



**IN THE NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
(IB) No. 731(PB)/2018**

**IA-2478(PB)/ 2019
IA-4393/PB/2023**

In the matter of:

ICICI Bank Limited

...Petitioner

VERSUS

M/s Punj Lloyd Limited

...Corporate Debtor

Having Office AT:

Punj Lloyd House 17-18

Nehru Place,

New Delhi- 110019

Through Ashwini Mehra (RP)

And

IN THE MATTER OF :

**IA- 2478(PB)/2019 renumbered as IA- 4393(PB)/2023 u/s 60(5) of
IBC, 2016 r/w Rule 11 of NCLT Rules, 2016 for seeking directions**

M/s Punj Lloyd Limited

...Applicant/Contractor/CD

Through Ashwini Mehra (RP)

Versus

1. M/s Mitsubishi Heavy Industries

...Respondent No. 1

Limited and Ors.

through

IN THE NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

IA 2478 (PB)/2019 & IA/ 4393 (PB)/2023 in CP(IB) No./731/2018



Yuji Yamada, Project Manager
No. 4, Second Floor
C.P. Ramaswami Road
Alwarpet, Chennai 600018

2. State Bank of India ...Respondent No. 2

Having Office at:

12th Floor, Jawahar Vyapar Bhawan
STC Building, 1 Tolstoy Marg
Janpath, New Delhi- 110001

3. IDBI Bank Limited ...Respondent No. 3

Having Office At:

Videocon Tower,
Jhandewalan Extension
New Delhi-110055

4. United Bank of India ... Respondent No. 4

Having Office at:

106-109, Ansal Tower
38, Nehru Place,
New Delhi- 110019

5. Central Bank of India ... Respondent No. 5

Having Office At:

Corporate Finance Branch
Parliament Street
New Delhi-110001

Order Pronounced on: 30.10.2023



CORAM:

CHIEF JUSTICE (RETD.) RAMALINGAM SUDHAKAR
HON'BLE PRESIDENT

SHRI AVINASH K. SRIVASTAVA
HON'BLE MEMBER (TECHNICAL)

Appearances

For the Applicant (Liquidator) Mr. Sunil Fernandes, Mr. Raghav Chadha, Ms. Diksha Dadu, Advs. for Liquidator

For the Respondents (Mitsubishi) Mr. Dushyant Manocha, Mr. Anusha Ramesh, Ms. Bhargavi Vadeyar, Ms. Mrinalini Mishra, Advs.

ORDER

1. This is an Application filed on 13.11.2019 by the Resolution Professional, (now, Liquidator as after CIRP initiation on 08.03.2019 the CD went into liquidation on 27.05.2022) of the Corporate Debtor under Section 60(5) of the IBC, 2016 (the code) seeking restraint on invocation of the Performance Bank Guarantee (**PBG**) being No. **0480314BG0000756** issued on **24.09.2015** by State Bank of India (Respondent No. 2) in favour of **M/s Mitsubishi Heavy Industries** (Respondent No. 1) for an amount of Rs. **47,72,34,933/-**. Applicant has prayed for the following reliefs:

(a) Nos. 3, 4 and 5 from encashing the Counter Guarantees as Allow the present application, and

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- (b) *Restrain the Respondent No. 2 from taking any steps towards encashment of Performance Bank Guarantee 04803148G0000756 and*
- (c) *Restrain the Respondent described in para 2 above, and*
- (d) *Quash the invocation letter issued by the Respondent No. 1 dated 30.10.2019 to the Respondent No. 2; and*
- (e) *Quash the invocation letters dated 07.11.2019 issued by the Respondent No. 2 to the Respondent Nos. 3, 4 and 5 respectively*
- (f) *Restrain Respondent No. 2 to 5 from releasing any money against the Performance Bank Guarantee and Counter Guarantees to Respondent No.1.*

2. IA- 2478(PB) /2019 and IA 4393 (PB)/2023 are one and the same. Former is the physical records which are not available on DMS while IA- 4393(PB)/2023 is the electronic compilation of all the documents filed in IA- 2478(PB) /2019.
3. Applicant submitted that the Respondent No. 1 has sent the letter for invocation of the PBG dated **30.10.2019** provided by Respondent No 2 Bank on behalf of the Corporate Debtor, in spite of being fully aware that such invocation and subsequent encashment will severely prejudice the CIRP of the Corporate Debtor and dislodge the mode and manner of payment as envisaged in CIRP regulations as well as during Liquidation. Applicant further submitted that Respondent No. 1 (Mitsubishi) has maliciously and fraudulently sought invocation of PBG without any feasible ground or sound reasoning.
4. The invocation and encashing of the Bank guarantee was stayed by this Adjudicating Authority vide order dated **13.11.2019**.
5. During the proceedings, Respondent No. 1 has submitted an order dated **22.03.2023** in CM(M) 466 of 2023 passed by Hon'ble High Court of Delhi , relevant part of which is extracted below:

“In view of the aforesaid facts and circumstances as also the

*order dated 14.03.2022 passed by this Court, it is directed that the NCLT takes up the matter on 28.03.2023, when the petition is stated to be listed before the learned Tribunal and dispose of the same in accordance with law, not later than **25.04.2023.***

BRIEF SUBMISSIONS BY THE APPLICANT/CONTRACTOR/CD ARE AS FOLLOWS:

- 6.** In the year 2014, Indian Oil Corporation Limited ('IOCL') issued tender documents seeking technical and commercial offers from interested and qualified parties, with a view to select a contractor for the IOCL LNG project at Ennore Chennai (' the Project'). Thereafter, Respondent No. 1 and the Corporate Debtor entered into a Memorandum of Understanding w.r.t the above project inter-alia agreeing that in case Respondent No. 1 is selected by IOCL as successful bidder and awarded the project, the Respondent No. 1 shall sub contract certain parts of the works under the Project to the Corporate Debtor.
- 7.** Thereafter on **30.03.2015**, another Memorandum of Understanding was entered by and between the Corporate Debtor and Respondent No. 1 on account of previous tender process being cancelled by IOCL. On **03.07.2015**, Letter of Award (LOA) was entered into by and between Respondent No. 1 and the Corporate Debtor. The scope of work as per the LOA envisaged certain work, generally described as early site work and civil works (including steel structure erection), construction work of LNG Tanks and Supply of Fabricated Steel Work of the LNG Storage Tank System for LNG Import, Storage and Re-classification Terminal Project of M/s IOCL at Ennore Port, Tamil Nadu. The LoA was followed by the Contract dated 15.09.2015 as amended from time to time, which in turn, included the General Conditions of Contract (GCC) and Special Conditions of Contract (SCC) . The relevant clauses of GCC are **6.4.1.4**



which pertains to Performance Bank Guarantee. Clause **6.4.1.4 is extracted later at para 31 of this order.** It is submitted that towards the performance of the Contract, the Respondent No. 2 provided the Performance Bank Guarantee as described above upon the request of the Corporate Debtor herein. The Performance Bank Guarantee to the tune of Rs. 35,79,26,199.00/- was in turn covered by the Counter Bank Guarantees provided by Respondent Nos. 3, 4 and 5 namely IDBI Bank, United Bank of India and Central Bank of India.

