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COVID-19 PANDEMIC - INJUNCTIVE RELIEF AGAINST INVOCATION OF BANK GUARANTEE ON THE BASIS OF SPECIAL EQUITIES UNDER SECTION 9 OF THE ARBITRATION ACT

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Introduction –

1. In light of cessation of routine judicial activities in recent times on account of the Covid-19 pandemic, the decision of the High Court at New Delhi on April 20, 2020 in *Halliburton Offshore Services Limited vs. Vedanta Limited and Another* comes as a welcome breather in an area otherwise seemingly parched for development of case law. The decision is perhaps the first order of its kind in India wherein grant of injunction against invocation and encashment of bank guarantee and performance of contract have been evaluated by the court keeping in mind the Covid-19 pandemic.
2. In the said order, the Hon'ble High Court has (i) granted an interim injunction against invocation and encashment of eight bank guarantees issued in favour of the first respondent and (ii) held that non-performance of the contract by the petitioner was on account of the lock down caused by the pandemic, which was *prima facie* in the nature of a force majeure event.
3. While fraud is generally the primary ground alleged by parties seeking a relief of injunction in similar situations, the criteria which the courts need to consider for grant of injunction under the said ground are widely considered as settled law. The instant case is intriguing and assumes significance as the Hon'ble High Court dwells into the issue of 'special equities' being the second ground sparsely alleged by the parties and evaluates the consequences of the Covid-19 pandemic as a tenable criteria for grant of injunction in an application filed under section 9 of the Arbitration and Conciliation Act, 1996 restraining the respondent from invoking an unconditional bank guarantee.
4. In the words of the Hon'ble Justice C. Hari Shankar, the Hon'ble Court opined that '*while egregious fraud is well-encapsulated as one of the two grounds on which invocation of an unconditional Bank guarantee may be injuncted, the contours of the second ground, of irretrievable or irreparable injury, are, in my opinion, somewhat more elastic*'.

Facts of the case –

5. The case involved the petitioner, i.e., Halliburton Offshore Services Limited being engaged by the first respondent, i.e., Vedanta Limited to set up certain infrastructure including drilling of (oil) wells. While the petitioner had substantially completed the project within the agreed timelines, the lock down on industrial activities as well as movement of persons in the country, owing to Covid-19 pandemic resulted in the petitioner defaulting in its obligations to complete performance of the contract and consequently failed to meet the timelines for completion of the project.
6. As the petitioner allegedly failed to complete its obligations within the agreed timelines, the first respondent terminated the contract and proceeded to invoke and encash the eight bank guarantees issued by the bank at the behest of the petitioner. Hence, the petitioner filed an application under section 9 of the Arbitration and Conciliation Act, 1996 *inter-alia* seeking an injunction against the first respondent restraining it from invoking and encashing the eight bank guarantees issued in its favour to secure the performance of obligations under the contract.

Addition of a new ground for grant of relief –

7. The Hon'ble High Court, while considering the facts and circumstance at hand, referred to various Supreme Court cases wherein it has been well settled that an order of injunction restraining the beneficiary from invocation and encashment of bank guarantee can be granted for two reasons – one being that there exists a serious dispute and the *prima facie* basis for the same is an egregious fraud and the second being 'special equities' resulting in irretrievable harm or injustice to one of the parties concerned.
8. In a recent case of *Standard Chartered Bank Limited vs. Heavy Engineering Corporation Limited [2019 SCC Online SC 1638]*, the Hon'ble Supreme Court extended to three, the exceptions where a court can injunct invocation and encashment of bank guarantee. The concept of special equities has been traditionally linked to irretrievable injustice. The criteria was said to be fulfilled where the court is satisfied that the party seeking refuge under a special equity is likely to suffer losses, which cannot be recovered if the matter is finally adjudicated in favour of the said party seeking the interim injunctive relief. The Supreme Court in the said *Standard Chartered Bank Limited* case however extended the scope of avenues available to a petitioner by visualizing irretrievable injustice and special equities as distinct circumstances.
9. Referring to the said judgment of the Supreme Court, the Hon'ble Delhi High Court was of the view that where special equities exist, a court is empowered to injunct the invocation and encashment of a bank guarantee, notwithstanding the difficulty of the petitioner to substantiate existence of circumstances leading to irretrievable injustice.

This would essentially mean that in the absence of a cogent ground to allege egregious fraud, a party may rely on 'special equities' or irretrievable injustice as two separate independent grounds to seek an interim relief of injunction against invocation of an unconditional bank guarantee. In doing so, the Hon'ble High Court has extended the scope of Section 9 of the Arbitration Act, *vis a vis* when dealing with a petition for grant of injunction against invocation of a bank guarantee.

