was noted by the Division Bench in this very same order), has answered the question which the Delhi High Court had posed to itself, ie ***"what should be the approach if the issuer was about to make payment to the beneficiary in circumstances where the beneficiary had no ground to make a documentary demand or was doing so in contravention of its agreement with the third party contained in the underlying transaction"***, and has categorically held that Courts should refrain from interfering with invocation of the bank guarantee. Unlike the Judgement in ***Hutchison*** on which the Division Bench of the Delhi High Court

had placed reliance upon, it is the judgements of the Supreme Court, referred to earlier, which is binding on all Courts/Tribunals in India.

63. In view of Article 141 of the Constitution, all courts in India are bound to follow the decisions of the Supreme Court. Judicial discipline requires, and decorum known to law warrants, that appellate directions should be taken as binding and followed. In the hierarchical system of courts which exists, it is necessary for each lower tier to accept loyally the decisions of the higher tier. The judicial system only works if someone is allowed to have the last word and if that last word, once spoken, is loyally accepted. (**Cassell & Co. v Broome: (1972) 1 ALL ER 801 (HL); SMT. KAUSHALYA DEVI BOGRA (SMT) AND ORS. VERSUS THE LAND ACQUISITION OFFICER, 1984 2 SCC 324).**

64. When the Supreme Court decides a principle it would be the duty of the High Court or a subordinate Court (or for that matter a statutory tribunal) to follow the decision of the Supreme Court. A judgment of the High Court (or Tribunal) which refuses to follow the decision and directions of the Supreme Court, or seeks to revive a decision of the High Court which had been set aside by the Supreme Court, is a nullity. (**Narinder Singh v. Surjit Singh, (1984) 2 SCC 402); Kausalya Devi Bogra v. Land Acquisition Officer, (1984) 2 SCC 324**;**Municipal Corporation of Guntur, Guntur v. B. Syamala Kumari, 2006 SCC OnLine AP 838; Somprakash v. State of Uttarakhand, 2019 SCC OnLineUtt 648; Director of Settlements, A.P. v. M.R. Apparao, (2002) 4 SCC 638).** In the hierarchical set up of our courts, the High Court is bound by the decisions of the Supreme Court. **(Sakinala Harinath v. State of A.P., 1993 SCC OnLine AP 195 (FB)).**

65. In **DWARIKESH SUGAR INDUSTRIES LTD VERSUS PREM HEAVY ENGINEEING WORK, 1997 6 SCC 450,** the Supreme Court held that, when a position in law is well settled as a result of judicial pronouncement of the Supreme Court, it would amount to judicial impropriety for the subordinate courts, including the High Courts, to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position; such judicial adventurism cannot be permitted; and it was time that this tendency stopped.

66. Reliance placed on ***Satluj Jal Vidyut Nigam Limited*** is, therefore, of no avail.

67. (ii) In **Mahanagar Telephone Nigam Limited v. Finolex Cables (2017 SCC Online Del 10497,** the appeal before the Division Bench of the Delhi High Court was filed by Mahanagar Telephone Nigam Limited *('MTNL')* under Section 37 of the Arbitration and Conciliation Act, 1996 challenging the order passed by the Single Judge accepting the objections filed by the Finolex Cables Limited *('FCL')* against the arbitral award.

68. MTNL had entered into a contract with FCL for supply of four sizes of Jelly Filled Cables (JFCs). Pursuant to the said contract, a purchase order was placed upon FCL prescribing the date of delivery of the aforesaid goods, the entire quantity of which was to be supplied to the Delhi/Bombay unit Three sizes of cables were duly supplied in accordance with the delivery schedule. However, the fourth size was a unique type of cable requiring approval of the Telecom Engineering Centre *('TEC')*, which admittedly could not be supplied by FCL by the specified date. In terms of the contract, FCL had furnished a performance bank guarantee. Clause 9.2 of the purchase order/Contract

stated that the MTNL reserved the rights to cancel the balance quantity of the order if the supply was not made within the delivery period or the extended delivery period. Clause 17 provided for liquidity damages.

69. According to FCL, after the type approval was granted (which was evidently after the stipulated delivery period), without once calling upon FCL to deliver the cable for a period of over nine years, MTNL had asked FCL to extend the PBG, which was extended 15 times. By its letter dated 7th April, 1992, FCL requested MTNL to short close the balance portion of the purchase order without any commercial implications, on account of there being no follow up by MTNL which, however, contended that, by keeping the PBG alive as and when demanded by them, there was an implied consent by FCL to keep the purchase order alive. MTNL addressed a letter to the Bank invoking the PBG furnished by the FCL as guarantee towards the contract. Thereafter FCL wrote a letter to MTNL stating, *inter alia*, that, as the requirement of the cable did not exist, financial burden should not be imposed upon them by encashing the bank guarantee, and the charges, deducted for the bank guarantee, be reimbursed to it. MTNL claimed liquidated damages of Rs. 40,70,756/- and recovered Rs. 18,37,650/- from the available performance bank guarantee and called upon FCL to deposit the balance Rs. 22,33,106/-. Thereafter, MTNL also invoked a bank guarantee for Rs. 20,79,320/- furnished by FCL in another contract, appropriating the amount thereof towards the claimed damages in the present contract. Another bank guarantee for Rs. 1,56,100/-, furnished by FCL towards another contract, was also encashed by MTNL and appropriated towards the amount claimed by it as liquidated damages.

70. The arbitrator passed an Award holding that there was implied consent of both FCL and MTNL to keep the purchase order alive; while MTNL did not follow up with FCL to deliver the material for a period of 12 years, nevertheless, the delay of 12 years in supply of the ordered material and lack of subsequent reminders by FCL to supply the material, left them no choice but to cancel the purchase order; there was no material to show that parties knew that the loss was likely to result from non-delivery of the cables; if the agreed liquidated damages were to be enforced, it must be a result of some genuine pre-estimated damages; and, in view of clause 7.4 of the purchase order, MTNL was justified in invoking the bank guarantees to a maximum of 10% of the ordered value. i.e., Rs. 36,75,300/-.

71. On a challenge to the arbitral award under Section 34 of the Arbitration Act, the Single Judge of the Delhi High Court placed reliance on ***Kailash Nath Associates* v. *Delhi Development Authority* (2015) 4 SCC 136,** and concluded that the claim of Rs. 36,75,300/- as liquidated damages was based on no evidence and, consequently, invocation of the bank guarantee by MTNL was unjustified.

72. On the question whether encashment of the bank guarantees, and appropriation of the amounts towards liquidated damages, was justified, the Division Bench of the Delhi High Court relied on ***Kailash Nath*** and held that, under Section 74 of the Contract Act, to claim liquidated damages even where liquidated damages may be specified, the party so claiming, is entitled only to "*reasonable compensation*" not exceeding the amount specified; even in a contract, where it is difficult to prove the actual damage or loss, proof thereof is not dispensed with to arrive at "*reasonable compensation*"; it was only in

cases where damages or loss was impossible to prove, that the amount named in the contract as liquidated damages, if it is a genuine pre-estimate of damage or loss, can be so awarded; it was incumbent on MTNL to prove before the Arbitrator that it had suffered some loss, even though it may not have to prove the actual loss; and while the Arbitrator had found that MTNL suffered no loss whatsoever, MTNL did not challenge this finding.