- 8.** The Corporate Debtor vide letters dated **03.09.2018** and **22.11.2018** requested the issuance of Mechanical Completion Certificate (**MCC**) from Respondent No. 1. Applicant submitted that to the utter shock and surprise of the Corporate Debtor, the Respondent No. 1 issued MCC to the CD on **30.03.2019** certifying the date of mechanical completion of work specified as **31.01.2019**. Upon receipt of the above certificate, CD issued another letter dated **02.04.2019** to Respondent No. 1 and requested it to reissue the MCC by mentioning the actual completion date as 03.09.2018. Further, the CD sent an email on 26.04.2019 informing Respondent No. 1 that CD has not been paid an amount of Rs. **64.46 crore** which is due and payable by the Respondent No 1 to the Corporate Debtor. On 01.08.2019, the CD also informed/requested the proportionate reduction in the PBG amount as per the Contract which provided reduction of PBG value post 12 months/1 year from the MCC date.
- 9.** Thereafter, between **26.08.2019** and **28.08.2019**, i.e. post the MCC the CD was informed by Respondent No. 1 that there was a leak discovered at FE-017B Orifice Flange 8 of one of the tanks constructed by CD. Respondent No.1 informed the CD that it is the CD's responsibility to fix the leakage as part of its warranty arrangement with the Respondent. Thereafter, on 8.09.2019, CD informed Respondent No.



1 that it had already achieved Mechanical Completion and has completed all outstanding punch-points. Further, it is submitted that CD, on directions from Respondent No. 1 had already demobilized its resources and requested Respondent No. 1 to undertake the repair work at their cost. Copies of the emails dated 26.08.2019, 27.08.2019 and 28.08.2019 are annexed as **Annexure A-15**. On 30.08.2019, the Respondent No. 1 informed the CD that CD had misinterpreted the contract and is in fact required to inspect and repair the leakage at one of the tanks. Further Respondent No 1 stated that though it will carry out these repairs on its own, however the costs incurred in doing so would be deducted from any amounts due to the CD. Copy of the letter dated 30.08.2019 is annexed at **Annexure A-16**.

- 10.** In response, the Corporate Debtor on **01.09.2019** informed the Respondent No. 1 that any delay in commissioning Tank 101-T02 is not attributable to it. Further, the Respondent No. 1, by way of its letter dated 20.05.2019 (Ref: PLL- MHI/PTIN18/1420-L) informed the Corporate Debtor that its commissioning assistance required for the aforementioned tank would be issued with one month's notice, which notice was never given to the Corporate Debtor by the Respondent No. 1. Therefore, the Respondent No. 1 cannot now, suddenly, instruct the Corporate Debtor to attend to the leakage at the aforementioned tank, particularly without any substantiation that the leakage was the Corporate Debtor's fault. On **02.10.2019**, Respondent No. 1 issued a letter stating that the Corporate Debtor must fulfil contractual obligations under the Contract and placed reliance on the GCC. Further, the letter stated that due to the failure of the Corporate Debtor to demonstrate its full compliance to complete the first successful year of the defect liability period as provided under the GCC, therefore the Respondent No. 1 opposes any reduction of the Performance Guarantee until 31 January 2020.



- 11.** CD further stated that Respondent No. 1 has misinterpreted the terms of the GCC since such terms can only be invoked if Respondent No. 1 could substantiate the leakage on grounds of poor workmanship of the Corporate Debtor. Then, the defect liability period of such rectified/repaired portion shall be extended for a period of 12 months and not for the entire project. Keeping the above in context, the Corporate Debtor once again requested Respondent No. 1 for reducing the Performance Bank Guarantee. CD in its submissions further stated that Respondent No.1 paid no heed to the explanation provided by the Corporate Debtor in its letter dated 08.10.2019. Further, the Respondent No. 1 issued letter dated 24.10.2019 wherein it inter alia stated that since Respondent No. 1 was forced to carry out and complete any repairs, rectification or making good in connection with the leak in lieu of the Corporate Debtor, the Respondent No. 1 exercises its right to recover its loss and damages incurred as a result of the Contractor's (CD's) failure to do so.
- 12.** The Corporate Debtor on 29.10.2019, responded to the Respondent No. 1's letter of 24.10.2019 inter alia reiterating that even though Respondent No. 1 has identified the occurrence of a leak, it has failed to substantiate the leakage has occurred only due to poor workmanship of Corporate Debtor. The Corporate Debtor further proposed to the Respondent No. 1 to issue unconditional notification to bank for allowing the Corporate Debtor to reduce the Performance Bank Guarantee towards achievement of mechanical completion of Tank 101-T01 and Tank 101-T02.
- 13.** CD further submits that the fact remains that the project work has been completed and as on the date the defect liability period has commenced/is underway. Therefore, it is not a case where project work was abandoned or stopped altogether. It is also submitted that



assuming without admitting, that there are claims within the defect liability period, then such claims are to be quantified and presented to the Corporate Debtor and the Corporate Debtor likewise is to look into the validity of the claims presented to it. The aforesaid is in line with clause 12.4.2 of the GCC (same is extracted later as para 31 of this order). Therefore, even assuming without admitting that there is a claim basis which the Bank Guarantee has sought to be invoked, then the said invocation, for the sake of argument, ought to be proportionate to a claim backed by evidence and not for the entirety of the Bank Guarantee amount especially when the corporate debtor is currently undergoing CIRP.

