In The High Court At Calcutta
Ordinary Original Civil Jurisdiction
Commercial Division
Original Side

GA 518 of 2019
CS 39 of 2019
Sun Pharmaceuticals Industries Ltd. & Anr.
-Vs.-
State Bank of India & Ors.

Before	:	The Hon'ble Justice Arijit Banerjee
For the petitioner	:	Mr. Jishnu Saha, Sr. Adv. Mr. K. R. Thakher, Adv. Mr. Arindam Chandra, Adv. Mr. Ishan Saha, Adv. Mr. Atish Ghosh, Adv. Mr. Souvik Ghosh, Adv.
For the defendant No. 1	:	Mr. Sourojit Dasgupta, Adv. Mr. Souvik Mazumdar, Adv.
For the defendant No. 2	:	Mr. Avik Ghatak, Adv. Mr. Soumyajit Mishra, Adv.
Heard On	:	20.02.2019, 19.03.2019, 01.04.2019, 11.04.2019
CAV On	:	18.04.2019
Judgment On	:	17.05.2019

Arijit Banerjee, J.:-

(1) In this interlocutory application the plaintiffs pray for orders restraining the respondent no. 1 (hereinafter referred to as 'SBI') from invoking two bank guarantees issued by the respondent nos. 2 and 3 banks and an order restraining the respondent nos. 2 and 3 from making payment under the bank guarantees issued by them.

(2) The material facts of the case are that a consortium of banks led by SBI had lent and advanced moneys to a company by the name of Gujarat NRE Coke Limited (in short 'GNRE'). Amongst the securities furnished by GNRE were certain wind-mill assets of the company. Moneys fell due to the consortium of banks. SBI took steps to liquidate the wind-mill assets of GNRE. The plaintiffs jointly participated in the process of sale of wind mill assets of GNRE and became the highest bidder. In compliance with the terms and conditions as stipulated by SBI, two bank guarantees were furnished by the plaintiffs in favour of SBI. Both the bank guarantees were dated 21 October, 2016. One was issued by the defendant no. 2 for an amount of Rs. 115,50,00,000/-. The other was issued by the defendant no. 3 for an amount of Rs. 19,50,00,000/-. Thus, two bank guarantees for the aggregate sum of Rs. 135 crores were furnished by the plaintiffs to SBI.

(3) A letter of intent dated 7 October, 2016 was issued by SBI in favour of the plaintiffs. The letter of intent was, *inter alia*, to the following effect:-

> *"We are pleased to inform you that your Bid for purchase of Assets is acceptable to the Lenders and you are hereby declared as the Successful Bidder, subject to the following:*
>
> *(a) Both Sun Pharma and Unimed are jointly and severally liable for compliance of the terms of this LOI and the Conditions;*
>
> *(b) You are required to pay 25% of the bid amount as mentioned in your Bid as an upfront payment within seven (7) days from the date hereof on a non-refundable basis ('Upfront Consideration'), provided however that only in the event where no-objection certificates for sale of the Assets is not received from all the Lenders ('NoC') within 60 days from the date of the receipt of the Upfront Consideration, then the*

Upfront Consideration will be refunded to you without any interest, and you will not hold SBI on behalf of all the Lenders liable, or raise any claim or objection for non-receipt of any NoC or for any matter whatsoever:

(c) You shall submit to State Bank of India ('SBI') (acting on behalf of the Lenders) a copy of this LOI duly signed (all the pages including the Annexure), satisfactory evidence of such authority of the person executing this LOI (such as a certified true copy of a board resolution and/or power of attorney), and specimen signatures of such persons;

(d) You shall provide a Bank Guarantee (BG) in favour of State Bank of India, Commercial Branch, 24 Park Street, Magma House, Kolkata – 700016, for the benefit of the Lenders, towards the balance 75% of the bid amount in the format provided in the Annexure to this LOI;"

(4) Appearing for the plaintiffs Mr. Saha, Learned Sr. Adv. Submitted that the contract between the parties was a contingent contract. It was subject to the receipt of No Objection Certificates (in short 'NOC') certificates from all the lenders. Such NOCs were to be received within 60 days from the date of payment of the upfront consideration by the plaintiffs, in default of which, the upfront consideration was to be refunded to the plaintiffs without interest. Admittedly, the upfront consideration of 25 per cent of the bid amount was paid by the plaintiffs on 21 October, 2016. The NOCs were to be received by 21 December, 2016 in terms of the letter of intent. However, such NOCs were not received. The plaintiffs were entitled to resile from the contract. However, the parties by their conduct extended the period for performance of the contract.

