

16th April, 2020

COVID-19- A CASE OF SPECIAL EQUITIES FOR INJUNCTION AGAINST INVOCATION OF BANK GUARANTEES



Amit Meharia

Managing Partner, MCO Legals

LLB (Hons) King's
College London

Solicitor (Supreme Court of
England & Wales)

Expertise:

Corporate Due Diligence &
Corporate/Commercial Arbitration

✉ amit.m@mcolegals.co.in



Neha Maniktala

Associate, MCO Legals

B.B.A., LLB

Symbiosis Law School

Noida

Expertise:

Corporate/Commercial Arbitration

✉ neha.m@mcolegals.co.in

Recently the Delhi High Court in the case of *M/s Halliburton Offshore Services vs. Vedanta Limited & Anr.* decided on two issues namely: (i) whether nationwide lockdown due to Covid-19 was a force majeure event and (ii) whether the present scenario of lockdown was a case of special equities for grant of injunction against invocation of bank guarantees. This article will first examine the general law relating to bank guarantees and its exceptions and then move on to the analysis of the case in hand.

General Law Relating to Bank Guarantees

The law relating to grant of injunction against invocation of bank guarantees has been well settled by the Supreme Court, through various judicial pronouncements. The following points need to be taken into consideration for grant of injunction against invocation of bank guarantee:

- ¹ A bank guarantee is an independent contract between the bank and the beneficiary and is absolute in nature. **Standard Chartered Bank vs. Heavy Engineering Corporation**, 2019 SCC Online 1638
- ² The bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one.
- ³ The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and is of no consequence.
- ⁴ When the beneficiary invokes the bank guarantee and a letter invoking the same is sent in terms of the bank guarantee, it is obligatory on the bank to make payment to the beneficiary. **UP State Sugar Corporation vs. Sumac International Ltd.** (1997)1SCC 568
- ⁵ The RBI Master Circular dated 01.07.2013 bearing number RBI/2013-14/66 on **Guarantees and Co-Acceptances** under the Chapter 2.5(**Payment of invoked guarantees**) mandates the banks that payment should be made to the beneficiaries without delay and demur.

An appropriate procedure for ensuring such immediate honouring of guarantees should be laid down so that there is no delay on the pretext that legal advice or approval of higher authorities is being obtained.

- ⁶ In the case of **Hindustan Construction vs. State of Bihar** [(1999) 8 SCC 436] Para 9 the Hon'ble Supreme Court held that the bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the bank guarantee or the person on whose behalf the guarantee was furnished.
- ⁷ The general law is that 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.

Exceptions to the General Law

- ¹ There are exceptions to the general rule when there is a clear case of fraud, irretrievable injustice or special equities. The Court can interfere and grant an injunction against encashment of a bank guarantee.
- ² The first exception being fraud where the beneficiary has a fraudulent intention.
- ³ In the case of **M.R. in Bolivinter Oil SA v. Chase Manhattan Bank** [(1984) 1 All ER 351, CA] it was held that an injunction may be granted if it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge.
- ⁴ The second exception is a case of special equities to prevent irretrievable damage being caused to the person who has executed the bank guarantee in favour of the beneficiary.

- ⁵ In the case of *Hindustan Steelworks vs. Tarapore Co. & Anr.* (1996)5SCC 34 the Hon'ble Supreme Court held that where the party approaching the court is able to establish that in view of special equities in his favour if injunction as requested is not granted then he would suffer irretrievable injustice, the court can and would interfere.

M/s Halliburton Offshore Services Inc. vs. Vedanta Limited and Anr:

I. Brief Facts:

- a The Respondent i.e. Vedanta Limited floated a tender for development of three blocks Mangla, Bhagyam and Aishwarya (for short "MBA") together.
- b A contract for drilling of well was executed on 25.04.2018 between the Petitioner and Respondent (for short "Contract").
- c Various bank guarantees, eight in numbers, were furnished by the Petitioner in favour of the Respondent, which are subject matter of the present case.
- d There was a delay in completion of the project by the Petitioner and time extension till 31.03.2020 was granted.
- e However due to COVID-19 pandemic – GOI imposed complete lockdown including State of Rajasthan.
- f The Petitioner invoked 'force majeure' clause in the Contract.
- g The Respondent did not accept the request for 'force majeure' and took steps for invocation of BGs.
- h The Petitioner approached the Delhi High Court under Section 9 of the Arbitration and Conciliation Act, 1996 (for short "Arbitration Act"), inter alia, seeking a restraint the Respondent from invoking, or encashing the BGs.

II Issue:

Whether in the present case an injunction can be granted against Invocation of the Bank Guarantees.

III Decision of the Court:

- a That the world was placed in peculiar circumstances where a pandemic had disrupted the functioning of all activities.
- b That the imposition of the lockdown was by way of a sudden and emergent measure has never, earlier, been imposed on the country.
- c That, even if, petroleum were to be treated as an essential commodity, and the activity of production thereof were exempted from the rigour of the lockdown, the petitioner was not engaged, *stricto sensu*, in the production of petroleum, but is, rather, engaged in drilling of the wells, which activity is substantially, if not entirely, impeded as the result of the imposition of the lockdown.
- d Time extension till 31.03.2020 is an admitted fact.
- e That the countrywide lockdown was in the nature of 'force majeure' and proceeded to injunct the Respondent from invoking the BGs as there were special equities in favour of the petitioner.

- f That the Courts are empowered to stay the encashment of the bank guarantee on the ground of "special equities" to prevent the irretrievable loss to the Petitioner.

- g The Hon'ble Court placed reliance *Standard Chartered Bank Ltd v. Heavy Engineering Corporation Ltd* which carves out an exception to the settled position in law that the Courts should not interfere with the invocation or encashment of the bank guarantee so long as the invocation is in terms of the bank guarantee unless when there is a clear case of fraud, irretrievable injustice or special equities
- h The Court did not grant a blanket protection to the petitioner. The order of injunction has been limited by time i.e. till the expiry of a period of one week from 03.05.2020, from the lifting of the lockdown.

III Conclusion:

- a The injunction granted by the Court was in the nature of *ad interim* i.e. limited by time.
- b Special equity was found because of completely unpredictable nature of lockdown due to Covid 19. As such special equity was not found because of the Respondent's action. Further special equity was found based on temporary force majeure.
- c Finding of special equity was not on the merits of the respondent's action. As such once Covid 19 lockdown is over, whether the issue of special equity can be found in favour of the petitioner is an issue to be decided on merits and no doubt same shall have to overcome the settled law on BG as discussed above.
- d The instant case is more of a situation where a force majeure has been held to be special equity. There was a delay in performance of the contract due to a force majeure event, which made it impossible for the Petitioner to perform the contract. Had the force majeure event not happened the contractual obligation on the part of the Petitioner would be complete. As and when the force majeure event ceases to exist, the rights of the Respondent under the Bank Guarantee would renew and thereafter any claim by the Petitioner seeking injunction against invocation of bank guarantee would be considered by the Court on merits.
- e The said judgement does not affect the well settled law of BGs. It is a case of exceptional circumstances and its ratio cannot be applied in general to the BGs.