- 14.** CD also submitted that invocation of bank guarantees during moratorium creates new creditors i.e., the banks herein, which are forced to part with large sums of monies without any visibility on the amounts due, that too if any. Further, permitting the invocation and consequential encashment would lead to a situation where the creditor, which is otherwise barred from extracting monies while a company is under CIRP, indirectly manages to benefit in spite of CIRP, to the detriment of the banks as well as the corporate debtor. It is further submitted that the invocation of the entire amount of Rs. 47,72,34,933/- of Bank Guarantees is without any basis since the Resolution Professional (now Liquidator) has not been provided with any documentation to show that the alleged claim basis which the Performance Bank Guarantee has been invoked is quantified at INR 47,72.34,933/-. CD further submits that the Resolution Professional (now, Liquidator) apprehends that if the Performance Bank Guarantee is encashed and resultant monies are obtained by the Respondent No. 1, it may in all likelihood create a situation where payment to one creditor (assuming the Respondents are creditors) is/are made in preference to others. It is submitted that, section 43 of the IB Code in



clear terms, states that if there is a transfer of property or an interest thereof of the Corporate Debtor for the benefit of a creditor or a surety or a guarantor on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor within the relevant period (as defined under the section), and if such a transaction leads to putting the such creditor/surety/guarantor in a beneficial position than it would be if assets were distributed in accordance with section 53 of the IB Code, then such a transaction would amount to a preferential transaction. It is further submitted that the invocation and encashment of Bank Guarantees during the CIRP period by Respondent No. 1 will in effect, lead to a preference being given to Respondent No.1, in as much as it would have arbitrarily retrieved money against amounts allegedly due to it, during the subsistence of the moratorium period, in priority to other classes of creditors and in violation of the waterfall mechanism provided for, under section 53 of the IB Code. Such an act on behalf of Respondent No. 1 is squarely in contravention of the provisions of the IB Code.

15. Therefore, in light of the above, the Applicant/CD craves leave that the Hon'ble Adjudicating Authority may pass appropriate direction restraining the Respondent Banks from encashing the Performance Bank Guarantees.

BRIEF SUBMISSIONS OF LEARNED COUNSEL APPEARING FOR THE RESPONDENT 1 (MITSUBISHI HEAVY INDUSTRIES LIMITED) ARE AS FOLLOWS:

16. Respondent No. 1 submits that this Hon'ble Tribunal does not have the jurisdiction to try and entertain the present Application inter alia on account of the following:
 - The express terms of the Bank Guarantee provide for a dispute resolution clause

- The bank guarantee was not submitted as a part of the CIRP
- The mere fact that CIR Process is ongoing, would not ipso facto confer jurisdiction to this Hon'ble Tribunal, which is otherwise clearly absent;

17. Respondent No1 further submits that the Bank Guarantee is admittedly in the nature of a Performance Bank Guarantee, the same is squarely covered by the proviso to Section 3 (31) of the Code and hence does not attract the provisions of the Section 14 of the Code. Respondent 1 further submits that the above legal position has not only been affirmed by this Hon'ble Tribunal but has also been upheld by Hon'ble NCLAT in the matter of **GAIL (India) Limited versus Rajeev Manadir and Ors. Company Appeal No. 319 of 2018 (2018 SCC OnLine NCLAT 374)**. The relevant para is extracted hereinbelow:

"From sub-section (31) of Section 3, it is clear that the 'security interest' do not include the 'Performance Bank Guarantee', therefore, we hold that the 'security interest' mentioned in clause (c) of Section 14(1) do not include the 'Performance Bank Guarantee'. Thereby the 'Performance Bank Guarantee' given by the 'Corporate Debtor' in favour of the Appellant- 'GAIL (India) Ltd.' is not covered by Section 14. The Appellant- 'GAIL (India) Ltd.' is entitled to invoke its 'Performance Bank Guarantee' in full or in part."

18. Respondent No. 1 further in its brief note of submissions dated **10.05.2022** had mentioned various orders of Hon'ble NCLT with respect to bank guarantees given by Punj Lloyd Limited and orders wherein bank guarantees issued in favour of Punj Lloyd Limited. Respondent No. 1 mentioned the orders in the matter of **Punj Lloyd vs IOCL and Ors., Punj Lloyd vs. GAIL (India) Limited and Anr., (GAIL's case) Graphite India Limited Versus Punj Lloyd (IA 4404(PB)/2020)** , **Mercens USA ACE Corp. versus Punj Lloyd (IA- 4351(PB)/2021) (MERSENS USA's Case) & Triveni Engineering and Industries Limited versus Punj Lloyd (IA- 5431(PB)/2021) (Triveni's Case)**. Respondent No. 1 has given a detailed chart (@ page no. 3-5 of its



brief submissions) reproducing the facts of the case and the basis of the order.

- 19.** The Respondent No 1 submitted that the law relating to stay of invocation/encashment of Bank Guarantees has been settled by a catena of judicial pronouncements including that of the Hon'ble Supreme Court of India. Respondent No. 1 further submitted that a bank guarantee is an independent contract between the Bank and the beneficiary and courts should not interfere with its invocation/encashment. To substantiate its argument, it relied upon the judgement by Hon'ble Supreme Court in the matter of **Standard Chartered bank versus heavy Engineering Corporation Limited and Anr. (2020) 13 SCC 574**. The relevant part of the judgement is extracted below:

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

Other judgements relied upon by Respondent No. 1 is **U.P. State Sugar Corporation versus M/s Sumac International Limited (1997) 5 SCC 568** and **Himadri Chemicals Industries Limited versus Coal Tar Refining Co. 1 (1997) 1 SCC 568**. **Relevant part of the judgements are extracted below:**

12. *The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to 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 d irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which e the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country.*

Himadri Chemicals Industries Limited versus Coal Tar Refining Co.

10. *The law relating to grant or refusal to grant injunction in the matter of invocation of a bank guarantee or a letter of credit is now well settled by a plethora of decisions not only of this Court but also of the different High Courts in India. In U.P. State Sugar Corpn. v. Sumac International Ltd. this Court considered its various earlier decisions. In this decision, the principle that has been laid down clearly on the enforcement of a bank guarantee or a letter of credit is that in respect of a bank guarantee or a letter of credit which is sought to be encashed by a beneficiary, the bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. Accordingly, this Court held that the courts should be slow in granting an order of injunction to restrain the realisation of such a bank guarantee. It has also been held by this Court in that decision that the existence of any dispute between the parties to the contract is not a restrain the enforcement of bank guarantees or letters of credit. However, this Court made two*



exceptions for grant of an order of injunction to restrain the enforcement of a bank guarantee or a letter of credit: (i) fraud committed in the notice of the bank which would vitiate the very foundation of guarantee; and (ii) injustice of the kind which would make it impossible for the guarantor to reimburse himself.