73. The Division Bench held that the extent of jurisdiction of the court, while dealing with the challenge to an arbitral award, was examined by the Supreme Court in ***Renusagar Power Co. Ltd.* v. *General Electric Co:* 1994 Supp (1) SCC 644, *Associated Builders* v. *DDA*: (2015) 3 SCC 49; *NHAI* v. *Hindustan Construction Co. Ltd.*** It then referred to para 43.6 of ***Kailash Nath,*** and held that no material in this regard was produced before the arbitrator; MTNL had not even asserted that it had suffered loss; the Arbitrator had not even examined the challenge by FCL to the encashment of the bank guarantees furnished by FCL to MTNL for other contracts, and in permitting the proceeds to be applied towards liquidated damages claimed by MTNL in the present case; and in any case, keeping in mind the view taken by the Single Judge *qua* the Award of the liquidated damages for which these two bank guarantees were encashed, there was no justification at all for encashment of these two bank guarantees. The appeal was dismissed with costs, holding that it was completely devoid of merits.

74. (iii) In **Continental Transport Organization Pvt. Ltd. v. Oil & Natural Gas Corporation Ltd., 2015 SCC OnLine Bom 4918,** the respondent, after encashing two bank guarantees and recovering the said amount from the bank, got the subject work executed through another contractor at a reduced

rate. The petitioner claimed that the total value of the work under the said two work orders was about Rs. 6 lacs whereas the respondent had invoked the two performance bank guarantees for the sum of Rs. 15,90,562/-. The dispute between the parties was referred to arbitration, and the award, rejecting the claims of the petitioner, was subjected to challenge under Section 34 of the Arbitration Act. The question that arose, for the consideration of the Bombay High Court, was whether the respondent was justified in encashing and appropriating the retention money deposit and the performance bank guarantees in view of the petitioner not having executed the two work orders on the ground that the reduction in freight/transportation charges by the respondent was unlawful; and whether the respondent was liable to prove any loss, if suffered, in view of the petitioner refusing to execute the two work orders.

75. It is in this context that the Bombay High Court held that the argument that the respondent had not recovered any liquidated damages from the petitioner or that encashment of the performance bank guarantee and the retention money deposit was neither under Section 73 nor Section 74 of the Indian Contract Act was untenable and contrary to Sections 73 and 74 of the Indian Contract Act, 1872; the respondent had neither pleaded nor proved that the amount mentioned in the contract, under the liquidated damages clause, was a reasonable compensation or was a genuine pre-estimate of the loss; though the value of work under the said two work orders was about Rs. 6 lacs, the respondent had appropriated a larger amount, and that also without proving breaches on the part of the petitioner and the loss suffered if any by the respondent due to such alleged breaches; they were in agreement with the views of the Queen's Bench Division (Commercial Court), in **Cargill**

International SA v. Bangladesh Sugar & Food Industries Corp. (1996) 4 All England Law Reports 563, that the performance bond provided to the buyer was not a windfall payment, it was necessary to imply into the contract that moneys paid under the bond, which exceeded the buyer's actual loss, would be recoverable by the seller, and the buyer will account to the seller for the proceeds of the bond, retaining only the amount of any loss suffered as a result of the breach of contract by the seller; the purpose of furnishing such performance bank guarantees was to secure the performance of the contract and to make the said sums available with the respondent to appropriate the same only against recovery, if any, of the respondent against the petitioner under the contract or for liquidated damages if such loss was capable of being calculated and was proved; in **Kailash Nath Associates v. Delhi Development Authority: 2015 SCC OnLine SC 19,** the Supreme Court had classified the measure of damages under Section 74 of the Indian Contract Act in detail, and had held that, if damage or loss was not suffered, the law did not provide for a windfall, the expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensed with, only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded; and, though a specific issue was raised by the petitioner that the respondent had not pleaded that they had suffered any loss due to non execution of the two work orders, the arbitrator had not dealt with the said issue while rejecting the claim for refund of the amount illegally appropriated by the respondent. The impugned award, in so far as rejection of the claim for refund

of the amount under the two performance bank guarantees was concerned, was set aside.

76. As reliance was placed by the Bombay High Court on the judgement of the Supreme Court in **Kailash Nath Associates v. Delhi Development Authority: 2015 SCC OnLine SC 19,** it is useful to take note of the law declared therein.

77. In ***Kailash Nath Associates v. DDA*****, (2015) 4 SCC 136 : (2015) 2 SCC (Civ) 502,** the Supreme Court held that the law on compensation for breach of contract under Section 74 could be stated to be as follows: (1) where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation; (2) Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act; (3) Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section; (4) The section applies whether a person is a plaintiff or a defendant in a suit; (5) The sum spoken of may already be paid or

be payable in future; (6) The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded; and (7) Section 74 will apply to cases of forfeiture of earnest money under a contract.

78. The scope and ambit of Sections 73 and 74 of the Indian Contract Act, on the compensation/liquidated damages payable on breach of Contract, was considered in ***Kailash Nath Associates***, and not the law governing interference by Courts to restrain invocation of unconditional bank guarantees.

79. Both the judgements, in **Mahanagar Telephone Nigam Limited** and **Continental Transport Organization Pvt. Ltd,** dealt with a post invocation of bank guarantee situation. It is in such circumstances that the claim of the Appellant for liquidated damages was examined, and, as it was found that the Appellant had not shown that it had suffered any loss, it was held that encashment of the bank guarantee was wholly unjustified. In the present case also, the entitlement of the Respondents to claim liquidated damages will undoubtedly be subjected to examination when the main appeal is heard. As at present, at the interlocutory stage of the proceedings, we are only concerned with the question whether or not the Respondents should be restrained from invoking the bank guarantee pending final adjudication of the Appeal. Reliance placed by Mr. Buddy Ranganathan, learned Counsel, on **Mahanagar Telephone Nigam Limited** and **Continental Transport Organization Pvt. Ltd,** is misplaced.

80. (iv) Three vessels, which stood berthed off the coast of Kolkata, constituted the subject matter of controversy in the petition, preferred under Section 9 of the Arbitration and Conciliation Act, 1996, in **THAR CAMPS PVT LTD VS INDUS RIVER CRUISES PVT LTD : 2021 SCC Online Del 3150.** The Delhi High Court relied on the judgement of the Supreme Court in ***Union of India* v. *Raman Iron Foundry*, (1974) 2 SCC 231** wherein it was held that a claim for damages for breach of contract was not a claim for a sum presently due and payable; damages are the compensation which a Court of Law gives to a party for the injury he has sustained and the plaintiff does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach; he gets compensation as a result of the fiat of the Court; therefore, it has to be decided by the Court, in the first instance, that the defendant is liable and then it proceeds to assess what that liability is; till that determination, there is no liability at all upon the defendant; and there would not be any debt payable unless the Court determines the liability.

