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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 24th July, 2025*

\+ CS(COMM) 497/2019

KOTAK MAHINDRA BANK LIMITED .....Plaintiff

Through: Mr. Sandeep Sethi, Senior Advocate with Mr. Aman Raj Gandhi, Mr. Parthasarthy Bose and Mr. Lakshay Kumar, Advocates.

versus

UNION OF INDIA & ORS. .....Defendants

Through: Mr. Ravi Prakash, Senior Advocate with Mr. Varun Agarwal and Mr. Syed Husain Adil Taqvi, Advocates for D-1 and D-2.

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J.

1. This suit is filed on behalf of the Plaintiff seeking a decree for declaration that Plaintiff is discharged from its obligations under Bank Guarantees ('BGs') being: (i) Bank Guarantee No. 0691OBG16010553 dated 23.08.2016; (ii) Bank Guarantee No. 0691OBG16010800 dated 26.08.2016; (iii) Bank Guarantee No. 0691OBG16011649 dated 14.09.2016; (iv) Bank Guarantee No. 0691OBG16012653 dated 30.09.2016; and (v) Bank Guarantee No. 0691OBG16014183 dated 26.10.2016 as also declaring that invocation of the said Bank Guarantees vide notices/letters dated 05.01.2019, 15.01.2019 and 29.01.2019 is invalid, illegal and void. Plaintiff also seeks a decree in the sum of Rs.48,77,13,600/- along with interest from the date of payment against Defendant No.1.

BRIEF FACTS

2. It is averred that Plaintiff is a Banking Company registered under the Companies Act, 1956 engaged in the business of banking. Defendant No.1/Ministry of Road, Transport and Highways ('MoRTH') is an Organization under the Government of India entrusted with task of formulating and administering, in consultation with other Central Ministries/Departments, State Governments etc., policies for Road Transport, National Highways and Transport Research, with a view to increasing the mobility and efficiency of road transport system in the country. Defendant No.3 is a Company against which NCLT, Mumbai has admitted insolvency proceedings and appointed Resolution Professional. During the pendency of Corporate Insolvency Resolution Process ('CIRP'), no legally compliant resolution plan was received by the Committee of Creditors till 269th day and hence by efflux of time, on 270th day, Defendant No.3 went into liquidation and NCLT thereafter appointed a Liquidator.

3. It is averred that MoRTH had entrusted the Government of Bihar the work of development, maintenance and management of NH-104 and had resolved to take up the work of rehabilitation and upgradation of 2 lanes with paved shoulders configuration and strengthening of Sitamarhi-Jaynagar-Narahai Section in the State of Bihar under Phase-I of the National Highways Inter-Connectivity Improvement Projects. By and under two separate bidding documents, both dated 01.04.2015, MoRTH invited bids for undertaking work in Lot-I and Lot-II of the Project.

4. It is stated that on 30.05.2015, Defendant No.3 and RCM Infrastructure Limited entered into two Joint Bidding Agreements for incorporation of a Joint Venture viz., SHEL-RCM JV ('Joint Venture') for

bidding for Lot-I and Lot-II of the Project and on 02.06.2015, bids were submitted through the Joint Venture. As per Clause 6 of the Joint Bidding Agreements, it was agreed between Defendant No.3 and RCM Infrastructure Limited that their share of the work in terms of proportion of construction and equity share in the project would be 51% and 49%, respectively.

5. It is averred that on 15.10.2015, bid of consortium of Rs.154,62,00,000/- was accepted by MoRTH, being the lowest bid and two separate Letters of Acceptance were issued. On 23.11.2015, Joint Bidding Agreements were superseded by two Supplementary Agreements and it was agreed that Defendant No.3 would now have participation of 100% and RCM Infrastructure Limited would be responsible only to the extent of providing Project Management Services and Technical Consultations. It was also agreed under Clause 5 that it shall be the responsibility of Defendant No.3 to furnish any bond, Performance BG or Counter BG required by MoRTH.

6. It is averred that on 18.02.2016, two Engineering Procurement and Construction Agreements ('EPC Agreements') were executed in favour of the consortium by MoRTH and relevant clauses were 19.2, dealing with advance payment, Clauses 19.2.2 to 19.2.5, providing that Defendant No.3 could demand advance payment by furnishing irrevocable and unconditional BG, equivalent to 110% of such instalments. Clause 19.2.6 mandated that Defendant No.3 shall repay the advance payment within 365 days from the date of receiving the same and Clause 19.2.7 provided that if the contractor failed to repay the advance payment on time, MoRTH could encash the BG for advance payment. Clause 19.5.1 provided that the Authority shall make electronic payment directly to contractor's bank account, which meant that

payments were to be made by Defendants No.1 and 2 into Joint Venture's bank account, as intimated from time to time.

7. It is averred that Defendant No.3 approached the Plaintiff for availing certain credit facilities, including issuance of BGs. For sanctioning the BGs, Plaintiff required Defendant No.3 to open an Escrow Account with the Plaintiff for all transactions related to the Project and requested that all advances/payments/receivables shall be routed through such Escrow Account only and this payment methodology would not be changed until Defendant No.3 submitted a 'No Objection Certificate' ('NOC') from the Plaintiff. Defendant No.3 was also required to issue a letter to MoRTH in this regard, which was further required to be duly acknowledged and confirmed by MoRTH. In furtherance of this understanding, on 17.06.2016, Defendant No.3 addressed a letter to Executive Engineer, NH Division, Sitamarhi, Bihar requesting payment of receivables in the Escrow Bank Account maintained with the Plaintiff, with copy to Regional Office, MoRTH, Patna. Defendant No.3 further requested MoRTH to make payments of all receivables, including advances, by way of cheques/RTGS/ NEFT favouring the Joint Venture into the Escrow Account and not to change the payment methodology until Joint Venture submitted an NOC from the Plaintiff in this regard.

8. It is averred that by letter dated 17.06.2016, Regional Officer, Patna, MoRTH forwarded letter dated 17.06.2016 addressed by Defendant No.3 to PIU Head-cum-Executive Engineer, informing about the Escrow Account and to convey the acknowledgement to the Joint Venture. Accordingly, Executive Engineer of MoRTH sent a letter dated 21.06.2016 to Defendant No.3 *inter alia* acknowledging and conveying its acceptance to all incoming

payments being routed through Escrow Account only.

9. It is averred that since the term of accepting all incoming payments, including advances being deposited in the Escrow Account was acceptable to MoRTH and since it was also agreed that payment methodology will not change without NOC from the Plaintiff, the bank agreed to issue six unconditional and irrevocable BGs in favour of MoRTH equivalent to 110% of the Mobilization Advance given to the consortium, for a period of one year and from time to time, the BGs were extended. As the first instalment for Mobilization Advance of Rs.3,09,24,000/- along with interest was recovered by MoRTH, 6th BG for Rs.3,40,16,400/- was returned by MoRTH to the Plaintiff on 16.10.2018. Plaintiff avers that since different working facilities, project specific cash credit etc., had been provided by Plaintiff to Defendant No.3, it agreed to enter into Master Facility Agreement and issued a renewed sanction letter on 11.12.2017. In the month of May, 2018, Plaintiff sent several e-mails to Defendant No.3 seeking information on the status of the Project and requesting to ensure its timely completion.

10. Plaintiff avers that it eventually realised that payments made to the Project, monies earned/generated by Joint Venture from/in respect of Project were not routed through the Escrow Account and accordingly on 07.08.2018, Plaintiff addressed a letter to MoRTH *inter alia* reminding them of the agreed payment mechanism/arrangement wherein all payments, advances and receivables were agreed to be routed through the Escrow Account as also expressing surprise on how methodology for the payment had changed, without NOC from the Plaintiff. It was highlighted that the rationale for specifying the escrow condition was to ensure proper control and monitoring on the cash flows and smooth functioning and closure of the

Project. Plaintiff requested MoRTH to restart all payments related to the Project in the designated Escrow Account, however, neither MoRTH nor Defendant No.3 responded to the said communication.

11. It is averred that in the meanwhile, an Insolvency Petition being CP(IB) 2295(MB)/2018 was filed against Defendant No.3 under Section 7 of Insolvency and Bankruptcy Code, 2016 ('IBC, 2016') before NCLT, Mumbai. By order dated 07.09.2018, NCLT admitted the Company Petition thereby initiating CIRP against Defendant No.3. On 21.09.2018, Plaintiff filed its claims against Defendant No.3 before the Resolution Professional ('RP'). On 10.10.2018, Joint Venture informed MoRTH that it was unable to repay the balance Mobilization Advance as per Clauses 19.2.6 and 19.2.7 of EPC Agreements and sought deferment against recovery of the advance payments along with interest till completion of the Project. On 16.10.2018, MoRTH wrote to Regional Officer, Patna informing that the Joint Venture was not in a position to repay the advance payment towards Mobilization Advance due to financial constraints and hence, MoRTH decided to encash the BGs to recover the balance amount and the remaining amount, if any, was to be paid to the Joint Venture.