(5) On 14 June, 2017 SBI Capital Markets Limited acting on behalf of SBI, sent an e-mail to the plaintiffs, which was inter alia to the following effect:

> *"Further, the Successful Bidders have also entered into a Business Transfer Agreement dated March 30, 2017 with the Company for the sale of the Assets. Also, the Lenders have, on or before March 23, 2017, issued no-objection certificates (NOC) to GNCL for release of the security created over the Assets for the benefit of the Lenders.*
>
> *Pursuant to this, an application had been filed by GNCL before the National Law Company Tribunal, Kolkata Branch (NCTL) under Section 10 of the Insolvency and Bankruptcy Code, 2016, the NCTL has, vide its order dated April 7, 2017, admitted the application filed by the Company for initiation of the corporate insolvency resolution process in respect of the Company ("CIRP") and has, in terms of Section 14 of the Code, declared a moratorium on inter alia the sale/disposal of assets of the Company.*
>
> ....
>
> *Now, in light of the commencement of the CIRP in respect of GNCL, the Lenders will like to have your opinion on completion of the transfer of the Assets to the successful bidder as per the terms of the BTA outside the purview of NCTL. Kindly let us know your view on the same at the earliest, since the next COC meeting is scheduled on 20.06.2017, where this proposition is going to be discussed."*

(6) By a return e-mail on the same date the plaintiffs stated that they had been waiting long for purchase of the asset in question. They will wait for one more month and if the deal is not completed within that time period, the deposit and the bank guarantees should be returned and the deal should be treated as cancelled.

(7) Nothing happened within a month or even thereafter. By an e-mail dated 18 August, 2017 the plaintiffs informed SBI Capital Markets Limited that they had

withdrawn their proposal to purchase the wind-mill assets of GNRE and asked for refund of the 25 per cent deposit along with interest and also for return of the bank guarantees. Mr. Saha submitted that the contract between the parties, therefore, stood terminated by lawful repudiation on the part of the plaintiffs. He submitted that the contract stood discharged. The Bank guarantees were furnished towards part of the consideration amount. Since, the parent contract stood discharged, no question of payment of any consideration could survive. Hence, SBI is not entitled to invoke the two bank guarantees in question.

(8) Mr. Saha further submitted that the attempted invocation of the bank guarantees is fraudulent. The plaintiffs were not informed until 14 June, 2017 that GNRE had approached the National Law Company Tribunal (NCLT) under Sec. 10 of the Insolvency and Bankruptcy Code, 2016 (in short 'IBC') for initiation of corporate insolvency resolution process in respect of the company. By its order dated 7 April, 2017 the NCLT had admitted the application of GNRE and had, in terms of Sec. 14 of the IBC, declared a moratorium in respect of sale/disposal of the assets of GNRE. The suppression of this very material fact amounted to fraud. Permission was obtained by SBI from NCLT for sale of the assets in question only on 22 August, 2017. However, prior thereto, on 18 August, 2017 the plaintiffs had withdrawn their proposal. In this connection, Mr. Saha referred to Sec. 55 of the Indian Contract Act, 1872 which provides, *inter alia*, that when a party to a contract

promises to do a certain thing at or before a specified time, and fails to do such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract. He submitted that from the very beginning time was of the essence of the contract. In view of failure on the part of SBI to perform its obligation within the time fixed or the mutually extended time, the plaintiffs became entitled to and lawfully repudiated the contract. The consequences would be restitution/refund of the upfront consideration paid by the plaintiffs along with bank guarantees as contemplated under Sec. 65 of the Indian Contract Act which provides, *inter alia,* that when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it. In this connection learned Counsel referred to the following two decisions:-

(i) **Orissa Textile Mills Ltd. & Anr.-vs.-Ganesh Das Ramkishun, AIR 1961 Pat 107**: This case was relied upon for the proposition that where time is of the essence of contract and is extended by mutual agreement, the extended date is also of the essence of the contract.