81. The Delhi High Court then took note of the judgements in ***ONGC Ltd.* v. *Saw Pipes Ltd.*, (2003) 5 SCC 705,** and ***Keshoram Industries & Cotton Mills Ltd.* v. *Commissioner of Wealth Tax (Central), Calcutta*, (1966) 2 SCR 688,** wherein the Supreme Court considered the meaning of the expression “debt owed”. It then held that, in its prima facie view, it was extremely doubtful whether “premature” determination of the agreement, before expiry of the period”, could mulct the Respondent with the liability to make payments, in accordance with Clause 6(A) of the agreement, even for periods when the vessels remained non-operational; it could not be gainsaid that the petitioner may, in the event of it succeeding in establishing that the agreement was being prematurely terminated, be entitled to some form

of compensation or recompense; that, however, would depend on the petitioner succeeding in proving loss, and the damages sustained by or as a consequence thereof; these were matters of trial - or, in the present case, arbitration; the agreement was, as yet, not terminated; the claim of the petitioner was predicated on a possible termination of the agreement during the lock in period; the supposed liability would arise only in the event of termination of the agreement during the lock in period; it was doubtful whether the prayer for securing the claim could at all be maintained at this point, when the agreement was yet to be terminated; the submission, urged on behalf of the Respondent, that Section 9 of the 1996 Act could not be used to secure any speculative claim for damages merited acceptance; and in ***Intertoll*** the Delhi High Court had cautioned even against directing furnishing of a bank guarantees to secure claims which were merely speculative in nature.

82. The Delhi High Court concluded holding that, inasmuch as the claim, of the petitioner against the respondents, for Rs. 18 crores, was not supported, *prima facie*, by the material on record, the vessels, the cumulative value of which was far greater than Rs. 18 crores, could not be detained in the present proceedings.

83. None of the above referred judgements of the Supreme Court, requiring Courts to refrain from interference with the invocation of bank guarantees except in the case of fraud or special equities, were noticed by the Delhi High Court in **THAR CAMPS PVT LTD VS INDUS RIVER CRUISES PVT LTD : 2021 SCC Online Del 3150** nor did the question, whether invocation of an unconditional bank guarantee could be stayed till the validity of the Order, levying liquidated damages in terms of the underlying contract was examined,

arise for consideration therein. Reliance placed on the aforesaid judgement is wholly misplaced.

84. At the cost of repetition, what arises for consideration in this I.A is only whether encashment of the bank guarantee can be stayed pending disposal of the main appeal, and the question whether the Respondents are entitled to impose liquidated damages in terms of the underlying contract would necessitate examination when the main appeal is finally heard and decided.

85. (v) In **Saisudhir Energy Ltd vs NTPC: (2016) SCC Online Del 5093,** cross-objections were filed, by both parties to an arbitral award, under Section 34 of the Arbitration and Conciliation Act, 1996. The Petitioner had challenged the Award whereby the Arbitral Tribunal, while holding that the Respondent had not suffered any loss and was not entitled for any damages, nonetheless granted them damages of Rs. 1.2 Crores. Reliance was placed by the Petitioner on Sections 73 and 74 of the Indian Contract Act, and the judgment of the Supreme Court in ***Fateh Chand* v. *Balkishan Dass*, AIR 1963 SC 1405, *Maula Bux* v. *Union of India*, (1969) 2 SCC 554, *Union of India* v. *Rampur Distillery and Chemicals Co. Ltd.*, (1973) 1 SCC 649, *ONGC* v. *Saw Pipes Ltd.*, (2003) 5 SCC 705, *State of Kerala* v. *United Shipper and Dredgers Ltd.*, AIR 1982 Ker 281, *Praveen Oberoi* v. *Raj Kumari*, (2014) 207 DLT 116 and *Vishal Engineers & Builders* v. *Indian Oil Corporation Ltd.*, (2012) 1 Arb.LR 253 (Delhi) (DB),** to contended that the Respondent was not entitled for any damages, as it was a simple case of breach of contract; at best they were entitled for compensation only to the extent of loss suffered, and as the Respondent had not suffered any loss, the question of compensation or damages did not arise; if the Court permitted the

Respondent to encash Bank Guarantees for a short delay of a few months, it would sound the death knell of the project, which was to last for 25 years.

86. The Delhi High Court held that Clause 4.6 of the agreement provided the formula/methodology for genuine pre-estimate of damages; the quantum of delay and the quantum of electricity were relevant factors in operating Clause 4.6; the liquidated damages provided under Clause 4.6 was a genuine pre-estimate of the damages, agreed to by the parties, and had nothing to do with actual proof of loss; Section 74 of the Contract Act stipulated that, in case of breach of contract, the party complaining of the breach was entitled to receive reasonable damages whether or not actual loss was proved to have been caused by such breach; in the present case, breach of contract is admitted by the petitioner; no doubt, loss was not proved; there were pleadings by way of defense on behalf of the Respondent that loss had been suffered due to non-supply of power to the consumers in time; the Respondent was pressing for compensation named in Clause 4.6 of the Contract; it was a genuine pre-estimate of the damages and it was difficult to assess; admittedly, there was breach on the part of the Petitioner on account of delayed supply of power; the provision for damages under Clause 4.6 is in the nature of fixed compensation, and had nothing to do with actual damages to be proved; and the present case was directly covered by the decisions of the Supreme Court in ***Saw Pipes*** and ***Construction and Design Services*** (supra) wherein the situation as in the present case was similar to a large extent.

87. Considering the peculiar facts and circumstances of the present case, and relying on ***Construction and Design Services*****,** the Delhi High Court was of the view that award of half the amount claimed by the Respondent was

reasonable compensation; the reasons for awarding half the amount was because the Respondent had neither invested any amount in the project nor had they proved any actual damage, although there was no such requirement in law; the Petitioner had incurred Rs. 193 crores on the project which was to last for 25 years; the delay was only for a few months; and the Petitioner would suffer hardship, and it would sound the death of knell of the project.

88. (vi) In the appeal preferred thereagainst, in **NTPC VIDYUT VYAPAR NIGAM LTD VS SAI SUDHIR ENERGY LTD: (2018) SCC Online Del 13477,** the Division Bench of the Delhi High Court quoted different portions of the majority award to highlight that the findings recorded therein, on the question of liquidated damages, were unacceptable and a challenge thereto merited acceptance. After referring to the decision of the Supreme Court in ***Kailash Nath Associates*, *Fateh Chand* v. *Balkishan Das*, (1964) 1 SCR 515; *Maula Bux* v. *Union of India*, (1969) 2 SCC 554 and *Saw Pipes Ltd,*** the Division Bench held that the principles laid down therein state that, in case of breach, the aggrieved party can receive as reasonable compensation, the sum named in the contract as liquidated amount if it is a genuine pre-estimate of damages and is found to be such by the Court; in other cases, where a sum is named in a contract as liquidated damages, only reasonable compensation can be awarded not exceeding the amount so stated as damages; similarly where the amount fixed is in the nature of penalty, only a reasonable amount of compensation, not exceeding the penalty amount, can be awarded; in view of the language of Section 74, breach of contract, damage or loss caused as a consequence of the breach, is a *sine qua non*; the Party must prove actual loss and damage; in those class of cases where damage or loss is difficult or impossible to prove, the liquidated amount named in the contract, if it is a

genuine pre-estimate of damage or loss, can be awarded; this is the purport of the expression "whether or not actual damage or loss is proved to have been so caused thereby", used in Section 74 'of the Contract Act; it was difficult, *albeit* impossible, to prove the quantum of damages, which should be awarded and paid in case of a breach on account of delay; the Respondent must claim damages when there is a breach of the contract of this nature; the damages stipulated in Clause 4.6 was not a genuine pre-estimate of the loss caused; it would be appropriate and proper that the Petitioner is asked to pay damages @ Rs. 1,00,000/- per megawatt per day for the entire period; and the Petitioner must also pay the Bank guarantee charges which had been paid by the Respondent during the pendency of arbitration proceedings, before the Single Judge and the Division Bench; and Rs. 20.70 crores plus Bank guarantee charges should be paid by Saisudhir Energy within 6 weeks, failing which it would be open for the Appellant to encash the Bank guarantee and recover Rs. 20.70 crores and also Bank guarantee renewal charges.