12. It is averred that Plaintiff received a letter dated 27.11.2018 addressed by Defendant No.2 forwarding letter dated 16.10.2018 by Defendant No.1, stating therein that in terms of Clauses 19.2.6 and 19.2.7 of EPC Agreements, MoRTH was entitled to encash the BGs in case advance payment was not repaid and that the Joint Venture had intimated its inability to repay the advance, leading to a decision by Defendant No.1 to encash the BGs. In response to the above letter, Plaintiff vide e-mail dated 01.12.2018 addressed to Defendant No. 2 *inter alia* highlighted the concerns regarding

discontinuance of escrow arrangement, whereby monies to the tune of almost Rs.36,03,96,317/- were not received in the Escrow Account. Plaintiff further sought clarification regarding the retention money for Lot-I and Lot-II of the Project, which was retained by Defendant No.2 and not adjusted in calculating the liability of Defendant No.3, at the same time pointing out that while determining Defendant No.3's final liability, Defendant No.2 had failed to take into account advance payment of Rs.3,23,26,576/- in respect of Lot-I and Rs.3,33,07,619/- in respect of Lot-II. On 15.01.2019, Plaintiff received an e-mail from Defendant No. 2 enclosing letters dated 05.01.2019 and 15.01.2019 addressed by MoRTH to the Plaintiff. By letter dated 05.01.2019, MoRTH requested for encashment of BGs and sought remittance of the amount in its account and by the second letter, Plaintiff was requested to expedite the process of remittance.

13. In response to e-mail dated 15.01.2019, Plaintiff sent a letter to Defendant No. 2 on 21.01.2019 *inter alia* informing that MoRTH and the Joint Venture had without Plaintiff's consent fraudulently discontinued the escrow mechanism and modified/varied the terms of relationship between the parties and therefore, in light of provisions of Indian Contract Act, 1872 ('1872 Act') and the applicable Uniform Rules for demand guarantees, Plaintiff stood discharged of its obligations under the said BGs and any upfront waiver by the Plaintiff in respect of any of its rights was invalid and untenable. By the same letter, Plaintiff also clarified that it shall not be liable and will not honour the invocation/encashment request in respect of the BGs. In fact, Plaintiff also wrote to Defendant No. 2 on 01.02.2019 not to release retention money in favour of Defendant No.3 until issues between Plaintiff and MoRTH were finally resolved and requested to maintain *status*

quo. It was also pointed out that Defendant No.1 was holding an aggregate sum of Rs.14,50,65,690/- in the form of retention money, recoveries of mobilization advance, withheld monies, etc.

14. It is further averred that without prejudice to its rights and to demonstrate its *bona fides* as also considering the long-standing relationships between the Plaintiff and MoRTH, Plaintiff deposited a sum of Rs.14 crores in MoRTH's account maintained with another Bank. Again, without prejudice to its rights, Plaintiff remitted a further sum of Rs.34,77,13,600/- on 02.05.2019, totalling to the actual amount under the BGs i.e., Rs.48,77,13,600/-. However, despite this MoRTH vide letter dated 16.07.2019 informed the Plaintiff that payment to Defendant No.3 shall be made in the bank account as requested by it, which triggered filing of the present suit.

15. It is pertinent to note at this stage that vide order dated 28.11.2019, Court disposed of I.A. No.12523/2019, being an application under Order XXXIX Rules 1 and 2 CPC, recording the stand of MoRTH that it did not intend to refund the retention money to Defendant No.3 or the consortium at that time. Recording the stand, Court directed MoRTH to inform the Plaintiff through counsel, at least two weeks in advance, if it intended to refund the retention money or any part thereof to Defendant No.3 or the consortium and Plaintiff was given liberty to move appropriate application at that stage, if so required. Defendants No.1 and 2 filed written statements and affidavits of admission/denial of Plaintiff's documents on 30.10.2019, taking a stand that the suit was bad for non-joinder of necessary parties inasmuch as RCM Infrastructure Limited was not impleaded, *albeit* it was a party to Joint Venture of Defendant No.3. It was further pleaded that

Defendants No.1 and 2 were not privy to the contract between Plaintiff and Defendant No.3 and Defendant No.3 and its Joint Venture had submitted irrevocable and unconditional BGs pursuant to Clause 19.2 of the Agreement dated 18.02.2016, executed between MoRTH and Defendant No.3. It was also stated that BG was an independent contract and the answering Defendants had every right to encash the BGs.

16. Based on the pleadings, following issues were settled by the Court on 11.08.2023:-

> *"(i) Whether the plaintiff is entitled to refund of Rs.48,77,13,600 (Forty Eight Crore Seventy Seven Lakh Thirteen Thousand Six Hundred Only) along with interest, from the defendant no.1? OPP*
>
> *(ii) Relief, if any."*

17. Parties stated before the Court that admission/denial of documents had taken place and evidence affidavits had been filed and that no oral evidence/cross-examination was required. With the consent of the parties, the suit was listed for final hearing.

SUBMISSIONS ON BEHALF OF THE PLAINTIFF:

18. In furtherance of the EPC Agreements executed *inter se* the Defendants, the Joint Venture had *inter alia* availed certain BGs which were to act as securities in the event the Joint Venture failed to refund the mobilization advance to Defendant No.1 within the stipulated timelines. Prior to issuance of BGs in favour of Defendant No.1 and on behalf of the Joint Venture, with a view to protect its interest and maintain an overall supervision over the Project, Plaintiff sought an assurance to the effect that all payments/advances/receivables, present and future, to be received by the Joint Venture will be routed through an Escrow Account maintained with the Plaintiff Bank. Defendants No.1 and 2 explicitly agreed to such

arrangement and in fact, acted upon it from August, 2016 to May, 2018. However, in June, 2018, Defendants No.1 and 2 stopped making payments into the designated Escrow Account and soon thereafter the Joint Venture defaulted on its contractual obligations under the EPC Agreements as well as in its payment obligations to the Plaintiff Bank. Fraudulently, the payment methodology, which was originally acknowledged, agreed and acted upon by the parties, was unilaterally modified/varied to Plaintiff's prejudice and thus Plaintiff stands discharged of its obligations to honour the BGs in question and resultantly, invocation of the BGs by MoRTH is completely illegal and invalid.

19. Unilateral alteration of payment methodology by Defendants No.1 and 2 is violative of Doctrine of Promissory Estoppel. Defendants No.1 and 2 had assented to the escrow arrangement and cannot unilaterally depart therefrom, citing absence of privity of contract. Plain reading of letter dated 17.06.2016 from Defendant No.3 to the Plaintiff shows that the said Defendant had written to Executive Engineer, PIU Head, NH-104 that Plaintiff had extended financial facilities for submitting BGs, for which Defendant No.3 had opened an Escrow Account with the Plaintiff Bank. Copy of the letter was endorsed to MoRTH and by this letter, Defendant No.3 also notified that all advances/payments, both present and future, were to be routed through the said Escrow Account only and no change in payment methodology should be made without NOC from the Plaintiff to Defendant No.2. Therefore, Defendants No.1 and 2 cannot claim that opening of the Escrow Account was not a vital factor in issuing the BGs by the Plaintiff.

20. MoRTH's contention that correspondence exchanged between the

Defendants on 17.06.2016 and 21.06.2016 was merely in furtherance of Clause 19.5.1 of EPC Agreements and Plaintiff had no connection, is wholly erroneous. Had this been the case, there was no need for the Joint Venture to mention that payment methodology shall not change without NOC from the Plaintiff or to have sought Defendants No.1 and 2's acknowledgement to the said letter. It is undisputed that MoRTH in fact acknowledged the existence of escrow arrangement in its letter dated 17.06.2016. Plaintiff had issued BGs under the legitimate expectation that neither of the Defendants will vary or modify the understanding between the parties once understood and acknowledged. In ***Union of India and Others v. Indo-Afghan Agencies Ltd., 1967 SCC OnLine SC 12,*** the Supreme Court held that it is open to a party, who has acted on a representation made by the Government, to claim that Government shall be bound to carry out the promise made by it even though the promise is not recorded as a formal contract. In law, Government is not exempt from liability to carry out the representation made by it as to its future conduct and cannot on some undefined and undisclosed ground of necessity or expediency, fail to carry out the promise solemnly made by it.

21. Contention of Defendants No.1 and 2 that there is no privity of contract with the Plaintiff, is also misconceived. The BGs were issued by the Plaintiff on assurance of Defendants No.1 and 2 to route all payments through designated bank account, which was within Plaintiff's control so that Plaintiff could monitor the inflow and outflow of monies from the bank account and this was thus a critical pre-condition for issuance of the BGs. By letter dated 21.06.2016, Defendants No.1 and 2 clearly acknowledged and agreed to this condition. It is trite that BG is a contract between the bank and the beneficiary and therefore, it cannot be claimed that there was no

privity of contract with the Plaintiff Bank. [***Ref.: Hindustan Steelworks Construction Ltd. v. Tarapore & Co. and Another, (1996) 5 SCC 34***].