(ii) **British Paints (India) Ltd.-vs.-Union of India (UOI), AIR 1971 Cal 393**: This decision was relied upon for the proposition that generally speaking, stipulations regarding time for delivery of the good are deemed to be of the essence of the

contract in mercantile transactions and that where time is of the essence of the contract and is extended, the extended date also becomes the essence of the contract.

(9) Mr. Saha then submitted that the contract between the parties became void with the passing of the moratorium order by NCTL on 7 April, 2017. In this connection, learned Counsel referred to Sec. 56 of the Contract Act which provides, *inter alia*, that a contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. Learned Counsel also referred to NCLT's order dated 11 January, 2018 which is an order for liquidation of GNRE in terms of the provisions of the IBC. He submitted that also because of this order the contract between the parties has become impossible of performance.

(10) Mr. Saha referred to the Apex Court decision in the case of **Union of India-vs.-Kishorilal Gupta & Bros., AIR 1959 SC 1362**, and submitted that just as an arbitration clause cannot operate if the original contract containing such clause has no legal existence or becomes void, in the present case, the two bank guarantees being contracts collateral to the parent agreement for sale of GNRE's wind-mill assets, stand discharged simultaneously with the parent contract becoming void or impossible of performance. He also referred to the Apex Court decision in the case of **Young Achievers-Vs.-IMS Learning Resources Pvt. Ltd., (2013) 10 SCC 535,**

which discussed and followed the principles laid down in **Union of India-vs.-Kishorilal Gupta & Bros.(supra)**.

(11) Mr. Saha then submitted that the Bank guarantees which were dated 21 October, 2016 were valid till 30 April, 2017. On 12 April, 2017 SBI wrote a letter to the plaintiffs asking for extension of the bank guarantees. In the said letter there was no whisper of NCLT's order of moratorium passed on 7 April, 2017. This was also an act of fraud on the part of SBI.

(12) The aforesaid letter dated 12 April, 2017 also mentioned about NOCs having been issued by all the lenders. However, it was not mentioned that the NOC issued by one of the consortium members being Lakshmi Vilas Bank was conditional inasmuch as it was stated in the NOC that the consideration amount pursuant to the sale of assets shall be directly remitted to the current account maintained by the said bank with SBI. Such condition has been specifically negated by the NCLT while giving permission to sell the wind mill assets of GNRE by its order dated 22 August, 2017.

(13) Learned Sr. Counsel submitted that in the facts and circumstances of the case special equity exists in favour of the plaintiffs. Specific allegations of fraud have been made and particulars of fraud have been stated in the petition. SBI has chosen not to file any affidavit in opposition. The statements in the petition remain uncontroverted and thus, admitted as per the rules of pleadings. Learned Counsel

finally relied on a decision of a learned Judge of this Court in **Rahee GPT (JV) & Ors.-vs.-The Union of India & Ors.** delivered on 10 November, 2017 in GA No. 855 of 2014, CS No. 97 of 2014 wherein, the learned Judge discussed the concept of special equity and granted an order of injunction restraining invocation of a bank guarantee in the facts and circumstances of that case.

(14) Appearing for SBI, Mr. Bhattacharya, learned Counsel submitted that no question of the plaintiffs withdrawing from the deal could arise. Referring to Sec. 5 of the Indian Contract Act he submitted that the plaintiffs' proposal to purchase the wind mill assets of GNRE fructified into a binding contract and hence the question of withdrawing from the proposal thereafter could not arise. In this connection, learned Counsel relied on a decision of the Apex Court in the case of **Mukul Sharma-vs.-Orion India Private Ltd. through Its Managing Director, (2016) 12 SCC 623**.

(15) Learned Counsel then submitted that the requirement of having the conditions precedent enumerated in the sale agreement dated 1 April, 2017 fulfilled not later than 120 days from the date of execution of the agreement, was given a go-bye by the plaintiffs by their subsequent conduct. Similar was the case in respect of the requirement of obtaining NOCs from all the lenders within 60 days from the date of payment of upfront consideration. The said requirement was also given a go-bye by the plaintiffs by their conduct. In this connection, learned Counsel relied on the

Apex Court decision in the case of **The Godhra Electricity Co. Ltd. & Anr-vs.-The State of Gujarat & Anr., (1975) 1 SCC 199**.