89. No order of a subordinate Court, even that of a High Court, can be construed to run counter to the Supreme Court's order. **(Mohd. Aslam v. Union of India, (1997) 5 SCC 475)**. The law declared by the Supreme Court binds Courts in India (**Rajeswar Prasad Misra v. State of W.B., AIR 1965 SC 1887)**. It is the duty of the High Court (as also statutory tribunals), whatever be its view, to act in accordance with Article 141 of the Constitution of India and to apply the law laid down by the Supreme Court. Judicial discipline to abide by the declaration of law, of the Supreme Court, cannot be forsaken by any Court, be it even the highest Court in a State, oblivious of Article 141 of the Constitution of India. (**Chandra Prakash v. State of UP, (2002) 4 SCC 234; State of Punjab v. Bhag Singh, (2004) 1 SCC 547 : 2004 AILD 204 (SC);**

and State of Orissa v. DhaniramLuhar, (2004) 5 SCC 568 : 2004 AILD 277 (SC)). **838).** Reliance placed on **Saisudhir Energy Ltd vs NTPC: (2016) SCC Online Del 5093** and **NTPC VIDYUT VYAPAR NIGAM LTD VS SAI SUDHIR ENERGY LTD: (2018) SCC Online Del 13477** is therefore of no avail.

90. (vii) In the special leave petition filed against the Order of the Division Bench of the Delhi High Court, in **M/S. SAISUDHIR ENERGY LTD v. M/S. NTPC VIDYUT VYAPAR NIGAM LTD: (SLP No. 4289-4290/2018),** the Supreme Court, while directing notice to be issued by its order dated 09.02.2018, directed, as an interim measure, that NTPC shall not encash the bank guarantees in question unless already invoked and SEL shall keep them alive.

91. It is well settled that interlocutory orders have no finality and are, therefore, not binding as a precedent. There is no finality to an interlocutory order, and interim orders passed by Courts on certain conditions are not precedents. (***Empire Industries Limited* v. *Union of India:* (1985) 3 SCC 314; *M. Vijaya Kumar* v. *General Manager, Milk Products Factory, Andhra Pradesh Dairy Development Cooperative Federation Ltd:* (1990) 3 ALT 382)**. The contention, relying on the aforesaid interlocutory order of the Supreme Court, that the law declared in a series of judgements of the Supreme court, on invocation of bank guarantees, should not be followed, necessitates rejection.

H. IDENTICAL ISSUES HAVE ALREADY BEEN DECIDED BY THIS TRIBUNAL EARLIER:

92. Questions, more or less identical to those raised before us in the present I.A, were also raised earlier before this Tribunal in **Shapoorji Pallonji Energy**

(Gujarat) Private Limited v. Gujarat Electricity Regulatory Commission, 2017 SCC OnLine APTEL 35, and reliance was placed on behalf of the Appellants, in that case, on ***Gangotri, Raman Iron Foundry*** and **Kailash Nath Associates.**

93. Among the contentions urged on behalf of the Appellant, before this Tribunal in **Shapoorji Pallonji Energy (Gujarat) Private Limited**, were that the Contract Performance Guarantee was not invocable to realise liquidated damages which can accrue only when there is any proven loss/damage suffered by the Respondent; restraint of such action till final adjudication on merits will not cause any harm to the Respondent since the guarantee continued to be valid; the judgment of the Supreme Court, in ***Gangotri Enterprises Limited*** **v.** ***Union of India*** **[(2016) 11 SCC 720**, is relevant and covers this case; it supports the contention that the sum claimed by the Respondent is pending adjudication and hence is not at present due; and, hence, the Bank Guarantee cannot be invoked.

94. After referring to ***Ansal Engineering Projects Ltd.*** **v.** ***Tehri Hydro Development Corporation Ltd :*** **(1996) 5 SCC 450; Hindustan Steel Workers Construction Ltd.** ***v.*** **G.S. Atwal Co. (Engineers) (P) Ltd: (2009) 5 SCC 313; Hindustan Steelworks Construction Ltd.** ***v.*** **Tarapore & Co:*(2009) 5 SCC 313;* U.P. Coop. Federation Ltd.** ***v.*** **Singh Consultants and Engineers (P) Ltd: (2009) 5 SCC 313;** ***Mahatma Gandhi Sahakara Sakkare Karkhane*** **v.** ***National Heavy Engineering Cooperative Limited*****: (2007) 6 SCC 470;** ***Vinitec Electronic Private Limited*** **v.** ***HCL Infosystem Ltd:*** **(2008) 1 SCC 544; U.P. State Sugar Corpn.** ***v.*** **Sumac International Ltd: (2015) 4 SCC 136; BSES Ltd.** ***v.*** **Fenner India Ltd: (2009) 5 SCC 313;**

Adani Agri Fresh* v. *Mehboob Shariff*: AIR 2016 SC 92;** and **Himadri Chemicals Industries Ltd. *v.* Coal Tar Refining Company: *(2007) 8 SCC 110, this Tribunal summarised the principles laid down by the Supreme Court as follows :

> *"……The Bank Guarantee is an independent contract between the bank and the beneficiary thereof. The bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable Bank Guarantee. The dispute between the beneficiary and party, at whose instance the bank has given the guarantee is immaterial and is of no consequence. The liability of the bank is absolute and unequivocal. The bank has to only verify whether the amount claimed is within the terms of the Bank Guarantee or Letter of Credit.* ***Any payment by the bank would obviously be subject to the final decision of the court or the tribunal. At the stage of invocation of Bank Guarantee, there is no need for final adjudication and decision on the amount due and payable by the person giving the Bank Guarantee.*** *The Courts should not interfere with invocation and encashment of Bank Guarantee unless there is fraud of egregious nature of which the beneficiary seeks to take advantage and which vitiates the entire underlying transaction or a case where irretrievable injustice is likely to be caused to either of the parties. That is to say, there must be special equities in favour of injunction such as when irretrievable injury or irretrievable injustice would occur if injunction were not granted. Since in most cases payment of money under 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.* ***There is no question of making out any prima facie case much less strong evidence or special equity for interference by way of injunction by the court in preventing encashment of Bank Guarantee. The bank must honour Bank Guarantees free from interference by the courts, otherwise trust in commerce, internal and international would be damaged irreparably.*** *There has to be glaring circumstances of deception or fraud warranting interference.* ***Final adjudication is not a pre-condition to invoke the Bank Guarantee and that is not a ground to issue injunction restraining the beneficiary from enforcing the Bank Guarantee. The mere fact that the Bank Guarantee refers to the principal agreement without referring to any specific clause in the preamble of the deed of guarantee does not make the guarantee furnished by the bank to be a conditional one*** *.. ……" (emphasis supplied)*