10. Although the exception of 'special equities' has been sufficiently ruled to be a valid reason for seeking a relief of injunction, the courts have nevertheless been circumspect on the boundaries and categories of circumstances which may be construed as 'special equities'. Until the *Standard Chartered Bank* case as aforesaid, the determination of application of special equities was limited to circumstances resulting directly in irretrievable loss or injustice. With the rendering of the said decision and consequently viewing the said causes independently, it will be interesting to see the development of law based on decisions of the courts on the circumstances which will fall within the concept of 'special equities', without recourse or association to irretrievable loss or injustice.

Bonafides of the party seeking relief –

11. Even otherwise, as is evident from a reading of the instant decision of the Delhi High Court, the exception of special equities will not be universal and cannot be applied generally in all instances, but will depend on the bonafides of the affected party on a case to case basis. A party at whose behest the bank guarantee is given cannot merely piggy-back on a crisis, such as the ongoing Covid-19 pandemic in order to reap benefits therefrom, but must be able to decisively establish *inter alia* (i) that there has been a genuine effort to fulfil the obligations under the contract, save and except for the situation arising from the special equities (such as Covid-19 pandemic), (ii) there is no adequate remedy otherwise available under law, (iii) the allegations of irreparable harm are not speculative, but genuine and immediate and the presence of exceptional circumstances exist which make it difficult (not necessarily impossible) for the guarantor to reimburse himself if he ultimately succeeds.

Right of bank –

12. In setting out the role of the bank in refusing to entertain a request for invocation of a bank guarantee where fraud has been alleged, the Hon'ble High Court has referred to the observations of Sir John Donaldson, M.R. in *Bolivinter Oil SA vs. Chase Manhattan Bank* [(1984) 1 All ER 351] (All ER at p. 352): (at SCC p. 197) in laying out the settled position of law that '*the evidence must be clear both as to the fact of fraud and as to the bank's knowledge*'. However in dwelling on the role of the bank in case of 'special equities', the Hon'ble Court has refrained from referring to any such liberty being granted to a bank to refuse request for invocation, despite the existence of the special equity being within the knowledge of the bank.

13. Given the unequivocal language in the decisions of various courts on the binding, distinct and independent nature of the contract between the bank and the beneficiary as regards a bank guarantee, it may be construed from a combined reading of the decisions that a right to refuse invocation of an unconditional bank guarantee by a bank (in case of special equities) may be exercised only upon grant of an injunction granted by a court.

Force majeure –

14. The Hon'ble Court has also held that the lock down that came into place on March 24, 2020 on account of Covid-19 pandemic was *prima facie* in the nature of 'force majeure'. The general assertion made by the court is problematic and cause of concern for several reasons.
15. At the outset, the court has not indicated a need to identify the situation as an event of force majeure in order for it to qualify as a 'special equity'. Further, even assuming that any such determination was required, the court will need to have adopted the test of law in order to determine if the situation was indeed an event of force majeure. This would have entailed the test as set out in seminal decision of *Satyabrata Ghose vs. Mugneeram Bangur & Co. [1954 SCR 310]*. As is evident from a reading of the decision, apart from making a general assertion or rather an assumption of the situation, the Court has not gone into details concerning the legal determination to arrive at its assumption.
16. Without having to dwell on the concept of force majeure, it may have been open to the court to rule the situation described by the petitioner as a 'special equity' based on the facts at hand, which may have been sufficient for the court to validly grant the relief of interim injunction as sought for by the petitioner.
17. The general assertion of the situation being an event of force majeure, sans a legal test to determine the same may have certain dangerous consequences. With the tremendous interruption and disruption caused to the economy and industrial activity on account of the Covid-19 pandemic, it is expected that the courts, judicial bodies and quasi judicial bodies will be inundated with repeated opportunities to determine and rule on the existence of an event of force majeure and the right of waiver of contractual obligations of the contracting parties. A general assertion, sans a legal test of determination in the instant case by the Hon'ble High Court is likely to create ambiguity as the minds of these adjudicating bodies as the same is likely to be considered as a *ratio decidendi*. It is not likely that the judicial and quasi judicial bodies will take note of the fact that the determination or rather inference of whether the situation was in effect an event of force majeure was irrelevant to the decision to be made by the court.

Conclusion –

It is noteworthy for the Hon'ble Court to have duly recognized and applied the cause of 'special equities' to grant the relief of interim injunction restraining the respondent from

invoking the unconditional bank guarantees. The Hon'ble Court has also aptly applied the principles of the *Standard Chartered Bank* case in expanding on the grounds which may be urged by petitioners in seeking an injunction in similar matters. It would nevertheless have been prudent for the Hon'ble Court to have dealt cautiously in making reference to the Covid-19 situation as an event of 'force majeure', which is likely to be the subject matter of several legal challenges expected in the days to come.