22. By virtue of provisions of Section 133 of the 1872 Act, Plaintiff being surety for Defendant No.3's obligations, stood discharged from its liability as soon as the payment methodology was modified/varied by MoRTH, without Plaintiff's knowledge and/or consent and hence, Plaintiff is no longer bound to honour the BGs on invocation. This Court in ***M/s D.S. Constructions Ltd. v. Rites Ltd. and Anr., 2006 SCC OnLine Del 68,*** observed that Section 133 makes it clear that any variance made without surety's consent in terms of the contract between the principal-debtor and the creditor, discharges the surety as to the transactions subsequent to the variance. As per Section 139 of the 1872 Act, if a creditor does an act which is contrary to rights of the surety or impairs his eventual remedy against the principal-debtor, surety is discharged. In ***State Bank of Saurashtra v. Chitranjan Rangnath Raja and Another, (1980) 4 SCC 516***, the Supreme Court held that where a surety, in good faith, gives a personal guarantee basis a clear understanding and subsequently surety's security interest is hampered owing to creditor's negligence, surety will be discharged of its obligations. In the present case, routing the payments through a different bank account deprived the Plaintiff of monitoring or supervising the end use of the said payments and this becomes critical in light of the admitted fact that shortly after modification of the payment methodology, Defendant No.3 defaulted on its obligations and consequently, Plaintiff stood discharged of its obligations as a surety by virtue of Section 139 of 1872 Act.

23. Terms and clauses of the BGs do not tantamount to a waiver of rights under Sections 133 and 139 of 1872 Act. Defendants No.1 and 2's reliance

on Clauses 1 and 5 of the BGs to suggest that since BGs are unconditional and irrevocable, Plaintiff has waived its rights, is fallacious. Firstly, BGs are invariably in standard form and contents, when issued in favour of Government departments/authorities etc. and not open to alteration/ negotiation by banks/lending Institutions. Secondly, Plaintiff is not even questioning Defendants No.1 and 2's right to vary the terms of advance payment in terms of Clause 5 of the BGs. Assuming for the sake of argument that Plaintiff waived its rights in terms of Clause 5, the purported waiver could only be confined to conditions of advance payments or extension of time or period of its repayments and cannot encompass a waiver in respect of any change in the payment methodology. Further, issue of waiver by sureties is no longer *res integra* and the Supreme Court in ***State Bank of India v. Machine Well Industries and Others, 1980 SCC OnLine Del 318***, held that language of Section 133 debars a creditor from making a variance in terms of the contract without consent of the surety, which means that consent should be given along with or at the time of the variance and there could not be any such consent when no variance had been made. It was also held that a surety cannot waive its rights under Sections 133 and 135 of 1872 Act and give consent in advance to the future acts, in contravention of these provisions and statutory rights of a guarantor or a surety cannot be abridged by contractual provisions in the Deed of Guarantee.

24. It is a settled law that if any deliberate or conscious act is done by a third party because of an inducement by the contracting party and that leads to breach of contract, the act resulting in breach is termed as 'tortious interference'. In such a situation, third party can be held liable for causing economic loss to the contracting party, as held by the Calcutta High Court in

Lindsay International Pvt. Ltd. & Ors. v. Laxmi Niwas Mittal & Ors., 2017 SCC OnLine Cal 14920. In the present case, Defendants acted in collusion with each other with an intent to cause loss to the Plaintiff, which is evident from the bare fact that as soon as the payment methodology was changed by Defendants No.1 and 2 at the instance of Defendant No.3, the latter violated its undertaking to the Plaintiff, resulting in actual quantifiable loss to the bank and this amounts to tortious interference with the rights of the bank. Plaintiff has thus become entitled to recover a sum of Rs.48,77,13,600/- from MoRTH or at least to recovery of Rs.14.50 crores, without prejudice to the first claim, misappropriated by MoRTH as retention money.

SUBMISSIONS ON BEHALF OF DEFENDANTS NO.1 & 2:

25. Two separate EPC Agreements, both dated 18.02.2016 were executed between Defendant No.1 and the Joint Venture. Clause 19.2 thereof related to advance payment and provided that Defendant No.1 would make interest free payment in installments equivalent to 10% of the contract price for mobilization, expenses and acquisition of the equipment. Clause 19.2.2 provided that contractor could demand advance payment by furnishing an irrevocable and unconditional BG equivalent to 110% of such installments and Clause 19.2.6 mandated that contractor shall repay advance payment within 365 days from date of receiving the advance payment. Clause 19.2.7 stipulated that if contractor failed to repay the advance payment on time, Authority shall be entitled to encash the BGs for advance payment. Clause 19.5.1 further provided that Authority shall make electronic payment directly into contractor's bank account, as intimated from time to time. Since Defendant No.3 vide letter dated 17.06.2016 requested Executive Engineer, NH Division, Sitamarhi, Bihar to make payment of the receivables,

including advances in the Escrow Account maintained with the Plaintiff Bank, payments were made in the said account and for no other reason.

26. Perusal of letter dated 17.06.2016 shows that Defendant No.3 only affirmed that for furnishing BGs, it had approached the Plaintiff Bank and had extended specific Financial Facilities towards the same and in this context, intimation was given by Defendant No.3 that an Escrow Account had been opened, which was to be used for all transactions for past and future services/supplies. There was no mention of the sanction letter issued by the Plaintiff in favour of Defendant No.3 making the opening of the Escrow Account and/or issuance of NOC by the Plaintiff as a pre-condition to issuing the BGs. Therefore, at the highest, the letter only indicated a self-imposed condition by the Joint Venture that the receivables from the Project would be paid into the Escrow Account and this cannot bind Defendants No.1 and 2. There is no document which even remotely indicates that Defendants No.1 and 2 had bound themselves to make payments in the Escrow Account and/or that the BGs were conditional upon the opening of the Escrow Account. Moreover, there is no averment by the Plaintiff in the pleadings as to how it became aware of: (a) letter dated 17.06.2016 from Defendant No.3; (b) letter dated 17.06.2016 from Regional Officer, Patna; and (c) letter dated 21.06.2016 from Executive Engineer, NH-104, since none of these communications were marked/sent to the Plaintiff.

27. Plaintiff has not placed on record the initial sanction letter issued to Defendant No.3 and its Joint Venture before issuing the BGs in question, which would have shed light on whether there was any pre-condition to the issuance of BGs mandating Defendant No.3 to ensure that payments are made in Escrow Account maintained with the Plaintiff. Plaintiff has averred

in paragraph 3.11 of the plaint that Defendant No.1 accepted all incoming payments including advances being deposited in the Escrow Account and that it was also agreed that payment methodology will not change without NOC from the Plaintiff. However, Defendants have categorically denied the averments in the written statement in paragraph 37 thereof and stated that MoRTH did not enter into any kind of agreement with the Plaintiff in relation to routing payments payable to the contractor through escrow mechanism and there was no such pre-condition in the Agreements for issuance of BGs.

28. Plain reading of the BGs in question would show that the BGs are unconditional, unequivocal and irrevocable, issued in favour of MoRTH, stipulating therein: "*The Bank hereby unconditionally and irrevocably guarantees the due and faithful repayment on time of the aforesaid installment of the Advance Payment under and in accordance with the Agreement and agrees and undertakes to pay to the Authority,….*" Therefore, on a mere demur, MoRTH was entitled to encash the BGs on occurrence of default by Defendant No.3 in making timely re-payments. If the plea of the Plaintiff is accepted, it would alter and convert an unconditional BG to a conditional BG, which is impermissible in law. Significantly, even in the BGs which were issued after the aforementioned three letters, there was no reference of any mandate that payments had to be made to the Joint Venture in the Escrow Account. As per the request of Defendant No.3 made vide letter dated 05.06.2018, Defendants No.1 and 2 started making payments in the account designated by Defendant No.3, which was in consonance with the terms of the contract dated 18.02.2016 and no illegality can be found with this action.

29. Defendant No.3 informed MoRTH vide letter dated 10.10.2018 that it will be unable to repay the advance taken due to financial constraints and therefore, MoRTH rightly decided to encash the BGs and recover the balance amount on account of mobilization advance including interest and the remaining amount, if any, was to be paid to the Joint Venture. This was the very purpose why Defendants No.1 and 2 had in fact called upon Defendant No.3 and its Joint Venture to furnish the BGs so that the advance payment made could be secured and finally reimbursed in the event of default by Defendant No.3. All this while Plaintiff never brought the sanction letter to the notice of Defendants No.1 and 2 and it was only vide letter dated 07.08.2018 that it was for the first time that Plaintiff asserted that opening of the Escrow Account and issuance of NOC from the Plaintiff, in case of change of payment methodology was a pe-condition of the BGs, by inviting attention to letter dated 17.06.2016. Strangely, even in the several letters written by Plaintiff to MoRTH on 01.12.2018, 21.01.2019, 30.01.2019, 01.02.2019, 22.02.2019 and 10.05.2019, there was no reference to the initial sanction letter. In this backdrop, Defendants No.1 and 2 validly invoked the BGs, in consonance with the terms and conditions of the EPC Agreements and the terms of the BGs.