95. After having noted that heavy reliance was placed on behalf of the Appellants on the judgment of the Supreme Court in ***Gangotri*****,** this Tribunal opined that the said judgment was not applicable to the case before it; they did not think that, in that case, the Supreme Court took a different view from the law settled by it in a catena of judgments crystallising principles underlying invocation and encashment of Bank Guarantees; in fact, after referring to a number of leading cases, which included ***U.P. State Sugar Corporation*****,** the Supreme Court had in ***Gangotri*** said that these judgments lay down general principles relating to Bank Guarantees, and there can be no quarrel over the propositions laid down in those cases; the Supreme Court then reiterated that

every case had to be decided with reference to the facts of the case involved therein, and then discussed the peculiar facts of the case before it; reliance was placed by the Appellants on the observations of the Supreme Court, in ***Raman Iron Foundry,*** that the sum claimed was neither an admitted sum, nor a sum which was adjudicated upon in any judicial proceedings, and that even in this case, the sum was not adjudicated upon; but it must be noted that this is not the only circumstance that weighed with the Supreme Court; perhaps the most important fact which distinguished it from other cases, and which was noted by the Supreme Court, was that the Bank Guarantee was in the nature of a Performance Guarantee furnished for execution work of a contract which was completed and the work, having been completed to the satisfaction of the Respondents, they had no right to encash the Bank Guarantee; thus, this case turned on its own peculiar facts; it did not take a view contrary to the view taken by the Supreme Court in earlier judgments that adjudication of claim is not a precondition for invocation and encashment of a Bank Guarantee; and the facts of ***Gangotri*** could never be equated with the facts of the present case.

96. This Tribunal then observed that reliance placed on **Kailash Nath Associates v. Delhi Development Authority: 2015 SCC OnLine SC 19** was also misplaced; in that case, the Supreme Court was considering the arbitrary forfeiture of earnest money by the DDA; one of the questions urged before the Supreme Court was whether even if there was a contractual stipulation in favour of the DDA, it could appropriate the earnest money without any loss being caused to it. The Supreme Court considered Section 74 of the Contract Act and *inter alia* held that damage or loss is *sine qua non* for the applicability of the Section; this judgment cannot be applied to the present case involving invocation and encashment of Bank Guarantee; the settled principles of law

laid down by the Supreme Court will have to be applied to it; and proof of loss or damage is not necessary for invocation and encashment of a Bank Guarantee.

97. The earlier order of this Tribunal, in **Shapoorji Pallonji Energy (Gujarat) Private Limited**, is a complete answer to the contentions raised in this appeal also, and we respectfully concur with the views expressed in the said judgement.

I. THE THREE JUDGE BENCH JUDGEMENT, IN "*ANSAL ENGG PROJECTS LTD*", HAS BEEN FOLLOWED BY THE SUPREME COURT EVEN IN JUDGEMENTS SUBSEQUENT TO "*GANGOTRI*":

98. Following the three judge bench judgement In ***Ansal Engg. Projects Ltd.* v. *Tehri Hydro Development Corpn. Ltd.*, (1996) 5 SCC 450,** the Supreme Court, in ***A.P. Pollution Control Board v. CCL Products (India) Ltd.*, (2019) 20 SCC 669,** held that a bank guarantee constituted an independent contract between the issuing bank and the beneficiary to whom the guarantee is issued; and such a contract is independent of the underlying contract between the beneficiary and the third party at whose behest the bank guarantee is issued.

99. After taking note of the submissions urged on behalf of the Appellant, and that reliance was placed by them, among others, on ***Gangotri Enterprises Ltd.* v. *Union of India*, (2016) 11 SCC 720,** the Supreme Court, in ***Standard Chartered Bank v. Heavy Engg. Corpn. Ltd.*, (2020) 13 SCC 574,** again followed the three judge bench judgement in ***Ansal Engg. Projects Ltd.* v. *Tehri Hydro Development Corpn. Ltd.*, (1996) 5 SCC 450,** and held

that the law relating to invocation of bank guarantees, with the consistent line of precedents of the Supreme Court, was well settled; the settled position in law that emerged from the precedents of the Supreme Court was that the bank guarantee is an independent contract between the bank and the beneficiary and the bank is always obliged to honour its guarantee as long as it is unconditional and irrevocable; the dispute between the beneficiary and the party at whose instance the bank has given the guarantee was immaterial and of no consequence; there were, however, exceptions to this rule ie when there was a clear case of fraud, irretrievable injustice or special equities; and the Court, ordinarily, should not interfere with the invocation or encashment of the bank guarantee so long as the invocation is in terms of the bank guarantee.

100. Even after the judgement in **Gangotri Enterprises Ltd. v. Union of India, (2016) 11 SCC 720**, the Supreme Court in ***A.P. Pollution Control Board v. CCL Products (India) Ltd.*, (2019) 20 SCC 669,** and ***Standard Chartered Bank v. Heavy Engg. Corpn. Ltd.*, (2020) 13 SCC 574,** has followed ***Ansal Engg. Projects Ltd*** which, as noted hereinabove, followed the long line of judgements of the Supreme Court wherein Courts were cautioned to refrain from interfering with the invocation of a bank guarantee. It is relevant to note that despite the judgement in **Gangotri Enterprises Ltd** being brought to its notice, the Supreme Court, in ***Standard Chartered Bank,*** followed ***Ansal Engg. Projects Ltd,*** and not **Gangotri Enterprises Ltd**.

III. DOES THE PRESENT CASE FALL UNDER THE EXCEPTION OF "SPECIAL EQUITIES"?

101. Placing reliance on ***Himadri* Chemicals Industries Ltd. -v- Coal Tar Refining Company, *(2007) 8 SCC 110***, Sri Anand Ganesan, Learned Counsel

for GUVNL, would submit that, in this Interlocutory Application, the Appellant does not even plead fraud or special equities; and this by itself is sufficient to reject the injunction sought for.

102. It is true that no plea has been taken by the Appellant regarding their case falling within the exceptions to the rule that Courts/Tribunals should refrain from interfering with the invocation of bank guarantees. Even during the course of oral submissions, no contention was put forth on behalf of the Appellant that invocation of the subject bank guarantees should be stayed, either because of egregious fraud or on account of special equities.

103. In his written submissions, Sri Buddy Ranganathan, Learned Counsel for the Appellant, has however contended that there are also special equities in favour of restraining the respondents from encashing the Bank Guarantees. The special equities, according to the Learned Counsel, are two fold, the first of which is on the merits of the Appellant's claim before the CERC ie on their entitlement in terms of the underlying contract, and the second on the ground that the interim order, restraining the Respondents from encashing the bank guarantees, has been in force for around four years.

104. While the first contention, on the merits of the order of the CERC, must await a hearing of the main appeal and, as shall be detailed hereinafter, do not constitute special equities, we are noting the contentions put forth on behalf of the Appellant in this regard, only to ensure that the Appellant has no grievance on this score. As fairness requires us to do so, we also record, albeit in brief, the findings of the CERC in the Order under appeal. We have refrained from expressing our views on the Appellant's submissions on merits, as they are irrelevant and extraneous to the question whether or not the Respondents can

be restrained from invoking the bank guarantees pending disposal of the main appeal.