11. Except under these circumstances, the courts should not readily issue injunction to restrain the realisation of a bank guarantee or a letter of credit. So far as the first exception is concerned i.e. of fraud, one has to satisfy the court that the fraud in connection with the bank guarantee or letter of credit would vitiate the very foundation of such a bank guarantee or letter of credit. So far as the second exception is concerned, this Court has held in that decision that it relates to cases where allowing encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned.

- 20.** Further Respondent No. 1 submitted the judicial precedents which hold that once a bank guarantee has been invoked on account of failure to perform the contract or breaches thereof, quantification or proof of losses at the stage of invocation of bank guarantee is not necessary. For this Respondent No. 1 relied upon the judgement of **Indu Projects Ltd. Vs Union of India, OMP 1097 of 2013 and J.P.C. Infrastructure and Constructions Pvt. Ltd vs. Alstom Systems India Pvt. Ltd, FAO (OS) (Comm) 104/2017 by Hon’ble High Court of Delhi. Same are quoted below:**

Indu Projects Vs. UOI

9.1 In the facts of the present case, there is no dispute that there has been a delay in the execution of the contract. The dispute which really obtains between the parties, is that, on whose door-step, the delay, in the execution of the contract, has to be laid. The question is: to whom is the delay attributable. The record shows that, as per the respondent, there is a breach, which has resulted in an injury, which the respondent has not been able to quantify, as yet. Therefore, keeping in mind this situation, the letter of invocation in terms of the bank guarantee speaks of the loss/damage, which would be caused to it by reason of breach, which is, estimated to exceed the value of the bank guarantee. The bank guarantee thus, draws a distinction between legal injury and

the quantification of compensation for that injury, when it speaks of losses that would be caused or suffered by the beneficiary, as against a situation, where amounts are claimed by way of loss or damage already caused.

9.3 It is trite to say that a bank guarantee is an independent contract. The bank, which has furnished the bank guarantee, at the behest of the contractor, i.e., the petitioner in this case, is not to look to the terms of the underlying or the main contract entered into between the contractor and the beneficiary, i.e., the petitioner and the respondent herein.

9.4 Therefore, the submission of Mr Sundaram that one would have to look at the provisions of clauses 47 and 48, and first proviso of clause 60 of the GCC, is completely untenable for more than one reason. First, there is no reference to the said clauses in the bank guarantee. Second, the examination by the court has to be from the point of view of the concerned bank which has furnished the bank guarantee and not independent of it. It is because of this reason that while examining the exception of fraud, or the other exception, which is, whether or not the invocation is in terms of the bank guarantee, that the tests adopted by the court are: Is the fraud "egregious"? Is it an established fraud of the beneficiary known to the bank? Is the encashment in consonance with the terms of the bank guarantee?

**J.P.C. Infrastructure and Constructions Pvt. Ltd vs.
Alstom Systems India Pvt. Ltd.**

18. A plain reading of the Performance Bank Guarantee indicates that the bank had undertaken to pay the amount guaranteed on account of any defects or shortcomings of the sub-contractor or the debts incurred by the sub-contractor to any other parties involved in the works, irrespective of whether the defects or shortcomings were "actual or estimated or expected". It is apparent from the plain language that it is not necessary for the respondent to finally ascertain the exact quantum of damages or loss suffered by it and the Performance Bank Guarantee could also be invoked on account of expected or estimated loss on account of any defect or shortcomings in the performance of works by the petitioner. It is trite law that bank guarantee is an independent contract.

- 21.** Respondent No1 further submits that a bank guarantee and specially an unconditional bank guarantee is a separate and independent



contract between the bank and the beneficiary (Respondent 1). In addition, in accordance with Article 14.2 of the General Conditions of the Contract, all unresolved disputes and/or disagreements between the Corporate Debtor and the Respondent No. 1, if any, shall be referred to and finally settled under the ICC Rules of Arbitration, by a Tribunal of three arbitrators appointed in accordance with the said Rules and which arbitration shall be held in Singapore and be governed by the laws of England and Wales. **Article 14.2 of the GCC is extracted below:**

14.2 ARBITRATION

14.2.1 Except as provided in Article 14.1.1 hereof, all unresolved disputes and/or disagreements between the Employer and the Contractor arising out of or in connection with the Contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by a tribunal of three (3) arbitrators appointed in accordance with the said Rules, Such arbitration shall be held in Singapore, and shall be conducted in the English language and shall be governed by the laws of England and Wales. In the event of a dispute between the Owner and the Employer, requiring the Contract to be construed in accordance with Law of

14.2.2 The award of the arbitrator(s) shall be final and binding on both the Employer and the Contractor.

14.2.3 Neither Party shall disclose to any third party the existence, content or outcome of any arbitration proceedings and shall not disclose to any third party any information or documents used in any arbitration proceedings, unless required to so disclose by a legal duty or to protect a legal right or to enforce or challenge an award.

22. Respondent No. 1 submitted that the Corporate Debtor vide its letters dated 01.08.2018 and 29.08.2018 sought Mechanical Completion Certificate (MCC) from Respondent No. 1. In response to these requests, Respondent No. 1 issued a letter dated 30 August 2018 clearly expressing that there were several activities which still remained

outstanding at the end of the Corporate Debtor and hence, in terms of the Contract, respondent No. 1 was not liable to issue the MCC to the CD till such time the said activities were completed. Letter dated 30.08.2018 is annexed as **Annexure R-1** of the reply dated 10.12.2019