30. Contention of the Plaintiff that it stood discharged of its liability under the BGs for the sole reason that there was variance in payment methodology, is misconceived. Defendant No.3's letter dated 17.06.2016 only reflects some understanding between Defendant No.3 and the Plaintiff with regard to the Escrow Account/NOC, however, clearly these were not pre-conditions in the BGs, which were admittedly unconditional. Clause 19.5.1 of EPC Agreements dated 18.02.2016 provided that within 10 days of

receipt of the Stage Payment Statement from the contractor, pursuant to Clause 19.4, Authority's Engineer shall broadly determine the amount due to the contractor and recommend release of 90% of the amount so determined as part payment, pending issue of Interim Payment Certificate by the Engineer and within 10 days of receipt of recommendation, Authority shall make electronic payment directly to contractor's bank account. Therefore, Defendant No.3's letter dated 17.06.2016 to MoRTH is in furtherance of Clause 19.5.1 giving details of the account in which electronic payment was to be made and has nothing to do with any alleged liability of Defendants No.1 and 2 *qua* the Plaintiff. Plaintiff's claim that it had issued the BGs in question on the assurance given in the letter dated 17.06.2016 has no basis as neither the said letter was marked to the Plaintiff nor its contents reveal any such assurance by Defendants No.1 and 2 and merely acknowledging a letter would not amount to any assurance. Moreover, Clause 5 of the BGs provided that the Authority shall have the liberty, without affecting in any manner the liability of the bank under the guarantees, to vary at any time, terms and conditions of the advance payment and the bank shall not be released from its liability or obligations under these presents by any exercise by the Authority of the liberty with reference to the matters mentioned therein or by reason given by the contractor or any other forbearance, indulgence, acts or omissions on the part of the Authority or of any other matter and that the bank waives all its rights under such law. From a reading of this clause, it is verily clear that any variation in the terms and conditions of the advance payment would not absolve the bank from its liability under the unconditional BGs.

REJOINDER SUBMISSIONS ON BEHALF OF THE PLAINTIFF:

31. Defendants No.1 and 2 have primarily contended that letters dated 17.06.2016 and 21.06.2016 were exchanged between Defendant No.3 and MoRTH only, in accordance with Clause 19.5.1 of the EPC Agreements providing that MoRTH shall make electronic payment directly to contractor's bank account and thus the change in payment methodology was in consonance with the agreements and the request made by Defendant No.3. This contention is misconceived. Clause 19.5 of EPC Agreements relates to "Stage Payment for Works" whereas BGs were furnished by the Plaintiff to secure the return of 'Advance Payments' made by MoRTH to the contractor, which is separately provided for in Clause 19.2, which does not contain any such analogous or similar provision prescribing the manner/ mode of payment to the contractor. Therefore, a clause describing modalities of Stage Payment cannot be relied upon or imported out of context to be construed as payment methodology for advance payments and Clause 19.5 is not attracted in the present situation.

32. The stand of Defendants No.1 and 2 that the purpose of contractor's letter dated 17.06.2016 was to notify MoRTH of the bank account in which payments/receivables were to be routed and the said correspondence had no connection with the Plaintiff, has no basis and had that been the case, there was no necessity for the contractor to mention that: (a) Defendant No.3 had approached the Plaintiff to issue BGs extending specific Financial Facilities towards the same; (b) Escrow Account had been opened with the Plaintiff in which monies from all transactions, past or future, will be deposited; (c) all advances/payments/ receivables, both present and future, to be received by the Joint Venture in future shall be routed through the said account only; (d)

payment of receivables (including advances) by way of cheques/RTGS/ NEFT, favouring Defendant No.3 shall be made in the Escrow Account; and (e) the payment methodology was not to change until the Joint Venture submitted NOC from the Plaintiff bank. If Plaintiff was a completely unconnected entity, MoRTH would have responded to Defendant No.3's letter clarifying that NOC from the Plaintiff was completely irrelevant, however, in contrast, MoRTH not only acknowledged the said letter but also agreed to the arrangement. Similarly, the contention that the deposit of money in the designated Escrow Account was only a self-imposed condition by Defendant No.3, is fallacious. This plea is belied by the fact that MoRTH accepted and acknowledged that grant of NOC from the Plaintiff was a pre-condition for change of payment methodology and this is evident from its letters dated 17.06.2016 and 21.06.2016.

33. MoRTH's contention that sanction letter, which provided for Escrow Account as a pre-condition is dated 11.12.2017 whereas BGs were issued in August-October, 2016 and therefore, escrow arrangement could not be a condition precedent, also falls to the ground for multiple reasons. EPC Agreements were executed on 18.02.2016 and original sanction letter was issued on 12.04.2016. Thereafter, three letters were exchanged between Defendant No.3 and MoRTH in June, 2016 acknowledging and accepting the escrow payment methodology and issuance of NOC and thereafter, the BGs were issued in favour of MoRTH in August-October, 2016. This chronology makes it evident that BGs were issued after condition of escrow arrangement was duly accepted by MoRTH. Plaintiff has specifically pleaded in the plaint that for sanctioning the credit facilities/BGs, Bank required Defendant No.3 to open an Escrow Account for all transactions

related to the Project and stipulated that payment methodology must not change till the contractor received NOC from the Plaintiff. It is also clearly pleaded that since escrow arrangement as also the pre-condition of NOC was acceptable to MoRTH, Plaintiff agreed to issue the BGs. This is reflected from paragraphs 3.7 and 3.11 of the plaint.

34. Much was also argued that the original sanction letter dated 12.04.2016 was not filed with the list of documents or even thereafter and cannot be tendered during the course of hearing by the Plaintiff. As for the original sanction letter, its belated production is inconsequential to MoRTH as the same was issued to Defendant No.3 and even if the same was filed earlier, MoRTH would have simply denied the same. Moreover, renewal sanction letter dated 11.12.2017 was always on record and its contents reveal the same position that opening of the Escrow Account was a pre-condition to issue the BGs and in fact, the said letter makes a clear reference to the original sanction letter dated 12.04.2016. There was thus no change in this stand of the Plaintiff on this score.

35. Plaintiff has never contested that the BGs were unconditional and irrevocable. However, furnishing an unconditional BG does not and cannot amount to waiver of Plaintiff's statutory rights under the 1872 Act. Sections 133 and 139 of the said Act are equally applicable to cases of conditional and unconditional/revocable and irrevocable guarantees. Regardless of the nature of BGs or the terms incorporated therein, a beneficiary, i.e. MoRTH can never jeopardize or strip away the security available with the surety, i.e. the Plaintiff. In fact, being a Ministry under the Government of India, duty of MoRTH to act fairly in contractual matters, is on a higher pedestal than a private party. Actions of MoRTH must be rational and free from

arbitrariness. [***Ref.: Kumari Shrilekha Vidyarthi and Others v. State of U.P. and Others, (1991) 1 SCC 212*** and ***ABL International Ltd. and Another v. Export Credit Guarantee Corporation of India Ltd. and Others, (2004) 3 SCC 553***]. The fact that MoRTH itself recognized and understood that Escrow Account was a pre-condition to issuance of BGs and mandatory to ensure financial discipline, is evident from the undisputed fact that for two years, the parties adhered to this agreed mechanism. Apparently and possibly, the mechanism changed once Defendant No.3 realized that it was unable to repay the advance payment due to financial constraints. Colluding with each other, Defendant No.3 informed MoRTH vide letter dated 10.10.2018 that it was unable to pay the money. Immediately, MoRTH decided to encash the BGs and closer to the methodology of payment being changed, Defendant No.3 was admitted to insolvency and later went into liquidation. The dates of events are evidence of the well-orchestrated planning and strategy of the Defendants, which has led to a serious loss to the Plaintiff inasmuch as in February, 2018 insolvency petition was filed against Defendant No.3. On 05.06.2018, MoRTH discontinued the escrow mechanism at the behest of Defendant No.3, without any intimation to or NOC from the Plaintiff. On 07.08.2018, Plaintiff wrote to MoRTH flagging the discontinuation of escrow mechanism and on 07.09.2018, insolvency petition was admitted and finally on 25.06.2019 Defendant No.3 went into liquidation. The entire action of the Defendants in inducing the Plaintiff to issue BGs by agreeing to pre-conditions of Escrow Account and NOC and thereafter, changing the payment methodology, without Plaintiff's knowledge and consent, has caused loss to the bank while MoRTH has been unjustly enriched by encashing BGs worth Rs.48.77 crores furnished by the

Plaintiff and it continues to retain Rs.14.50 crores approximately in the form of retention money, which was to be released to Defendant No.3 upon furnishing PBGs as per Clause 7.5 of the EPC Agreements. Therefore, without prejudice to the Plaintiff's rights and contentions qua refund of entire amount of Rs.48.77 crores, retention money is liable to be released forthwith.