A. APPELLANT's CONTENTIONS ON THE FINDINGS OF THE CERC:

105. Sri Buddy Ranganathan, Learned Counsel for the Appellant, would submit that the CERC has found, as a fact, that the subject projects are no longer required; there is no finding by the CERC that any of the beneficiaries have suffered any loss or injury at all; therefore, encashment of the Bank Guarantees at this stage would be an undue windfall to the beneficiaries; the CERC held that the contracts (TSA's) stood frustrated, but it had been frustrated because of the Appellant's fault; this finding has been rendered only with reference to the conclusion in the Minutes of the Meeting dated 29.07.2020 that the subject lines were no longer required since alternate lines had been planned because these projects had not come; this is factually wrong and contrary to the Record; the CERC did not consider a word of the 28-page long submissions of the Appellant to prove that the aforesaid conclusion of that Meeting was factually wrong and contrary to the record; the Appellants submissions clearly prove that all the alternate lines had been planned independently of the subject projects and were not a substitute for the subject lines not coming up; the CERC proceeded on the erroneous basis in the impugned order; it held that the Order dated 02.09.2015. whereby it directed the projects to be completed in revised timelines, had not been stayed; this is factually wrong and contrary to the record; the said Order dated 02.09.2015 had been stayed by the Supreme Court by Order dated 12.08.2016 which stay continued at least till 07.02.2019 when the matters were permitted to be taken back to the CERC, (if not effectively till the impugned Order); and there was no

independent petition (erroneously recorded or referred to as "prayer" in the Interim Order dated 25-4-2022 of this Tribunal) by any of the beneficiaries to claim liquidated damages or prove injury or loss against the Appellants before the CERC; and though two of the Replies contained prayers for the same, the same did not either constitute independent petitions or even counter claims against the Appellant.

B. FINDINGS OF THE CERC IN THE ORDER UNDER APPEAL:

106. In the Order under appeal, the CERC examined the Appellants contention, that the delay in execution of the projects was not for any reasons attributable to them, and held that, as per Article 11.6 and 11.7 of the TSA, an affected party is contractually bound to continue to perform its obligations as provided in the TSAs to the extent not affected by the force majeure event; as held by this Tribunal, both the Appellants were affected by force majeure on account of delay in granting powers of Telegraph Authority under Section 164; and for this period of a few months, affected by force majeure, both the Appellants may be discharged from performing their obligations. However, after grant of Section 164 approval by the Central Govt on 11.08.2011, there was no embargo or impediment for the Appellant to discharge their obligations under the TSAs; for force majeure events, affecting the PSP (in this case the Appellant), the available reliefs under the TSA were in the form of extension of SCOD, commensurate with the period of force majeure, with a maximum period of 180 days, and waiver of liability to pay liquidated damages for the extended period beyond SCOD; there was no provision under the TSA for financial compensation in the form of revision of cost or tariff for an event of force majeure; Section 68 approval was due to expire on 07.12.2011, before

which date the Appellants were required to commence work on the project; even though Section 164 authorisation was received on 11.08.2011, almost four months before expiry of the Section 68 approval on 07.12.2011, the Appellant chose not to commence work on the project; and therefore non-execution of the projects on the ground that Section 68 approval had expired, even though the force majeure event was mitigated nearly four months prior to its expiry, was squarely attributable to the Appellant.

107. On the Appellant's contention that the fundamental basis of the TSAs stood altered and eroded as the projects were not required any more, the CERC held that, after noting that the CEA and the LTTCs had emphasized the criticality and necessity of the transmission projects, it had, in its order dated 2.9.2015, sought a firm commitment from the Appellants to implement the transmission project within a period of 30 months from 01.10.2015; however, without showing any commitment to implement the projects, the Appellant had challenged the said order before this Tribunal, and had subsequently sought disposal of the appeals with liberty to approach the Commission for redressal of their grievance; it is on account of the failure of the Appellants that alternate arrangement and planning had to be done to meet the requirements of the LTTCs; as on 02.09.2015 the projects, in their original form, were necessary and critical for the reliability of evacuation of power from Talcher-II STPS to the Southern Region, and for transmission of power from the Eastern Region to the load centres in the Northern Region; and if the fundamental basis of TSAs stood altered and eroded, and the projects were not required any more, it was because the Appellant had failed to implement the projects in time when they were critically required.

108. On the Appellants contention that the Transmission Agreement stood frustrated, the CERC held that Article 11.6 of the TSA required the Appellants to continue to perform their obligations to the extent not prevented by force majeure events; under Article 11.7 of the TSA, no party shall be in breach of its obligation pursuant to the agreement, except to the extent performance of its obligations was prevented or hindered or delayed due to force majeure event; and non-execution of the projects by the Appellant, after mitigation of the event of force majeure, had resulted in the breach of the contractual provisions by the Appellant.

109. After noting the contents of the meeting held on 29.07.2020, the CERC held that, on account of delay in implementation by the Appellant, the transmission system within their scope of work was no more required on technical grounds, as either investment in alternate lines had been made or an alternate scheme had been planned for implementation; the Appellants were solely responsible for rendering the transmission system redundant having no utility for the LTTCs; and all the stakeholders were of the unanimous view that the decision regarding redundancy of the transmission lines, within the scope of work, shall not absolve the rights of LTTCs under the Transmission Service Agreements. While holding that the transmission system was no longer required in the present circumstances, since alternate arrangement had already been made or were under implementation, the CERC held that any decision to go ahead with implementation of the transmission projects, within the scope of the work awarded to the Appellants, would not serve any purpose; and considering all the factors in totality, the transmission systems, under the scope of the subject transmission system, should be abandoned.

110. On the question whether the Appellants were entitled for return of the Performance Bank Guarantee, the CERC held that, evidently, the Appellants had failed to implement the project within the scheduled COD, and even by the extended timeline granted; on the Appellants failing to achieve the COD by SCOD or extended SCOD, the provisions of Article 6.4.1 and 6.5.1 of the TSAs came into operation; and, in the light of these provisions, the LTTCs were at liberty to recover the liquidated damages by invoking the Performance Bank Guarantee.

C. OTHER CONTENTIONS ON MERITS:

111. While Mr. Vallinayagam, Learned Counsel for TANGEDCO, has also raised contentions on merits in his written brief, we see no reason to burden this Order with a reference either to those contentions, or the submissions in reply thereto by Mr. Buddy Ranganathan, Learned Counsel for the Appellant, as these aspects necessitate examination when the main appeal is finally heard, and not in this interlocutory application where the enquiry is confined to whether or not the Respondents should be restrained from invoking the subject bank guarantees.

112. The question which necessitates examination is whether the merits of the dispute in terms of the underlying contract, or the Order of the CERC in this regard, constitute special equities justifying the respondents being restrained from invoking the bank guarantees. It is necessary in this context to understand what constitutes the exception of “Special Equities”.