- 23.** Respondent No. 1 submitted that the request on part of the CD to proportionately reduce the amount of Bank Guarantee was based on an incorrect reading of the Contract. The CD miserably failed to comply with its contractual obligations. In fact, on around 26 August 2019, there was a leakage which was detected as a defect. The CD refused to even inspect to ascertain the source of leakage. Respondent No 1 further denied that the works were satisfactorily completed. It is further submitted that the entire purpose of furnishing a bank guarantee would be defeated if the contention of the Applicant is taken to be correct. If a bank guarantee can be invoked only once the claims are quantified; it would defeat the purpose of having a bank guarantee in the first place.
- 24.** Further, respondent No. 1 submitted that for an unconditional bank guarantee, the bank in question has promised to pay unconditionally pay out the monies on a demand being made. There is no requirement for Respondent No. 1 to satisfy the Bank or CD that there is ample justification for the invocation of bank guarantee. Respondent No. 1 further submitted that the justification, if any, needs to be considered by a court/tribunal of competent jurisdiction in the event the CD chooses to initiate the dispute resolution mechanism prescribed under the Contract. However, this Hon'ble Tribunal in the present Application cannot and must not embark upon a fact finding exercise of whether there existed valid reasons/conditions for the invocation of the Bank Guarantee. It is further contended by the Respondent No. 1 that it is under no obligation much less a legal one to supply the Applicant with documentation before it can exercise its legal right to invoke the Bank



Guarantee. The mere fact that Respondent No. 1 did not furnish any documents justifying the invocation, does not make the invocation fraudulent as alleged.

25. Respondent No. 1 has also submitted relevant contractual clauses and communications between parties vide additional notes of submissions. Briefly, it consists of **Clause 2 of Special Conditions of Contract (SCC)** which specifies the time period for the CD to achieve Mechanical Completion of works is 33 months. Respondent No 1 submits that the agreed date for mechanical completion was **23.03.2018** while the Mechanical completion was achieved by CD on **31.01.2019**. **Next, Respondent No. 1 cited** Clause 10.3(xv) of the SCC which states that for a delay in achieving Mechanical Completion beyond 15 weeks, Respondent No. 1 is entitled to claim 10 % of the Contract price which is approx. INR 47.7 crores. Clause 12.4 of Defect Liability period (para 25 ibid) was also emphasized by the Respondent No. 1 which has been reproduced hereinbefore in Respondent No. 1 submitted that Defects Liability Period was to last until 31.07.2021.

26. In its additional notes of submissions dated **08.08.2023**, Respondent No. 1 submitted that it was constrained to invoke the PBG due to persistent and fundamental breaches of the Contract by the CD, including

- The CD's failure to achieve Mechanical Completion within the agreed time period and;
- The CD's failure to repair defects which arose during the Defects Liability Period under the Contract including a serious leakage in an LNG tank constructed by the CD;



**BRIEF REJOINDER SUBMISSIONS MADE BY COUNSEL FOR THE
RESOLUTION PROFESSIONAL (Now Liquidator) ARE AS FOLLOWS:**

- 27.** The CD through RP (Liquidator) is seeking discharge of its Bank Guarantees issued in favour of Respondent 1 based on the common order passed by this Hon'ble Tribunal dated 18.02.2022 in two applications (IA 4351/2021 and IA 5431/2021 in IB 731/2019 filed by M/s MERSENS USA ACE Corp. and M/s Triveni Engineering respectively.
- 28.** It is submitted by the counsel for the Liquidator that this Hon'ble Tribunal held in Triveni-Mersens that once a Mechanical Completion Certificate is issued, there cannot be any valid basis for invoking the Bank guarantee. Respondent No 1 during the course of hearing sought to resist the aforesaid analogy and argued that there is a variance in the factual matrix between Triveni-Mercens and Mitsubishi cases and that the application of RP (now Liquidator) is not maintainable under section 14(3) of the IBC.
- 29.** Counsel for Liquidator submitted that Respondent No. 1 (Mitsubishi) issued the MCC only on 31.01.2019. Once Mitsubishi realized that M/s Punj Lloyd has been admitted to CIRP on 08.03.2019 it raised a frivolous plea for the first time only on 30 August 2019 of some leakage in one of its pipes. Further, counsel for Liquidator submitted that from August 2019 to the present day, Mitsubishi has not given any monetary estimate along with proper valid documentary proof of monetary amount suffered as loss, due to alleged leakage. Even when a pointed query was posed by this Hon'ble Tribunal, regarding the quantification of the alleged loss, the same was not provided by the Respondent No. 1.



ANALYSIS AND FINDINGS

30. We have heard the learned Counsels appearing for the Applicant (Corporate Debtor) through its Liquidator and Respondent No 1 (Mitsubishi), perused the documents, written submissions, notes and additional notes that are placed on record. We have also examined the various case laws rendered by Hon'ble Supreme Court, Hon'ble High Court of Delhi, Hon'ble NCLAT and by this Adjudicating Authority. The issue is **Whether the invocation of Performance Bank Guarantee by Respondent No.1 is sustainable and held to be valid in the facts and circumstances of the case?**

31. Before examining this issue, we would like to cite relevant clauses of the agreement which took place between the parties. **Clause 6.4.1.4 of General Conditions- Contents (GCC) is as follows:**

6.4.1.4 PERFORMANCE BANK GUARANTEE

6.4.1.4.1 Within thirty (30) calendar days of the Effective Date of the Contract and before any payment whatsoever, the Contractor shall provide the Employer, at the address given in the Form of Agreement, with security for the Contractor's punctual, proper and correct performance of the Contractor's obligations under the Contract by means of an unconditional and Irrevocable bank guarantee. The bank guarantee shall be issued by a scheduled Indian bank acceptable to the Employer and shall be in the English language and shall use the words used in Attachment 7 to these General Conditions. The amount of the bank guarantee shall be equal to ten per cent (10%) of the Contract Price and shall be in the same currency as the Contract Price. Such Bank Guarantee shall be valid until thirty (30) months of Defect Liability Period plus three (3) months after. Contractor shall bear the cost of providing the bank guarantee for such period.

6.4.1.4.2 Upon successful completion of the first (1) year of the Defect Liability Period, the Contractor shall be



permitted to reduce the value of said Bank Guarantee(s) to half (1/2) with validity for balance period of defect liability period plus three (3) months i.e. for a further period of eighteen (18) + three (3) months, for which the Employer shall issue an unconditional notification to the issuing bank of Contractor authorizing reduction in value of said bank guarantee to a sum equivalent to five percent (5%) of the Contract Price.