(16) Mr. Bhattacharyya then submitted that by virtue of the permission granted by NCLT on 22 August, 2017 for sale of the subject asset of GNRE, as on that date the assets could be sold to the plaintiffs. In fact, as on that date or subsequent thereto the plaintiffs could file a suit for specific performance against SBI to which SBI would practically have no advance. Hence, it cannot be said that the contract became frustrated or incapable of performance.

(17) As regards Sec. 55 of the Indian Contract Act, learned Counsel submitted that time was not of the essence of the contract. Had it been so, the plaintiff could have and should have avoided the contract upon the expiry of 21 December, 2016 on the ground that NOCs from all the lenders were not available within 60 days from the date of payment of the upfront consideration. The plaintiffs did not do so. By their conduct they waived the said requirement of 60 days and evinced their agreement to accept performance of the contract at a time other than that agreed upon. The plaintiffs induced SBI to approach NCLT for permission to sell the wind mill assets of GNRE and thereby gave a go-bye to any particular date within which the contract was required to be performed. He submitted that the third limb of Sec. 55 of the Contract Act would apply which is to the effect that if, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the

promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so. The plaintiffs never treated time as an essence of the contract and kept on extending the bank guarantees in question.

(18) Learned Counsel then referred to an e-mail dated 31 August, 2017 sent on behalf of SBI to the plaintiffs informing them of the approval granted by NCLT for sale of the wind mill assets of GNRE to the plaintiffs before the conclusion of the insolvency resolution process. By the said email, request was made to the plaintiffs to reconsider their decision of withdrawing from the transaction and complete the pending formalities for the successful closure of the transaction. He submitted that such request was unreasonably rejected by the plaintiffs by their e-mail dated 31 August, 2017.

(19) Learned Counsel then submitted that Sec. 14 of the IBC is not a complete bar to the sale of assets of the company in question. It is true that moratorium was declared by NCLT under Sec. 14 of IBC by its order dated 7 April, 2017. However, subsequently requisite permission was granted for completion of the transaction by order dated 22 August, 2017. Hence, there was no question of frustration of the contract.

(20) Mr. Bhattachayya then referred to Regulation 29 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 which provides, *inter alia*, that the resolution professional may sell unencumbered assets of the corporate debtor, other than in the ordinary course of business, if he is of the opinion that such a sale is necessary for better realization of value under the facts and circumstances of the case. Sub-Regulation 3 further provides that a *bona fide* purchaser of assets sold under Regulation 29 shall have a free and marketable title to such assets notwithstanding the terms of the constitutional documents of the corporate debtor, shareholder's agreement, joint venture agreement or other document of a similar nature. He submitted that sale of the wind mill assets of GNRE to the plaintiffs could have been completed under the said regulation also which would have given the plaintiffs good title to the assets had the plaintiffs not wrongfully withdrawn from the deal.

(21) On the point of time being the essence of the contract, Learned Counsel referred to the decision of an English Court of Appeal in the case of **Charles Rickards Ld.-vs.-Oppenhaim, (1950) 1 KB 616**. I have gone through the decision. In my opinion, the same does not have much relevance to the facts of the present case. Reference was also made to an Apex Court decision in the case of **Satyabrata Ghose-vs.-Mugneeram Bangur & Co. & Anr., AIR 1954 SC 44**. The said decision deals with the principles of frustration of contract. It was observed by the

Apex Court that in deciding cases of frustration in India the only doctrine that we have to go by is all that supervening impossibility or illegality as laid down in Sec. 56 of the Contract Act, taking the word 'impossible' in its practical and not literal sense. When an event or change of circumstance occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole, the Court can pronounce the contract to be frustrated and having come to an end.

(22) Mr. Bhattacharyya finally referred to the Apex court decision in the case of **National Highways Authority of India-vs.-Ganga Enterprises & Anr., (2003) 7 SCC 410** in support of his submission that invocation of an unconditional irrevocable bank guarantee should normally not be interfered with. He relied on paragraph 10 of the reported judgment wherein it was observed that if the enforcement of an 'on-demand bank guarantee' is in terms of the guarantee, then Courts must not interfere with the enforcement of bank guarantee. The court can only interfere if the invocation is against the terms of the guarantee or if there is any fraud.