D. EXCEPTION OF SPECIAL EQUITIES - ITS SCOPE:

113. The question of examining whether a prima facie case is made out, and in whose favour the balance of convenience lies, does not arise as the Court cannot interfere with the unconditional commitment made by the bank in its guarantees. (**Adani Agri Fresh -v- Mehboob Sharif and Ors, AIR 2016 14 SCC 517; U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd., (1988) 1 SCC 174**) The two exceptions, for the refusal to grant an order of injunction to restrain the enforcement of a bank guarantee, are (i) fraud committed in the notice of the bank which would vitiate the very foundation of the guarantee; and (ii) injustice of the kind which would make it impossible for the guarantor to reimburse himself. (**Himadri Chemicals Industries Limited -v- Coal Tar Refining Company (2007) 8 SCC 110).**

114. Interference by Courts, with the enforcement of a bank guarantee, is only in cases where fraud or special equities are prima facie made out as a triable issue by strong evidence so as to prevent irretrievable injustice to the parties. (**Ansal Engg. Projects Ltd. v. Tehri Hydro Development Corpn. Ltd., (1996) 5 SCC 450; Standard Chartered Bank -v- Heavy Engineering Corporation Limited and Anr, (2020) 13 SCC 574**). Otherwise, the very purpose of bank guarantees would be negated and the fabric of trading operation will be in jeopardy.

115. As no contention of “fraud” has been raised even in the written submissions filed on behalf of the appellant, let us examine whether the second exception to the general rule of non-intervention is attracted. This exception arises 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 (**Vinitec Electronics (P) Ltd. v. HCL Infosystems Ltd.,**

(2008) 1 SCC 544; Adani Agri Fresh -v- Mehboob Sharif and Ors, AIR 2016 14 SCC 517; U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568; Himadri Chemicals Industries Limited -v- Coal Tar Refining Company (2007) 8 SCC 110). Cases, under this category, arise where allowing encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties. 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.(**Vinitec Electronics (P) Ltd. v. HCL Infosystems Ltd., (2008) 1 SCC 544; Adani Agri Fresh -v- Mehboob Sharif and Ors, AIR 2016 14 SCC 517; U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568**).

116. To attract the ground of irretrievable injury, it must be decisively established and proved, to the satisfaction of the Court, that there would be no possibility whatsoever of recovery of the amount by the beneficiary. The irretrievable injury must be of the kind which was the subject-matter of the decision in **Itek Corporation. v. First National Bank of Boston, (566 Fed Supp 1210)**. In that case an exporter in the U.S.A. entered into an agreement with the Imperial Government of Iran and sought an order terminating its liability on stand by letters of credit issued by an American bank in favour of an Iranian Bank as part of the contract. The relief was sought on account of the situation created after the Iranian revolution when the American Government cancelled the export licences in relation to Iran, and the Iranian Government had forcibly taken 52 American citizens as hostages. The U.S. Government

had blocked all Iranian assets under the jurisdiction of the United States and had cancelled the export contract. The Court upheld the contention of the exporter that any claim for damages against the purchaser if decreed by the American Courts, would not be executable in Iran under these circumstances and realization of the bank guarantee/Letters of credit would cause irreparable harm to the plaintiff.

117. To avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if they ultimately succeed, will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. In **Itek Corporation. v. First National Bank of Boston, (566 Fed Supp 1210),** there was certainty on this issue. (**Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineerings Works (P) Ltd; U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568; ITD Cementation India Ltd -v- Reliance Infrastructure Limited and Others (2014) SCCOnline Born 198**). Proof of loss or damage being suffered by the Respondents, in terms of the underlying contract, is not necessary for invocation and encashment of a Bank Guarantee. (**Shahpoorji Pallonji Energy (Gujarat) Private Limited-v-Gujarat Electricity Regulatory Commission& Anr., (decision in I.A. No.384 of 2017 in Appeal No.161 of 2017 dated 29.05.2017)**.

118. After relying on the judgements of the Supreme Court in **Ansal Engineering Project Ltd. v. Tehri Hydro Development Corporation Ltd. & Anr, U.P. State Sugar Corporation, Mahatma Gandhi Sahakara Sakkare Karkhane v. National Heavy Engineering Cooperative Limited & Anr, and Vinitec Electronic Private Limited v. HCL Infosystem Ltd, Adani Agri**

Fresh v. Mehboob Shariff & Ors, this Tribunal, in **Shahpoorji Pallonji Energy (Gujarat) Private Limited-v- Gujarat Electricity Regulatory Commission& Anr., (decision in I.A. No.384 of 2017 in Appeal No.161 of 2017 dated 29.05.2017)**, held that to avail of the exception of irretrievable injury or special equity, exceptional circumstances which make it impossible for the Guarantor to reimburse himself, if he ultimately succeeds, will have to be decisively established, which the Applicants have not done in this case.

E. THE PRESENT CASE DOES NOT FALL WITHIN THIS EXCEPTION:

119. As the exception of "special equities" in favour of grant of injunction must be such as to make it impossible for the Appellant to reimburse themselves if they were to ultimately succeed in the main appeal, the mere apprehension (no such apprehension has even been expressed) that the Respondents will not be able to pay, is not enough. The possibility of payment of the amounts, under the bank guarantee, adversely affecting either the bank, or the Appellant at whose instance the guarantee was given, does not also justify a restraint order being passed against its invocation. The appellant has neither been able to show that the harm or injustice caused to them, on invocation of the bank guarantee, is 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, nor have they decisively established and proved, to the satisfaction of this Tribunal, that there would be no possibility whatsoever of recovery of the amount, by them from the Respondents, even if they were to succeed in the main appeal later.

120. The merits of the dispute between the parties in terms of the underlying contract, even if it relates to a claim for liquidated damages, does not constitute a third exception to the general rule against interference with the invocation of the bank guarantee. As the twin exceptions, to the rule, have neither been pleaded nor proved, we will not be justified in granting the appellant the relief of stay of its invocation.

121. In **BSES Ltd. (Now Reliance Energy Ltd.) v. Fenner India Ltd. & Anr, (2006) 2 SCC 728,** the Supreme Court held that, as per the terms of the Bank Guarantee itself, the beneficiary was the best judge to decide as to when and for what reason the Bank Guarantee should be encashed; and it was no function of the Bank or of the Court to enquire as to whether due performance had actually happened when, under the terms of the Guarantee, the Bank was obliged to make payment when the Guarantee was called in, irrespective of any contractual dispute between the parties. After noticing that arbitral proceedings were pending, the Supreme Court observed that there was no case of irretrievable injustice, if the Appellant therein was allowed to encash the Bank Guarantee because justice could always be rendered to the first Respondent therein, if it succeeded before the Arbitrators.

122. In **Shapoorji Pallonji Energy (Gujarat) Private Limited**, this Tribunal concluded holding that equities could be adjusted, and relief could be given to the Appellants if they succeeded in the pending Appeals; but encashment of Bank Guarantees could not be stayed on that ground.

123. Needless to state that encashment of the Bank guarantee, if the Respondents so choose to do so, will undoubtedly be subject to the result of the main appeal and, while equities can be adjusted and the relief, of refund of

the amount along with interest, can also be considered if the Appellant were to succeed in the main Appeal, encashment of the Bank Guarantee cannot be stayed on the mere possibility of their success in the main Appeal.