6.4.1.4.3 *Bank Guarantee as maintained by Contractor under the provisions of Clauses 6.4.1.4.1 and 6.4.1.4.2 hereof shall not be invoked by Employer merely for the sake of its similar Bank Guarantee(s) being Invoked by Owner under the Main Contract unless such invocation is caused due to the reasons solely attributable to the Contractor.*

Clause 11.5.4 Part 6 of the Contract, The General Conditions is as follows:

Beyond Mechanical Completion, Contractor shall only be responsible for utilities required for closure of its Punch-B & C Category Items and providing assistance to Employer with pre- identified resources for start-up commissioning and conducting performance tests on 3 Day Rate basis, as may be specified elsewhere in the Contract.

GCC Clause 12.4.2 of the Contract. Clause 12.4.2 is as follows:

12.4 defect liability Period..

..

..

12.4.2 If, in the opinion of the Employer, the works or any part thereof contains any defect, imperfection, omission, shrinkage or other fault at any time prior to the expiry of the Defects Liability Period, then the Employer may so notify the Contractor either at time(s) within the Defects Liability Period or at time(s) within fourteen (14) calendar days after its expiry. The Contractor shall promptly and as its own expense repair, rectify and make good such defect, imperfection, omission, shrinkage or other fault to the satisfaction of the Employer. The Contractor shall commence, carry out and complete such repair, rectification and making good within the time(s) stipulated by Employer who may require the

Contractor to commence, carry out and complete the repair, rectification and making good at time(s) to suit the Owner's operational requirements.

(Contractor is M/s Punj Lloyd Limited; Employer is M/s Mitsubishi Heavy Industries limited; Owner is M/s IOCL)

- 32.** During the proceedings, Respondent No. 1 submitted that it informed the CD that it is responsible to fix the leakage as part of its warranty arrangement with Respondent No. 1 and therefore liability survives. While CD averred that it had achieved Mechanical Completion and has completed all outstanding punch-points hence no liability. Further, Applicant/Contractor/CD submits that Respondent No. 1 misinterpreted the terms of the GCC since such terms can only be invoked if Respondent No. 1 could substantiate defect, imperfection, omission, shrinkage or the alleged leakage on behest of poor workmanship of the Applicant/CD. Further, Applicant/CD submits that on directions from Respondent No 1 it had already demobilized its resources and requested Respondent No 1 to undertake the repair work at their own cost. Another important point raised by the Applicant/CD is that Respondent No 1 cannot suddenly instruct the Applicant/CD to attend to the alleged leakage particularly, without any substantiation that the leakage was the CD's Default. CD further averred and states that even assuming that there are claims within the defect liability period which are denied, then such claims ought to be quantified and presented to the Applicant/Contractor/CD which has not been done in the appropriate manner to justify default on Applicant/CD.
- 33.** It is pertinent to mention the clause of the Contract pertaining to Performance Bank Guarantee (**Clause 6.4.1.4 @page 114 of this application (extracted supra) which forms the part of General Conditions of Contract (GCC)**) entered upon between parties.

“Within thirty (30) calendar days of the Effective Date of the Contract and before any payment whatsoever, the Contractor shall provide the

Employer, at the address given in the Form of Agreement, with security for the Contractor's punctual, proper and correct performance of the Contractor's obligations under the Contract by means of an unconditional and Irrevocable bank guarantee.”

On one hand, the term used is Performance Bank Guarantee and the object behind giving this performance bank guarantee is for the Contractor's punctual, proper and correct performance, and on the other hand, the words unconditional and irrevocable bank guarantee' has been used by Respondent No. 1. Performance Bank Guarantee is 'to guarantee a certain level of performance of the product'. The indispensable feature of the performance bank guarantee is that it can be invoked if the contract remained unperformed which is not in the present case more so after the MCC, issued though belatedly. Reading of the clause of performance bank guarantee does not give the impression of it being unconditional and with no reason.

- 34.** On perusal of the Clause 6.4.1.4.3 (supra), there is a prohibition on the power of invocation of the bank guarantee by the Employer (in this case, Mitsubishi) on the Contractor (Punj Lloyd) merely for the sake of its similar Bank Guarantee(s) being invoked by the Owner (IOCL) under the Main Contract unless such invocation is caused due to the reasons solely attributable to the Contractor (in this case Punj Lloyd, the Applicant). It is not the case of Respondent No. 1 that IOCL has invoked the Bank Guarantee on Mitsubishi which is due to the reason solely attributable to the Applicant/Contractor/CD.
- 35.** We may like to quote few facts of the cases- IOCL's Case, GAIL's Case, Triveni and MERSENS USA's case (para 18 supra) which the Respondent no. 1 has relied upon. In the case of Punj Lloyd Versus IOCL, the project was not completed within the stipulated time, advance bank guarantees had been given against mobilization advances provided by IOCL. In that case invocation of PBG by IOCL was upheld



by this Adjudicating Authority keeping in mind the finding on facts of that case. Clearly, the facts and circumstances of the IOCL case is not applicable in the facts of the instant case at hand. In the GAIL matter, the question of breach of contract was never decided by this Adjudicating Authority. The only limited question answered by this Adjudicating Authority was whether the Performance Bank Guarantee can be invoked within the period of Moratorium or not. In this case, it is the stand of Respondent No. 1 that the Applicant/Contractor/CD has breached the contract whereas the project has been completed and the Mechanical Completion Certificate has been issued by Respondent No.1. In the case of Triveni and MERSENS USA wherein the PBG were issued by Triveni and Mersens USA in favour of Punj Lloyd, therein this Adjudicating Authority has directed the CD (Punj Lloyd) to release the Applicants' PBG as they have performed their contract- based on the Mechanical Completion Certificate in case of Triveni; and performance of commissioning services in case of MERSENS USA. Therefore, in the instant case, Applicant/Contractor/CD having successfully completed the obligations under the Contract, and has obtained Mechanical Completion Certificate. Therefore, in our opinion, the precedents in the case of Triveni and Mersens USA are applicable to the facts of this case.