ANALYSIS AND FINDINGS:

36. Indisputably, two separate Joint Bidding Agreements dated 30.05.2015, Ex.P-3, were executed between Defendant No.3 and RCM Infrastructure Limited for undertaking work under Lot-I and Lot-II, which were superseded by two Supplementary Agreements, both dated 23.11.2015, Ex.P-5 and Ex.P-6, whereby the Joint Venture partners *inter alia* agreed that execution of the project would be undertaken 100% by Defendant No.3 and RCM Infrastructure Limited would only provide project management services and technical consultations for smooth and timely execution of the Project. RCM Infrastructure Limited also agreed to waive its right of 49% participation as earlier agreed under the Joint Bidding Agreements. It was also agreed that under Clause 5 of the Supplementary Agreements, it shall be the responsibility of Defendant No.3 to furnish any bond, Performance BG etc. required by MoRTH. These facts are proved by Plaintiff's witness, Mr. Dipanshu Singh, Associate Vice President-Legal.

37. Mr. Dipanshu Singh deposed that pursuant to Letters of Acceptance dated 15.10.2015, MoRTH executed in favour of Joint Venture, two EPC Agreements dated 18.02.2016 in respect of Lot-I and Lot-II of the Project on the terms and conditions set out therein *albeit* the originals were not in possession of the Plaintiff and excerpts were furnished by Defendant No.3 to

the Plaintiff as supporting documents with its loan application. He stated that Defendant No.3 approached the Plaintiff to avail certain credit facilities including issuance of BGs and while sanctioning the BGs, Plaintiff required Defendant No.3 to open an Escrow Account with the Plaintiff for all project related transactions and requested that all advances/payments/receivables shall be routed through such Escrow Account only and the methodology should not be changed until Defendant No.3 furnished an NOC from the Plaintiff. As part of terms and conditions of sanction, Defendant No.3 was required to issue a letter to MoRTH, which was in turn required to be duly acknowledged and confirmed by MoRTH.

38. It was further stated that in furtherance of the pre-conditions, Defendant No.3 wrote to Executive Engineer of MoRTH on 17.06.2016 *inter alia* informing that it had opened an Escrow Account, which it shall be using for all past and future transactions relating to the project and all advances/payments/receivables, both present and future, shall be routed through the said account only. It was also intimated that there would be no change in the payment methodology till NOC was given by the Plaintiff. Letter dated 17.06.2016 (Mark P-9) was addressed by Defendant No.3 to Executive Engineer of MoRTH and therefore, the original is not in custody and possession of the Plaintiff *albeit* Defendant No.3 had furnished a photocopy of the said letter to the Plaintiff.

39. Mr. Dipanshu Singh further stated that by communication dated 17.06.2016, Regional Officer of MoRTH forwarded Defendant No.3's letter dated 17.06.2016 to PIU Head (NH-104)-cum-Executive Engineer *inter alia* informing about the opening of the Escrow Account. Copy of the letter was also marked to the Joint Venture and was furnished by Defendant No.3 to

the Plaintiff to obtain approval for credit facilities. The letter is an admitted document and is exhibited as Ex.P-10. On 21.06.2016, recipient of the letter acknowledged that all incoming payments will be routed through Escrow Account and based on the acceptance of these pre-conditions, by all Defendants, Plaintiff agreed to issue six BGs for a total sum of Rs.52,17,30,000/- on behalf of Defendant No.3 in favour of MoRTH, which were renewed from time to time. Subsequently, Plaintiff also issued a renewal sanction letter dated 11.12.2017 reiterating terms and conditions of Master Facility Agreement signed by Mr. Atul Bansal, Ex-Vice President of the Plaintiff. Witness identified the signatures of Mr. Bansal on the renewal sanction letter Ex.P-18.

40. Witness further stated that having issued the BGs, Plaintiff sent various e-mails to Defendant No.3 requesting early completion of the Project between 03.05.2018 to 22.05.2018, Ex.P-19 (colly.). After almost two years, Plaintiff realised that monies earned or generated by the Joint Venture from the Project were not being routed through the Escrow Account and on 07.08.2018, Plaintiff addressed a letter (Ex.P-20) to MoRTH reminding about the agreed payment mechanism with copy to Defendant No.3. In the meantime, insolvency proceedings were filed against Defendant No.3 under Section 7 of IBC, 2016 before NCLT, which was admitted vide order dated 07.09.2018 (Ex.P-21) and CIRP process started. Plaintiff filed its claims against Defendant No.3 before the Resolution Professional on 21.09.2018. Witness also deposed that MoRTH recovered first installment of mobilisation advance for Rs.3,09,24,000/- with interest and therefore, BG bearing No.0691OBG16011654 for an amount of Rs.3,40,16,400/- was returned on 16.10.2018. By letter dated 10.10.2018, Joint Venture intimated

MoRTH that it was not in a position to repay the advance payment due to financial constraints upon which MoRTH decided to encash the BGs and recover the balance amount on account of mobilisation advance with interest and the remaining amount, if any, was to be paid to the Joint Venture. On 27.11.2018, Defendant No.2 addressed a letter to the Plaintiff enclosing with it a letter dated 16.10.2018 from MoRTH and pointing out Clauses 19.2.6 and 19.2.7 of EPC Agreements, whereby MoRTH was entitled to encash the BGs in case advance payment was not repaid and that one Mr. Mohd. Nusrtullah Khan, Assistant Executive Engineer, MoRTH was authorized to encash the BGs, pursuant to which Plaintiff vide e-mail dated 01.12.2018 highlighted its concerns regarding discontinuance of escrow arrangement due to which monies to the tune of Rs.36,03,96,317/- were not received in the Escrow Account as also the fact that while fixing Defendant No.3's liability, Defendant No.2 had not taken into account advance payment of Rs.3,23,26,576/- in Lot-I and Rs.3,33,07,619/- in Lot-II, recovered by Defendant No.2. It was also deposed that Plaintiff by e-mail dated 21.01.2019 informed Defendant No.2 that MoRTH and Joint Venture had, without Plaintiff's consent, fraudulently discontinued the escrow mechanism and modified/varied the terms of relationship between the Plaintiff and Defendants No.1 and 3 and thus in light of the provisions of 1872 Act and applicable Uniform Rules for Demand Guarantees, Plaintiff stood discharged of its obligations under the BGs and any upfront waiver by the Plaintiff in respect of any of its rights was invalid and untenable. Witness also stated that on 25.06.2019, NCLT, Mumbai passed a liquidation order (Ex.P-36) in favour of Defendant No.3 and appointed a Liquidator.

41. Evidence affidavit was filed on behalf of Defendants No.1 and 2 by

Sh. Vikash Chandra, Authorized Representative. He stated that BGs were invoked strictly in terms of the provisions contained therein and Plaintiff cannot be discharged from its obligations to honour the same. He stated that BGs were unconditional and irrevocable and a separate and independent contract between the Plaintiff and MoRTH, wherein Plaintiff had undertaken to repay, in case the contractor committed default in payment of installments of the advance amount. MoRTH being the beneficiary under the BGs was the sole judge to ascertain the breaches.

42. Mr. Chandra further stated that vide letter dated 05.06.2018 (Ex.DW-1/3), Joint Venture informed MoRTH that all advances/payments/ receivables shall be routed through an account other than the earlier Escrow Account. This account was maintained with Indian Overseas Bank and on receipt of this request, all advances/payments/receivables etc. henceforth were routed through the said account. The letter is in possession of Defendant No. 2. By two letters dated 10.10.2018, Joint Venture intimated that it was not in a position to repay the advance payments due to financial constraints and MoRTH thus decided to encash the BGs and recover the balance amount of mobilisation advance with interest. Thereafter, a letter was sent on 27.11.2018 to Plaintiff Bank seeking encashment of the BGs informing the reason for taking such an action considering that BGs were unconditional and irrevocable.

43. Witness further stated that there was no escrow arrangement between MoRTH, Defendant No.3 and the Plaintiff and neither was the opening of the Escrow Account a term or condition of the BGs. MoRTH had nothing to do with the internal arrangement of opening an Escrow Account entered into between the Plaintiff and Defendant No.3. On continuous denial by the

Plaintiff to fulfil its obligations to encash the BGs, MoRTH wrote to Banking Ombudsman, RBI and to the Department of Financial Services, Ministry of Finance, Government of India, to intervene in the matter and thereafter, Ministry of Finance vide letter dated 10.04.2019 asked the Executive Director, Department of Banking Supervision, RBI, Mumbai to examine the matter. Letters dated 15.02.2019, 02.04.2019 and 10.04.2019 are Ex.DW-1/5, DW-1/6, DW-1/7.