(23) In reply, Mr. Saha, Learned Sr. Counsel only added that since by its e-mail dated 14 June, 2017 SBI proposed to complete the deal outside the purview of NCLT, the plaintiffs agreed to wait for one month. Since nothing happened even after a month, by their e-mail dated 18 August, 2017 the plaintiffs withdrew from the deal.

(24) I have given my anxious consideration to the rival considerations of the parties.

(25) The short question that arises for determination is whether or not the plaintiffs are entitled to an order restraining SBI from invoking the two bank guarantees in question or to an order restraining the defendant nos. 2 and 3 from making payment under the bank guarantees.

(26) The law relating to unconditional irrevocable bank guarantees is fairly well-settled. Ordinarily a bank which gives a guarantee must honor that guarantee according to is terms. In **R. D. Harbottle (Mercantile) Ltd.-vs.-National Westminster Bank Ltd., (1977) 3 All ER 862,** Kerr, J. observed that it is only in exceptional cases that the Courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the Banks have notice the Courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available or stipulated in the contracts. The Courts are not concerned with their difficulties to enforce such claims; these are risks which the merchants take. The machinery and commitments of banks are on a different level. They must be allowed to be

honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged.

(27) The said observations of Kerr, J. were cited with approval by Lord Denning M. R in **Edward Owen Engineering Ltd.-vs.-Barclays Bank International Ltd., (1977) 3 ALL ER 764** and also by our Apex Court in **United Commercial Bank-vs.-Bank of India & Ors., AIR 1981 SC 1426.**

(28) In **UP Cooperative Federation Ltd.-vs.-Sing Consultants and Engineers (P) Ltd., (1988) 1 SCC 174**, Sabyasachi Mukharji, J. observed that commitments of banks must be honoured free from interference by the Courts. An irrevocable commitment either in the form of confirmed bank guarantee or irrevocable letter of credit cannot be interfered with. In order to restrain the operation either of irrevocable letter of intent or of confirmed letter of credit or of a bank guarantee, there should be serious dispute and there should be good *prima facie* case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Otherwise, the very purpose of bank guarantees would be negatived and the fabric of trading operation will get jeopardised. The Learned Judge referred to His Lordship's decision delivered as a Judge of the Calcutta High Court in **Texmaco Ltd.-vs.-State Bank of India, AIR 1979 Cal 44,** wherein His Lordship held that in the absence of special equities arising from a particular situation which might entitle the party on whose behalf guarantee is given to an injunction restraining the bank in

performance of the bank guarantee and in the absence of any clear fraud, the bank must pay to the party in whose favour guarantee is given on demand, if so stipulated, and whether the terms are such have be found out from the guarantee document as such.

(29) A similar view was taken by the Apex Court in **Svenska Handelsbanken-vs.-M/s. Indian Charge Chrome & Ors., AIR 1994 SC 626,** wherein the observations of the Apex Court in **UP Cooperative Federation Ltd. (supra)** were copiously reproduced.

(30) In **Himadri Chemicals Industries Ltd.-vs.-Coal Tar Refining Co., (2007) 8 SCC 110**, the Apex Court held that when an unconditional bank guarantee or confirmed letter of credit is given or accepted in the course of commercial dealings, the beneficiary is entitled to realise payment under such a bank guarantee or letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract. In the matter of invocation of a bank guarantee or a letter of credit, it is not open to the bank to rely upon the terms of the underlying contract between the parties. The bank giving such guarantee is bound to honor it as per its terms irrespective of any dispute raised by its customer. 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 such bank guarantee or letter

of credit. These are two exceptions to this. Firstly, if fraud of a egregious nature is committed to the notice of the bank which would vitiate the very foundation of the guarantee or letter of credit and the beneficiary seeks to take advantage of the situation; and secondly, if injustice is likely to be caused of the kind which would make it impossible for the person at whose instance the guarantee has been issued to reimburse himself or would result in irretrievable harm or injustice between all the parties concerned.