36. In the case of **J.P.C. Infrastructure Versus Alstom Systems 2017 SCC OnLine Del 8020** (*supra*) of Hon'ble High Court of Delhi's judgements referred by Respondent No. 1 are concerned, facts of this case are stated below:

The respondent alleged that there were continuous defaults committed by the petitioner. The petitioner disputed the allegations made by the respondents. The respondent also removed the works to be executed from the petitioner's scope of works under the sub contract. Petitioner had sought reference of the disputes for conciliation in terms of the



clause of the sub contract. Hon'ble High Court in para no. 17 has referred the relevant extract of Performance Bank Guarantee. In para no 18 , Hon'ble court observed that:

“ A plain reading of the Performance Bank Guarantee indicates that the bank had undertaken to pay the amount guaranteed on account of any defects or shortcomings of the sub-contractor or the debts incurred by the sub-contractor to any other parties involved in the works, irrespective of whether the defects or shortcomings were “actual or estimated or expected. It is apparent from the plain reading that it is not necessary for the Respondent to finally ascertain the exact quantum of damages or loss suffered by it and the Performance Bank Guarantee could also be invoked on account of expected or estimated loss on account of any defect or shortcomings in the performance of works by the Petitioner....”

This observation which is based upon the clause/ condition referred in Performance Bank Guarantee clause is not applicable to the facts of this case where Mechanical Completion Certificate has already been achieved and based on the Applicant/Contractor/CD having successfully performed his obligations under the contract.

It is noteworthy that the judgement itself states “..bank had undertaken to pay the amount guaranteed on account of any defects or shortcomings”..(para 18)

Also, Hon'ble High Court had stated that “in that case petitioner had not established any case of fraud or irretrievable injury”,

Whereas in the present *lis*, the Applicant/CD is undergoing Liquidation ‘as a going concern’. There are approximately 3000 employees that are working for the CD, The admitted claims run into billions of INR. Whether there is an irretrievable injury to the party or not has to be decided in the facts and circumstances of each case. In J.P.C case,



Petitioner has not established the case of irretrievable injury which is not the case in this *lis*.

As far as the case of **Indu Projects versus UOI OMP 1097/2013** (*supra*) is concerned, Respondent No. 1 has cited the said case to substantiate the point that there is no requirement for quantification of damage. In the said case, petitioner seeks injunction on the bank guarantee solely on the ground that the invocation is not in terms of the bank guarantee. The question before the Hon'ble Court was to examine the terms of bank guarantee and the assertions made in the letter of invocation. Counsel for the petitioner submitted that *"the terms of the bank guarantee are such that the respondent will have to demonstrate to this court the damage that was likely to be the cause on account of the petitioner's alleged breach of the terms and conditions of the Contract obtaining between the parties. This submission was based on the wording of the Bank guarantee..."*

Hon'ble High Court of Delhi considered **Whether the bank guarantee in issue , is a conditional bank guarantee as contended by the petitioner.** In para 9.1 and 9.2, the Court held as follows:

"9.1 A reading of para 4 of the letter of invocation would show that the respondent has indicated the following: First, the petitioner has breached the terms and conditions of the contract. Second, by virtue of the breach, there is, a likelihood of loss/ damage being caused to the respondent. Lastly, the loss/ damage is estimated to exceed the value of the bank guarantee in issue and other bank guarantees held by the respondent.

9.2 In my view, the letter of invocation is in terms of the bank guarantee as it adverts to the loss or damage which is likely to be caused on account of the breach by the petitioner of the terms and conditions of the contract obtaining between the parties. There is no requirement, therefore, to quantify the loss at this stage.

In the facts of said case, legal injury was not disputed by the Petitioner



whose Bank guarantee was invoked while in the instant case, firstly injury to Respondent No. 1 has not been proved nor it has been proved that any such injury is attributable to Applicant/Contractor/CD. In this case performance bank guarantee is given for the proper performance of the Applicant/CD. Even if we apply the ratio of Indu's case (supra) to the facts of this case, letter of invocation should be in the terms of the Bank Guarantee and the terms of the bank guarantee is for the proper performance of the Applicant/CD. Breach is not proved and hence the invocation is not proper. The ratio of Indus Projects is not applicable to this case.

- 37.** Respondent has relied upon three judgement of Hon'ble Supreme Court namely **Standard Chartered Bank v. Heavy Engineering (2020) 13 SCC 574, UP State Sugar Corporation v. M/s Sumac International Limited (1997) 5 SCC 568 and Himadri Chemicals Industries Limited v. Coal Tar Refining Company (2007) 8 SCC 110.** Respondent No. 1 has relied upon these judgements to substantiate the legal submission i.e. the Bank Guarantee is an independent Contract between the Bank and the Beneficiary and Courts should not interfere with its invocation/ encashment.

Firstly, in all the cases the word which has been used is that Court 'should not' and not the words 'cannot'. We mean to say that, in General, Courts should not interfere with the invocation of Bank Guarantees. But there are exceptions to this General Rule. In all the three cases there are exceptions mentioned and discussed therein to this General Rule which is **Fraud, and Irreparable Injury or Special Equities.** Fraud is clearly not present in the instant case but there are some special equities which are in the favour of CD as CD is already undergoing Liquidation 'as a going concern'. The aim of the Code is maximization of value of assets of the CD, availability of credit, inter-



alia. These two exceptions are elaborately discussed in all these three cases.

Few facts in the case of Standard Chartered Bank (supra) is mentioned in para 14, 25 of the judgement which are extracted below:

...“this is the case where the appellant Bank in its independent capacity, refused the claim for it being clearly false to its knowledge and also not in accordance with the terms of the guarantee i.e. beyond the purview of the bank guarantees and failing to apportion those losses suffered on account of claims which would be within the terms of the Bank guarantees”

“1st respondent informed the appellant Bank that due to defective supply of plant and equipment as well as non-supply of plant and equipment and also other contractual deficiencies of SCIL (Respondent No. 2), losses had been suffered by the 1st respondent and it was duly informed to the appellant Bank that the losses had been incurred both on account of supply of plant and equipment and on account of performance of the supply of plant and equipment. On reading of letters exchanged by and between 1st respondent and the appellant Bank pertaining to invocation of the guarantees, the condition of the guarantees had been duly complied with.”

These facts and circumstances do not find place in the present case. In the present case, Applicant/CD is already in liquidation. The breach of performance contract and contractual obligations is not proved in this case. A mere statement of defect will not suffice. Allowing the encashment of the performance bank guarantee will have a direct bearing on all the stakeholders/creditors of Applicant/Contractor/CD. Further, in all the judgements cited by Respondent No. 1, it has been repeatedly stated that the second exception to the general rule of non-intervention is such that where there is “irretrievable injury” or ‘injustice’. In the present case, firstly the so called defect and then damages are not quantified. The alleged leakages are not proved on the basis of which performance bank guarantee was invoked. Without there being an admitted apparent fault of the Applicant/Contractor/CD,



request to encash the PBG will amount to irretrievable harm/injustice not only to the CD but for its various stakeholders including the employees of the CD. The present case does not establish a case of breach of contract for invocation of PBG.