44. It was further stated that MoRTH had not entered into any agreement with the Plaintiff to route the payments payable to Defendant No.3 through escrow mechanism. In terms of the Agreements between MoRTH and Joint Venture, mobilisation advance at the rate of 10% of contract price was paid to Defendant No.3 against amount equivalent to 110% of the advance payment in the form of BGs. As per Clause 19.5.1 of the Agreements, MoRTH was to make electronic payment directly to contractor's bank account as intimated from time to time, which it did. Forwarding of the letter dated 17.06.2016 by Regional Office of MoRTH to PIU Head does not in any manner amount to a concluded contract between MoRTH and the Plaintiff, binding it to an Escrow Account. By this letter, Executive Engineer was only informed of the opening of the Escrow Account and the requirement of NOC before change of payment method and no more. Furthermore, contents of letter dated 21.06.2016 cannot be construed as a contract with the Plaintiff to necessarily continue with the Escrow Account. It was never a term of the BGs that payment methodology could not be changed without NOC from the Plaintiff and therefore, the change of the methodology does not absolve the bank from honouring its commitment under the unconditional BGs. Clause 7.5 of EPC Agreements provided that

from every payment for Works, due to the contractor, in accordance with provisions of Clause 19.5, Authority has the right to deduct 6% as guarantee money for performance of contractor's obligations, subject to the condition that maximum retention money shall not exceed 5% of the contract price. EPC Agreements provided for refund of retention money only upon the contractor furnishing unconditional BGs. Since the Joint Venture did not complete the project, retention money was retained by MoRTH to protect its interests. Plaintiff is a stranger to these EPC Agreements and cannot lay a claim over the retention money.

45. For the sake of completeness, it may be noted that no other evidence was led by the parties and it was agreed that neither party will cross-examine the witnesses, who had filed their evidence by way of affidavits and the matter would proceed for final arguments. The only issue settled by the Court was whether Plaintiff is entitled to refund of Rs.48,77,13,600/- along with interest from MoRTH and the onus to prove the entitlement was on the Plaintiff. By filing evidence affidavits, witnesses of Plaintiff and MoRTH have deposed on the lines of the plaint and the written statement, respectively.

46. Main plank of the argument of the Plaintiff is that the BGs were issued only after Defendant No.3 agreed that all advances/payments/ receivables etc. received from the project, present and future, will be routed through Escrow Account maintained with the Plaintiff Bank and the payment methodology will not change, save and except, with the NOC of the Bank and this pre-condition was made clearly known to Defendants No.1 and 2 and was acknowledged by them in writing. It is on this assurance given in writing by Defendant No.3, that Plaintiff furnished the BGs as this

was the only security with the Bank, in the event Defendant No.3 failed to fulfil its obligations towards the principal creditor. It is also the case of the Plaintiff that once the Defendants changed the payment methodology without consent of the Plaintiff, Plaintiff's liability to honour the BGs as a guarantor stood discharged by virtue of Sections 133 and 139 of 1872 Act and merely because the opening of the Escrow Account and issuance of NOC by the Plaintiff was not a pre-condition/term of the BGs or that it was stipulated in the BGs that MoRTH had the liberty to vary the terms and conditions of the advance payment and Bank shall not be released from its liability and obligation under the BGs, the statutory rights of the Plaintiff cannot be waived. Defendants No.1 and 2, on the other hand, take a position that BGs in question are unconditional and irrevocable and their invocation/ encashment cannot be indicted and on a mere demand, Plaintiff, which is the guarantor, is obliged to honour them and that the said Defendants are not privy to any agreement or arrangement between Defendant No.3 and the Plaintiff for opening the Escrow Account or obtaining NOC from the Plaintiff, as a pre-condition to issuance of BGs. Defendants No.1 and 2 have acted in consonance with the contractual terms requiring them to disburse money into the account of the contractor as detailed, without any rider. If the plea of the Plaintiff was to be accepted, the purpose of furnishing unconditional BGs shall be defeated and moreover, the crucial distinction between a conditional and unconditional BG will be obliterated.

47. Before proceeding further to examine the rival contentions of the parties, it will be useful to have a close look at the nature of the BGs in question and for ease of reference, terms of one of the BGs dated 26.08.2016 are extracted hereunder:-

"BANK GUARANTEE FOR ADVANCE PAYMENT

BG No. 0691OBG16010800
Date of Issue: 26-Aug-2016

To,

DG (RD) & SS,
Ministry of Road Transport & Highways,
Transport Bhawan,
1 Parliament Street,
New Delhi-110001

WHEREAS:

*(A) **M/s Sunil Hitech Engineers Limited**-RCM Infrastructure Limited JV a Joint Venture Between M/s. Sunil Hitech Engineers Limited (Lead Member), having its office at **MET Educational Complex**, 6th Floor, "C" Wing, A.K. Vaidya Marg, Bandra Reclamation, Bandra (West), Mumbai-400050 and **M/s RCM Infrastructure Limited** (Other Member), having its office at **D. No. 8-2-622/5/A/2, 2nd Floor, Indira Chambers**, Avenue-4, Road No.10, Bajanara Hills, Hyderabad-500034 (hereinafter called the **"Contractor"**) has executed an agreement dated **18.02.2016** (hereinafter called the "**Agreement**") with the **DG (RD) & SS**, Ministry of Road Transport & Highways, Transport Bhawan, Parliament Street New Delhi-110001, (hereinafter called the "**Authority**") for the "Construction of the **Rehabilitation and Upgrading to 2 lanes/2 lane with paved shoulders configuration and Strengthening of Sitamarhi-Jaynagar-Narahia section (km 40.000 to Km 219.945) of NH 104 in the state of Bihar (Package No. NHIIP-BR-104-11) for LOT-II Km 79.00 to Km 156.500 under phase-I National Highways Inter-Connectivity Improvement Projects (NHIIP)**" on Engineering Procurement and Construction (the "**EPC**") basis, subject to and in accordance with the provisions of the Agreement.*

*(B) In accordance with Clause 19.2 of the Agreement, the Authority shall make to the Contractor an interest free advance payment (herein after called "**Advance Payment"**") equal to 10% (ten per cent) of the Contract Price; and that the Advance Payment shall be made in three installments subject to the Contractor furnishing an irrevocable and unconditional guarantee by a scheduled bank for an amount equivalent to 110% (one hundred and ten percent) of such installment to remain effective till the complete and full repayment of the installment of the Advance Payment as security for compliance with its obligations in accordance with the Agreement. The amount of Second installment of the Advance Payment is **₹9,59,04,000/-(Rupees Nine Crore Fifty Nine Lakh And Four Thousand Only)** and the amount of this Guarantee is **₹10,54,94,400/-(Rupees Ten Crore Fifty Four Lakh And Ninety Four Thousand Four Hundred Only) (**the **"Guarantee Amount")**.*

*(C) We **Kotak Mahindra Bank Ltd**, having its registered office at 27BKC, C 27, G Block, Bandra Kurla Complex, Bandra (E), Mumbai - 400 051 and branch office among other places at Corporate Operations, 7th Floor Ambadeep Building, KG Marg, New Delhi-110001 (the "**Bank**") have agreed to furnish this bank guarantee (hereinafter called the "**Guarantee**") for the Guarantee Amount.*

NOW, THEREFORE, the Bank hereby, unconditionally and irrevocably, guarantees and affirms as follows:

1. The Bank hereby unconditionally and irrevocably guarantees the due and faithful repayment on time of the aforesaid installment of the Advance Payment under and in accordance with the Agreement, and agrees and undertakes to pay to the Authority, upon its mere first written demand, and without any demur, reservation, recourse, contest or protest, and without any reference to the Contractor, such sum or sums up to an aggregate sum of the Guarantee Amount as the Authority shall claim, without the Authority being required to prove or to show grounds or reasons for its demand and/or for the sum specified therein.

2. A letter from the Authority under the hand of an officer not below the rank of Superintendent Engineer of EAP Zone MoRTH that the Contractor has committed default in the due and faithful under and in accordance with the Agreement shall be conclusive, final and binding on the Bank. The Bank further agrees that the Authority shall be the sole judge as to whether the Contractor is in default in due and faithful performance of its obligation during and under the Agreement and its decision that the Contractor is in default shall be final and binding on the Bank notwithstanding any differences between the Authority and the Contractor, or any dispute between them pending before any court, tribunal, arbitrators or any other authority or body or by the discharge of the Contractor for any reason whatsoever.

3. In order to give effect to this Guarantee, the Authority shall be entitled to act as if the Bank were the principal debtor and any change in the constitution of the Contractor and/or the Bank, whether by their absorption with my other body or corporation or otherwise, shall not in any way or manner affect the liability or obligation of the Bank under this Guarantee

4. It shall not be necessary, and the Bank hereby waives any necessity, for the Authority to proceed against the Contractor before presenting to the Bank its demand under this Guarantee.