(31) There are legions of decisions of various High Courts as well as Supreme Court which lay down the law as discussed above. It is neither possible nor necessary to refer to all such decisions. What emerges from the decisions is that *ordinarily* the Courts will not interdict the operation of an unconditional irrevocable bank guarantee. However, the said rule is qualified by two exceptions. One is where the beneficiary of the bank guarantee has committed fraud of a very serious nature and the bank has notice of such fraud. The other is where special equity exists in favour of the person at whose instance the bank guarantee has been issued. In such cases, the Court would be justified in interfering with the operation of a bank guarantee. Let us see if in the facts of the present case it can be said that the plaintiffs come within the aforesaid two exceptions to the general rule of refusal of injunction in bank guarantee cases.

(32) It is not in dispute that the plaintiffs paid 25 per cent of the upfront bid amount on 21 October, 2016. On that very date the plaintiffs furnished two bank guarantees to SBI issued by the defendant nos. 2 and 3 respectively, for the balance 75 per cent of the bid amount. However, the said bank guarantees were not the usual performance guarantee or mobilization advance guarantee. It may be noted that the decisions that I have adverted to above, were all delivered in cases where bank guarantees were furnished either to guarantee the performance of one of the parties to the underlying parent contract or to secure the mobilization advance paid by the buyer to the seller. In the present case, however, the bank guarantees were furnished towards the balance bid price for the wind-mills in question. Both the bank guarantees referred to the letter of intent dated 7 October, 2016 issued by SBI in favour of the plaintiffs. The bank guarantees were thus meant to be part of the consideration to be paid by the plaintiffs to SBI for sale of the wind-mills in question to the plaintiffs. To that extent, it cannot be said that the bank guarantees were unconditional. To my mind, the bank guarantees could be invoked only if sale of the assets in question was completed in favour of the plaintiffs. The bank guarantees were clearly part of consideration money payable by the plaintiffs for the contemplated sale of the wind mill assets of GNRE.

(33) The sale, however, never went through. On 7 April, 2017 a moratorium was declared in respect of GNRE by the NCLT which made it impermissible for anybody

to deal with the assets of GNRE. On 14 June, 2017 SBI suggested to the plaintiffs that it would make efforts to complete the transaction outside the purview of NCLT. On the same date, the plaintiffs replied that they were willing to wait only for one more month since they had already waited long enough. On 18 August, 2017 the plaintiffs informed SBI that the deal was off and should be treated as cancelled. Although SBI obtained permission of the NCLT to transfer the wind mill assets in question in favour of the plaintiffs on 22 August, 2017, prior thereto, the plaintiffs had repudiated the contract and in my opinion, were not unjustified in doing so. They were out of pocket by a substantial sum of money since 21 October, 2016. As per the sale agreement dated 1 April, 2017, the deal was to be completed within 120 days from the date of the agreement. The plaintiffs waited for a reasonable period even after expiry of 120 days. In my opinion, they could not be expected to wait indefinitely. In my *prima facie* view, there was sufficient justification for the plaintiffs to repudiate the contract.

(34) Subsequently, by reason of NCLT's liquidation order dated 11 January, 2018, the contract for sale of the wind mill assets of GNRE to the plaintiffs, in any event, became impossible of performance. There was frustration of the contract.

(35) What is important to note is that at no point of time, the property in the assets in question was transferred to the plaintiffs. As such, the plaintiffs were not, nor now are, under any obligation to pay the price of the said goods to SBI. As I have

noted above, the bank guarantees in the present case are not the run of the mill bank guarantees issued to ensure performance of some obligation or as security for mobilization advance. These two bank guarantees were meant to be part of price of the goods that were to be sold to the plaintiffs. The sale never having been effected and having then become impossible to effect, the question of payment of price of the goods by the plaintiffs to SBI could not and cannot arise. Consequently, in my *prima facie* view, SBI is not entitled to invoke or encash the two bank guarantees. Indeed, it would be preposterous to suggest that even without transferring the title to the goods in question to and in favour of the plaintiffs, SBI could demand or recover the price thereof from the plaintiffs.

(36) The phrase 'special equity' has not been defined in any of the decisions. What will amount to special equity has not been laid down in any of the decisions. It has been left to the discretion of the court to apply the said principle in a given set of facts on the basis of sound judicial principles and to prevent irretrievable injustice. To my mind, special equity can be said to exist in favour of a person at whose instance a bank guarantee has been issued if the facts and circumstances are such that invocation and encashment of the bank guarantee by the beneficiary would shock the conscience of the Court; would be iniquitous, grossly unfair and unjust. It is a situation where judicial conscience feels that unless the Court interferes, gross injustice would be done to the party seeking an order restraining operation of a bank

guarantee. In my view, the present case is such one case. This is not the usual bank guarantee case. This is quite a unique and exceptional case. My judicial conscience does not permit SBI to recover the price of the goods in question without transferring the title thereto in favour of the plaintiffs.