38. In this case of Standard Chartered, it was held that:

“ once the demand was made in the due compliance of the bank guarantees, it was not open for the Appellant bank to determine as to whether the invocation of the bank guarantee was justified so long as the invocation was in the terms of the bank guarantee.

The invocation was refused by the Bank even though the invocation was done in terms of Bank guarantee as held by the Hon’ble Supreme Court. In the present case, it is not pleaded by the respondent No. 1 that the invocation has been refused by the Bank. In the facts of Standard Bank’s case, Respondent No. 2 had abandoned the work due to which Respondent No. 1 suffered huge losses. Respondent No. 1 invoked the bank guarantee in accordance to the terms of the guarantee, however, the Bank refused to encash the Bank Guarantee. In that background, Hon’ble Supreme Court has refused to interfere with the invocation of Bank Guarantee. The facts are different in the present case.

39. In the case of **U. P Coop. Federation (supra)**, it has been stated that:

“When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The existence of any dispute between the parties to the contract is not a ground for issuing an injunction to restrain the enforcement of bank

guarantees. The courts have carved out only two-exceptions A fraud in connection with such a bank guarantee would vitiate the very-foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country.”

40. In the case of Himadri Chemicals (para 37 supra), Hon’ble Supreme Court have laid down the following principles in the matter of injunction to restrain the encashment of the bank guarantee or a letter of credit:

“i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realization of a bank guarantee or a letter of credit.

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

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

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

On perusal of the abovementioned principles, point no. (iii) and point no. (vi) is utmost important. Firstly Court should not readily restrain



the invocation. It should calculate all the pros and cons while restraining the invocation. Also, Court must see whether allowing encashment can lead to cause an irreparable injury or harm to the parties concerned. Here, Applicant/ CD is already facing the rigours of Insolvency/Liquidation and so do its stakeholders. Allowing such encashment will further gave a blow to the CD. There is an admitted claim of Rs. **133,863,364,182/-**. Various stakeholders, banking institutions, workmen and employees, Government dues are involved. Allowing an encashment when there is no breach of contract, shall have serious repercussions.

- 41.** Respondent No. 1 submitted that the Bank Guarantee was issued in its favour for the proper and correct performance of the Corporate Debtor's obligations under the Contract. It further submitted that in any event, given that the Bank Guarantee is unconditional in nature, Respondent No. 1 is not required to furnish any reasoning much less a sound reasoning for the invocation of the Bank Guarantee. It further reiterated that disputes, if any, on the underlying transaction shall in no case prevent the Respondent from invoking the Bank Guarantee. The Performance Bank Guarantee is issued on an understanding that Applicant/CD will undertake and execute the work as per the specification of the Employer/ respondent No. 1 and on such execution, the MCC will be issued. This part of the Contract is over. What remains is the issue of defects, imperfection, omission, shrinkage or other fault. In this case, leakage is attributed and alleged. However, there is no clear statement of defect attributed to Applicant/Contractor/CD- calling upon Applicant/Contractor/CD to rectify. Respondent No. 1 has raised the issue when the demand for reduction of PBG arose and repeated request for MCC's date was insisted (para 8 *ibid*). Further, the owner's stand on breach of performance is not clear as observed in para 34.



- 42.** On perusal of the various clauses of the Contract we have encountered another sub clause in Article 7 (clause **7.1.2 (Annexure 8, @page 80-198) which is extracted below:**

7.1.2. If the Employer issues a Certificate of Mechanical Completion for any part or all of the Works, the Contractor shall cease to be responsible for that part or all of the Works from date stated in the Certificate of Mechanical Completion except for any damage to the Works caused by or as a result of the Contractor's continued activities after that date.

On perusal of the above clause, Contractor (Applicant/CD herein) shall cease to be responsible for that part or all of the Works from date stated in the Certificate of Mechanical Corporation except for any damage to the Works which has not been proved in the instant case. Further, on perusal of the agreement entered upon by the parties, the time period for achieving the Mechanical Completion was of 33 months and agreed date is 23.03.2018 and CD completed it on **03.09.2018**. Afterwards the MCC was issued by respondent No. 1 on **30.03.2019** certifying the date of Mechanical Completion of the work specified as **31.01.2019** which means that respondent No. 1 had acknowledged the completion of work of the Applicant even though it is delayed for a certain period. Respondent No. 1 has chosen not to invoke PBG that time, thereby, Contractor and Employer were *ad idem* on completion.

- 43.** The letter of Performance Bank Guarantee contains the object of the guarantee i.e. 'for the correct and proper performance of the CD' and there is a specific clause with respect to the default of the CD. The contention of the Respondent No. 1 that they not bound to give reasons for Invocation of Guarantee is not justified in the tenor and language of the PBG. The reason undoubtedly was the alleged leakage in the tanks which has not been proved by Respondent No. 1. To repeated queries by the Bench to Respondent No. 1 to furnish any letter of Owner (IOCL) or inspection report or other document to substantiate the leakage in

the LNG tank and that being because of poor craftsmanship, there was no reply, verbal or written. The damages, if any, are also not quantified.

- 44.** Every Contract has an underlying object which in effect gives rise to the formation of the contract and the breach of the contract which gives a right to the aggrieved party to a recourse in terms of the provisions of the contract. It may not be right, to say that the alleged breach is not required to be proved, that too because of the independent nature of the PBG contract, though otherwise connected with the contract between the Applicant/Contractor/CD and Respondent No. 1.
- 45.** As per the relevant Clause of Defect Liability Period, the liability of the contractor (CD) will only arise when there is a fault on part of the CD which is not proved in the instant case. Hence, allowing the Respondent No. 1 to encash the PBG would not be justifiable in the facts and circumstances of the Case.
- 46.** For the aforesaid reasons, we are inclined to rule in favour of Applicant/CD. Accordingly, prayers (b), (c), (d), (e), and (f) in IA 2478/2019 & IA 4393/2023 are hereby **ALLOWED**.

-sd/-

(RAMALINGAM SUDHAKAR)
PRESIDENT

-sd/-

(AVINASH K. SRIVASTAVA)
MEMBER (TECHNICAL)