5. The Authority shall lays the liberty, without affecting in any manner the liability of the Bank under the Guarantee, to vary at any time the terms and conditions of the Advance Payment or to extend the time or period of its repayment or to postpone for any time, and from time to time, any of the rights and powers exercisable by the Authority against the Contractor, and either to enforce or forbear from enforcing any of the terms and conditions

contained in the Agreement and/or the securities available to the Authority, and the Bank shall not be released from its liability and obligation under these presents by any exercise by the Authority of the liberty with reference to the matters aforesaid or by reason of time being given to the Contractor or any other forbearance, indulgence, act or omission on the part of the Authority or of any other matter or thing whatsoever which under any law relating to sureties and guarantors would but for this provision have the effect of releasing the Bank from it liability and obligation under this Guarantee and the Bank hereby waives all of its rights under any such law.

6. This Guarantee is in addition to and not in substitution of any other guarantee or security now or which may hereafter be held by the Authority in respect of or relating to the Advance Payment.

7. Notwithstanding anything contained hereinbefore, the liability of the Bank under this Guarantee is restricted to the Guarantee Amount and this Guarantee will remain in force for the period specified in paragraph 8 below and unless a demand or claim in writing is made by the Authority on the Bank under this Guarantee all rights of the Authority under this Guarantee shall be forfeited and the Bank shall be relieved from its liabilities hereunder.

8. The Guarantee shall cease to be in force and effect on ***25-Nov-2017****. Unless a demand or claim under this Guarantee is made in writing on or before the aforesaid date, the Bank shall be discharged from its liabilities hereunder.*

9. The Bank undertakes not to revoke this Guarantee during its currency, except with the previous express consent of the Authority in writing, and declares and warrants that it has the power to issue this Guarantee and the undersigned has full powers to do so on behalf of the Bank.

10. Any notice by way of request, demand or otherwise hereunder may be sent by post addressed to the Bank at its above referred branch which shall be deemed to have been duly authorised to receive such notice and to effect payment thereof forthwith and if sent by post it, shall be sufficient to prove that the envelope containing the notice was posted and a certificate signed by an officer of the Authority that the envelope was so posted shall be conclusive.

11. This Guarantee shall come into force with immediate effect and shall remain in force and effect up to the date specified in paragraph 8 above or until it is released earlier by the Authority pursuant to the provisions of the Agreement.

12. This Guarantee is subject to the Uniform Rules for Demand Guarantees (URDG) 2010 Revision, ICC Publication No. 738, except that the supporting statement under Article 15(a) is hereby excluded.

Notwithstanding anything contained herein above:

1. Our liability under this Bank guarantee shall not exceed is ***₹10,54,94,400/-(Rupees Ten Crore Fifty Four Lakh And Ninety Four Thousand Four Hundred Only)***

2. This Bank guarantee will be valid up to ***25-Nov-2017.***

3. We are liable to pay the guarantee amount or any part thereof under this Bank guarantee only if you serve upon us a written claim or demand (and which should be received by us), on or before ***25-Nov-2017*** *(Inclusive of Claim Period) at Kotak Mahindra Bank Ltd. Corporate Operations, 7th Floor, Ambadeep Building, KG Marg New Delhi 110001 and a copy of the same to be sent to Bank Guarantee Dept. (BGLC Team), Corporate Banking Operations (CPC), 6th Floor, Kotak Infiniti, Zone 4, Building No. 21, Infinity Park, Off Western Express Highway, Goregaon Mulund Link Road, Malad (E), Mumbai- 400097 whereafter it ceases to be in effect in all respects whether or not the original bank guarantee is returned to us."*

48. Pertinently, I may note that Mr. Sethi, learned Senior counsel for the Plaintiff in his usual fairness candidly admitted that the BGs in question are unconditional and irrevocable. It is clearly annotated in the BGs that in accordance with Clause 19.2 of the Agreements, MoRTH shall make to the contractor an interest free advance payment equal to 10% of the contract price and that the advance payment shall be made in three installments subject to the contractor furnishing an irrevocable and unconditional guarantee by a Scheduled Bank for an amount equivalent to 110% of such installment to remain effective till the complete and full repayment of the installment of the advance payment as security for compliance with its obligations in accordance with the Agreements. Plaintiff Bank unconditionally and irrevocably guaranteed the due and faithful repayment on time of the installments of the advance payment under and in accordance with the Agreements and undertook to pay to MoRTH, upon its mere first written demand and without any demur, reservation, recourse, contest or protest and without any reference to the contractor, such sum or sums, upto an aggregate sum of the guarantee amount, as MoRTH shall claim, without

MoRTH being required to prove or to show grounds or reasons for its demand and/or for the sum specified therein. Indisputably, the BGs in question are 'unconditional' and 'irrevocable'.

49. Law on invocation/encashment of unconditional and irrevocable BGs is far too well-settled for any debate and in order to avoid prolixity, I may refer only to a few judgments on this aspect. In ***Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co, (2007) 8 SCC 110,*** the Supreme Court enumerated six principles of unconditional BGs *albeit* in the context of grant of injunction against their invocation and I quote:-

> *"14. ……*
>
> *(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 realisation 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 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."*

50. In ***Vinitec Electronics Private Ltd. v. HCL Infosystems Ltd, (2008) 1 SCC 544,*** the Supreme Court held as follows:-

> ***"11.*** *The law relating to invocation of bank guarantees is by now well settled by a catena of decisions of this Court. The bank guarantees which provided that they are payable by the guarantor on demand is considered to be an unconditional bank guarantee. When in the course of commercial*

dealings, unconditional guarantees have been given or accepted the beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes. In U.P. State Sugar Corpn. v. Sumac International Ltd. [(1997) 1 SCC 568] this Court observed that: (SCC p. 574, para 12)

> *"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 realise 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 realisation 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 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. The two grounds are not necessarily connected, though both may coexist in some cases."*

12. *It is equally well settled in law that bank guarantee is an independent contract between bank and the beneficiary thereof. The bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and of no consequence. In BSES Ltd. v. Fenner India Ltd. [(2006) 2 SCC 728] this Court held: (SCC pp. 733-34, para 10)*

> *"10. There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non-intervention is when there are 'special equities' in favour of injunction, such as when 'irretrievable injury' or 'irretrievable injustice' would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this Court [**Ed.**: See*

e.g. U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568 at pp. 574-77, paras 12-16; State of Maharashtra v. National Construction Co., (1996) 1 SCC 735 at p. 741, para 13. See also United Commercial Bank v. Bank of India, (1981) 2 SCC 766; Centax (India) Ltd. v. Vinmar Impex Inc., (1986) 4 SCC 136.], that in U.P. State Sugar Corpn. v. Sumac International Ltd. [(1997)1 SCC 568] (hereinafter 'U.P. State Sugar Corpn. [(1997) 1 SCC 568]') this Court, correctly declared that the law was 'settled'."

xxx xxx xxx

***14.** In Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engg. Coop. Ltd. [(2007) 6 SCC 470] this Court observed: (SCC p. 471b-d)*

"If the bank guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction from enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered into between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury.

What is relevant are the terms incorporated in the guarantee executed by the bank. On careful analysis of the terms and conditions of the guarantee in the present case, it is found that the guarantee is an unconditional one. The respondent, therefore, cannot be allowed to raise any dispute and prevent the appellant from encashing the bank guarantee. The mere fact that the bank guarantee refers to the principal agreement without referring to any specific clause in the preamble of the deed of guarantee does not make the guarantee furnished by the bank to be a conditional one."

(Paras 22 and 28)
(emphasis supplied)

51. The principles that clearly emerge from the aforesaid decisions are that BGs which are payable on mere demand by the guarantor are unconditional BGs and these entitle the beneficiary in whose favour the guarantee is furnished by the Bank to enforce the BG and the Bank is bound to honour the same as per the terms of the BG on a mere demand,

irrespective of and *de hors* any dispute between the parties, else the purpose of giving such a BG would stand defeated. It is also settled that Courts have to be extremely slow in injuncting invocation/encashment of unconditional BGs and the only exceptions carved out by the Courts are: (a) existence of fraud of an egregious nature; or (b) irretrievable injustice of an exceptional nature; or (c) special equities. In this context, I may also refer to judgment of the Division Bench of this Court in ***CRSC Research and Design Institute Group Co. Ltd. v. Dedicated Freight Corridor Corporation of India Limited and Others, 2020 SCC OnLine Del 1526*** and of the Co-ordinate Bench in ***SMS Limited v. Oil & Natural Gas Limited, 2021 SCC OnLine Del 5728.***

52. As noted above, Mr. Sandeep Sethi, learned Senior Counsel for the Plaintiff in his usual candour and fairness admitted that the BGs in question were unconditional and did not question the position of law with regard to the scope of interference by the Courts in invocation/encashment of unconditional and irrevocable BGs. However, what was strenuously urged was that as a pre-condition of issuance of BGs, Defendant No.3 was under a mandate to open an Escrow Account with the Plaintiff Bank and the payment methodology agreed upon between the parties could not change or vary without NOC from the Plaintiff. Once this methodology changed and Defendants No.1 and 2 agreed to deposit the receivables from the project in another account of Defendant No.3 without NOC from the Plaintiff, Section 133 of 1872 Act was attracted and Plaintiff was discharged from honouring the BGs. I am afraid this argument cannot be accepted.