(37) SBI may well contend that the deal could not be completed because of unlawful repudiation of the contract by the plaintiffs. SBI will be free to take appropriate action against the plaintiffs for recovering damages if it is of the view that the plaintiffs have wrongfully repudiated the contract. However, without effecting sale of the goods in question and subsequently not being in a position to effect such sale SBI cannot be permitted to encash the bank guarantees which represent 75% of the consideration amount.

(38) There is another reason that impels me to restrain SBI from invoking/encashing the two bank guarantees. On 23 March, 2017 the Board of Directors of GNRE resolved to approach the NCLT under Section 10 of the IBC. It is hard to believe that SBI was not aware of such resolution, being the leader of the consortium of banks which had lent and advanced substantial sums of money to GNRE. In any event, SBI was a party to the application filed by GNRE before the NCLT on 7 April, 2017 when the application was admitted and moratorium was declared under Section 14 of the IBC. The bank guarantees were due to expire on 30 April, 2017. On 12 April, 2017 SBI wrote a letter to the plaintiffs for renewing the

bank guarantees. There was no whisper of the NCLT proceedings or the moratorium in such letter. The said request was renewed by a subsequent letter dated 26 April, 2017 wherein also the said fact was not mentioned. It was submitted by Mr. Saha, learned Senior Counsel for the plaintiffs that the first time SBI informed the plaintiffs about the NCLT proceedings was on 14 June, 2017 and this could not be disputed to any extent by learned Counsel for SBI. Nothing could be produced on behalf of SBI to demonstrate that prior to obtaining extension of the bank guarantees SBI had apprised the plaintiffs of the NCLT proceedings and the moratorium. This, in my view, amounts to gross suppression of extremely material facts amounting to fraud. It was the duty of SBI to make the plaintiffs aware of the NCLT proceedings and the moratorium contemporaneously and before inducing the plaintiffs to extend the validity of the bank guarantees. The plaintiffs may have taken appropriate steps and may not have caused extension of the bank guarantees had they been informed about the NCLT proceedings and the moratorium prior to causing such extension. However, I need not speculate on the same as in my opinion, concealing the factum of the NCLT proceedings and the moratorium from the plaintiffs prior to obtaining extension of the bank guarantees was a fraudulent act on the part of SBI.

(39) In view of the aforesaid, in my opinion, a strong *prima facie* case of fraud and special equity has been made out by the plaintiffs. The balance of convenience also, in my view, is in favour of the plaintiffs. If the bank guarantees are allowed to be

encashed at this stage, the same may well result in commercial disaster of the plaintiffs. However, in the event, the plaintiffs, lose at the trial of the suit, SBI would be able to encash the bank guarantees since I am directing the plaintiffs to keep the bank guarantees alive till the disposal of the suit. The plaintiffs shall renew the bank guarantees at least 15 days prior to the expiry of validity thereof, failing which SBI would be at liberty to encash the bank guarantees.

(40) The ad interim order that was passed on 20 February, 2019 in terms of prayers (a) and (b) of the notice of motion shall continue till the disposal of the suit with the rider that the plaintiffs shall keep the bank guarantees alive and valid till the disposal of the suit causing renewal thereof at least 15 days before their expiry upon intimation to SBI, on failure of which SBI shall be entitled to encash the bank guarantees and the interim order shall stand vacated automatically.

(41) In view of the conclusion that I have arrived at, I do not deem it necessary to deal with the point as to whether or not time was of the essence of the contract. I further make it clear that all the views expressed in this judgment and order are *prima facie* and only for the purpose of considering this application for interlocutory relief.

(42) The application being G.A No. 518 of 2019 is accordingly disposed of. There shall be no order as to costs.

(43) Urgent certified Photostat copy of this judgment and order, if applied for, be given to the parties upon necessary requisite formalities.

(Arijit Banerjee, J.)