F. INTERIM ORDER IN FORCE FOR A CONSIDERABLE PERIOD: ITS EFFECT:

124. The other special equities in this case, according to Sri Buddy Ranganathan, Learned Counsel for the Appellant, justifying restraint on invocation of the bank guarantees, is that an interim order of restraint has been in force since 07-02-2019 by the Order of APTEL, and subsequently by the CERC Order dated 19-02-2019; and neither of these orders had been challenged by any of the beneficiaries for the past 4 years.

125. Passing an interim order, directing the Respondents to refrain from encashing the bank guarantees, is an act of the Court/Tribunal, and is extraneous both to the underlying contract between the parties as also to the Contract of bank guarantee between the bank and the beneficiary. It does not stand to reason, therefore, that an interim order passed by a Court/Tribunal would constitute special equities justifying continuation of an order of restraint.

126. We may not be justified in continuing the interim order, which has been in operation for a considerable period, for at least two reasons. Firstly, having held that the appellant's case does not fall within the exceptions, there is no justification in directing the earlier interim order to be extended. Secondly, the fact that the Appeal relates to the year 2022. This Tribunal has a huge backlog of cases, and appeals of the year 2013 are still pending adjudication. It is highly unlikely that Appeals of the year 2022 will be taken up, in its turn, in the near future. Continuation of the interim order may well result in the Respondent

being denied their right, to decide on invocation of the bank guarantee, possibly for a period more than that for which an order of interim stay has been in operation till date. The request for continuation of interim stay, on this score, is wholly unjustified.

IV. FAILURE OF THE RESPONDENTS TO PAY COURT FEE ON THEIR PRAYER BEFORE THE CERC TO PERMIT THEM TO ENCASH THE BANK GUARANTEES: ITS EFFECT

127. Sri Buddy Ranganathan, Learned Counsel for the Appellant, would also submit that the prayer made by TANGEDCO, before the CERC, for encashment of the Bank Guarantee, was part of its Reply; it was neither an independent petition nor was it a properly constituted counter claim; TANGEDCO, to the best of their knowledge, has not even paid the Court Fees thereupon as if it were a counter claim; and, in the absence of any specific provision in this regard, even a counter-claim could not have been filed.

128. It matters little that some of the Respondents had sought directions from the CERC to permit them to encash the bank guarantees. As a decision in this regard is solely within their province, the Respondents did not need any such permission. Non-payment of the prescribed court fee can, at best, result in rejection of their reply, even if it be construed to be a counter-claim. Since no such permission was required in the first place, rejection of the reply filed by TANGEDCO would have been of no consequence, as it would have no bearing on their right to decide whether or not to invoke the bank guarantees.

V. HAS THE CERC DIRECTED THE RESPONDENTS TO ENCASH THE BANK GUARANTEES?

129. The submission urged on behalf of the Appellant, as noted in the interim Order passed by this Tribunal earlier, appears to be that the CERC had, in the order under appeal, directed the Respondents to encash the bank guarantees, which it could not have.

130. In their petition filed before the CERC, the Appellants had sought return of the Performance Bank Guarantee. While examining the question as to whether they were entitled for such a relief, the CERC held that they had failed to implement the project within the scheduled COD, and even by the extended timeline granted; and in the light of the provisions of Article 6.4.1 and 6.5.1 of the TSAs, the LTTCs were at liberty to recover the liquidated damages by invoking the Performance Bank Guarantee.

131. We find considerable force in the submission of Sri Anand Ganesan, Learned Counsel for GUVNL, that grant of liberty does not amount to a direction or a permission, and even otherwise no such direction or permission was required or warranted in the first place. It is, evidently, because there was earlier a restraint order over encashment of the unconditional and irrevocable bank guarantee, and the Appellant's claims were being rejected, that the CERC had thought it fit to make it clear that the earlier restraint, over encashment of the bank guarantee, had ceased to remain in force. Suffice it to clarify that vacation of the interim order by us, does not obligate the Respondents to encash the bank guarantees, and they are free to take an appropriate decision, as there is no longer any restraint on them in this regard.

VI. OTHER CONTENTIONS:

132. Sri S. Vallinayagam, Learned Counsel for TANGEDCO, would submit that the appellant had suppressed facts, and had presented wrong facts before this Tribunal, when they initially filed an I.A seeking interim relief, with the ulterior motive of obtaining an interim Order from this Court; while the appellant communicated a copy of the interim order, a copy of appeal and the application for stay was not served on TANGEDCO, as required under Order 39 Rule 3 CPC, and as directed by this Tribunal vide order dated 25.04.2022, which is fatal; the appellant paid only Rs.3 Lakhs towards court fee on the date of filing the appeal; the appeal arrayed 65 respondents and there was a deficiency in court fee, of around Rs.4 lakhs approximately, at least till 12.05.2022, and the appeal was under defect; no notice will be sent by the Registry to the respondents till the defects are cured; and the interim order is liable to be dismissed on this ground also.

133. As the earlier interim order is being vacated, and there is no longer any restraint on the respondents preventing them from invoking the bank guarantees, it is unnecessary to examine the contentions urged under this head.

VII. CONCLUSION:

134. Since the Appellant has not made out a case of fraud or special equities, justifying the Respondents being restrained from encashing the Bank Guarantees, the relief sought by them in this I.A. cannot be granted. Suffice it to make it clear that invocation of the Bank Guarantees, if the Respondents so choose to do, shall be subject to the result of the main appeal pending on the file of this Tribunal; and, in case the Appellant were to succeed therein, equities can always be suitably adjusted in their favour. Subject to the aforesaid

observations, the I.A. No. 599 fails and is, accordingly, dismissed. Consequently, the interim order granted earlier stands vacated, and IA Nos. 2216 & 2217 of 2022 stand disposed of.

135. Pronounced in the open court on this the **23rd day of February, 2023**.

(Sandesh Kumar Sharma)
Technical Member

(Justice Ramesh Ranganathan)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

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IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

COURT I

IA NOS. 599, 2216 & 2217 OF 2022 IN
APPEAL NO. 188 OF 2022

Dated : 23.02.2023

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member

In the matter of:

North Karanpura Transmission Company Ltd. & Anr. .... Appellant(s)

Versus

Central Electricity Regulatory Commission & Ors. .... Respondent(s)

Counsel for the Appellant(s) : Buddy A. Ranganadhan
Hasan Murtaza
Sameer Sharma
Nandini Tomar

Counsel for the Respondent(s) : Anup Jain for R-3

Ravi Sharma for R-9

Anand K. Ganesan
Ashabari Thakur for R-7

S. Vallinayagam for R-45, 50-55

ORDER

Order on IA Nos. 599, 2216 & 2217 OF 2022 pronounced today in the open court.

APPEAL NO.188 OF 2022

Learned Counsel for the Respondent, requests four weeks' time to file reply, which is granted. Rejoinder, if any, may be filed within three weeks thereafter.

Mr. Avijeet Kumar Pandey, learned Counsel for 1st to 5th Respondents, states that the reply is ready and shall be filed in the Registry tomorrow. His submission is recorded.

Registry to verify whether pleadings are complete, and thereafter let this Appeal be included in the 'List of Finals of Court-I' to be taken up from there, in its turn.

(Sandesh Kumar Sharma)
Technical Member

(Justice Ramesh Ranganathan)
Chairperson

vt/tp/mkj