53. Indisputably, the BGs were unconditional and irrevocable and as the terms of BGs, one of which has been extracted above, Plaintiff

unconditionally guaranteed due and faithful repayment by Defendant No.3 of the installments of the advance payment upon a mere first written demand by MoRTH without any protest, demur or reservation. Clearly and admittedly, opening of the Escrow Account with the Plaintiff Bank and/or issuance of NOC by the Bank before the receivables/payments were paid into another account of Defendant No.3, was not a term of the BGs. Therefore, learned Senior Counsel for Defendants No.1 and 2 is right in his submission that if the plea of the Plaintiff was accepted, virtually, an unconditional BG will be converted into a conditional BG, which is impermissible in law. As a matter of fact and record, after two Agreements both dated 18.02.2016 were executed between MoRTH and the Joint Venture, BGs were furnished by the Plaintiff at the instance of Defendant No.3 and MoRTH being a beneficiary, in my view, has rightly invoked the BGs in terms thereof upon a communication received from Defendant No.3 that it was unable to make good its commitment of payment. A Bank Guarantee is an independent contract from underlying Agreements and therefore to test the validity of invocation of a BG, one can only look at the terms of the BG and not the underlying contract or even the main contract and it is trite that the Bank is bound to honour the unconditional and irrevocable BGs irrespective of and *de hors* the dispute between the principal debtor and the beneficiary/creditor.

54. It is manifest from reading of Article 19.2 of the EPC Agreements that MoRTH was under an obligation to make an interest free advance payment to Defendant No.3 equal in amount to 10% of the contract price for mobilisation expenses and acquisition of equipment in three installments i.e. first installment equal to 2%, second equal to 3% and the third equal to 5%

of the contract price. Defendant No.3, on the other hand, was obliged to furnish an unconditional and irrevocable BG while applying for the first installment of advance payment from a Bank for an amount equivalent to 110% of such installment, and the BG was to remain effective till complete and full repayment thereof. The same procedure was to be followed for the second and the third installments. Clause 19.2.7 provided that in the event of Defendant No.3's failure to repay on time, MoRTH was entitled to encash the BGs towards advance payment. It is in this context that Defendant No.3 called upon the Plaintiff to furnish the BGs in question. Clause 19.5.1 provided that MoRTH shall make electronic payment directly to contractor's bank account. Opening of the Escrow Account and/or issuance of NOC by Plaintiff as a pre-condition for issuance of BGs is not a term of the Agreements in question. There is no separate agreement between Plaintiff and Defendants No.1 and 2 binding the latter parties to necessarily route the monies in favour of Defendant No.3 through an Escrow Account with the Plaintiff Bank.

55. It is a matter of record that letter dated 17.06.2016/Ex.P-9 was sent by Defendant No.3 to MoRTH informing that the Joint Venture had opened an Escrow Account with the Plaintiff Bank and all advances/payments/ receivables, present and future to be received by the Joint Venture shall be routed through the said account and payment methodology shall not change until Defendant No.3 submitted NOC from Plaintiff to MoRTH. It is also a matter of record that this letter was forwarded by Regional Office of MoRTH to PIU Head-cum-Executive Engineer by another letter sent on the same day. However, as rightly flagged by Mr. Ravi Prakash, learned Senior Counsel, this letter was only an intimation of opening of an Escrow Account

and/or the requirement of NOC. It was not mentioned anywhere in the letter that these were pre-conditions of issuance of BGs by the Plaintiff and it would bear repetition to state that there was no provision to open Escrow Account by way of an Agreement between all the parties and rather the Agreements by way of Clause 19.5.1 provided for electronic payment directly to the contractor's account without any specifics of an Escrow Account. Letters dated 17.06.2016 emphatically relied upon by the Plaintiff can at best be a communication/agreement between the Plaintiff and Defendant No.3 and cannot bind Defendants No.1 and 2. It is pertinent to mention that even copies of the initial sanction letter and the renewal sanction letter were never communicated to MoRTH and admittedly, the sanction letter was never filed in the present suit.

56. Plaintiff led evidence through Mr. Dipanshu Singh, Associate Vice President-Legal, who in his deposition proved that Defendant No.3 addressed a letter to Executive Engineer of Defendant No.1 *inter alia* informing that he had opened an Escrow Account which it shall be using for past and future transactions related to the project and all advances/payments/ receivables, both present and future to be received by the Joint Venture shall be routed through the said Escrow Account and Defendant No.3 requested Defendant No.1 to make all payments by whichever mode in the Escrow Account only and not to change the payment methodology till NOC was received from the Plaintiff. He also deposed that vide another letter dated 17.06.2016, Regional Officer of Defendant No.1 forwarded this letter to PIU Head (NH-104) cum executive engineer, *inter alia,* informing him about the opening of the Escrow Account and pursuant thereto, on 21.06.2016, the said officer sent a letter to the Joint Venture *inter alia* acknowledging and

conveying its acceptance to all incoming payments including advances for both Lots. The witness deposed that only because the terms of accepting payment including advances being deposited in the Escrow Account was acceptable to Defendant No.1 that Plaintiff agreed to issue the BGs on behalf of Defendant No.3. Evidence was led with regard to the Renewal Sanction Letter dated 11.12.2017 providing for continuation of the escrow arrangement. From the deposition of the witness, the only thing that stands proved is intimation by Defendant No.3 to Defendants No.1 and 2 of the arrangement of Escrow Account and methodology of payment in the said account as also the requirement of NOC before change of methodology and its acknowledgement by Defendants No.1 and 2. This arrangement was purely between Defendant No.3 and the Plaintiff and certainly, Defendants No.1 and 2 were neither party to this arrangement nor was the same a term of the unconditional BG and therefore cannot bind Defendants No.1 and 2.

57. In fact, Mr. Vikash Chandra, witness of Defendants No.1 and 2 has stated in his affidavit that there was no escrow arrangement or mechanism signed between Defendant No.1, Defendant No.3 and Plaintiff and nor was there any provision in the contract agreements signed between Defendant No.1 and the Joint Venture or the Contractor for Lot-I and Lot-II projects. He has also deposed that Defendant No.1 never entered into any kind of agreement with the bank for routing the payments payable to Defendant No.3 through escrow mechanism and emphasised on Clause 19.5.1 of the Agreements whereby the Authority was required to make electronic payment directly to contractor's bank account as intimated from time to time.

58. Witness has also deposed that forwarding of letter dated 17.06.2016 by Regional Officer of Defendant No.1 does not amount to any concluded contract between Defendant No.1 and the Plaintiff to adhere to the escrow mechanism. Letter dated 17.06.2016 was only an intimation and once it was received, it was simply acknowledged in the ordinary course of work. Most importantly, it was deposed that the Plaintiff was not a party to the agreements executed between Defendant No.1 and the Joint Venture and was only a party to the unconditional and irrevocable BG given by the Joint Venture in favour of Defendant No.1 to ensure repayment of advance payments made to it. There was no term/clause/pre-condition in the BGs stating that if the payments were not routed through the Escrow Account or that if the NOC was not received from the Plaintiff in case of change of payment methodology, it would entail discharge of liability of the Bank such that the unconditional BGs would not be honoured. Therefore, in my view, Defendants No.1 and 2 cannot be bound by the terms agreed upon between the Plaintiff and Defendant No.3 for the purpose of issuance of the BGs.

59. Much was argued with regard to the discharge of liability of a guarantor under Sections 133 and 139 of 1872 Act. This argument also does not aid the Plaintiff. Section 126 of 1872 Act provides that a contract or guarantee is a contract to perform the promise or discharge the liability of a third person in case of his default. The person who gives the guarantee is the 'surety'; the person in respect of whose default the guarantee is given is called the 'principal-debtor'; and the person to whom the guarantee is given is called the 'creditor'. Section 128 of 1872 Act deals with surety's liability and provides that liability of the surety is co-extensive with that of the principal-debtor unless otherwise provided by the contract. Sections 133 to

139 deal with discharge of surety. As rightly placed by Mr. Sethi, learned Senior Counsel if any variance is made without surety's consent in the terms of the contract between the principal-debtor and the creditor, it amounts to discharge of the surety as to the transactions subsequent to the variance. Section 139 of 1872 Act provides that if the creditor does any act which is inconsistent with the rights of the surety or omits to do any act which his duty to the surety requires him to do and the eventual remedy of the surety himself against the principal-debtor is thereby impaired, the surety is discharged. As can be seen from the plaint and the relief claimed therein, Plaintiff seeks discharge from its obligations under the BGs as also a decree of recovery from MoRTH of an amount of Rs.48,77,13,600/-. Therefore, it is clear that the claim is against MoRTH and not Defendant No.3. There is no contract between the Plaintiff and MoRTH mandating that the monies under the project were to be routed through the Escrow Account maintained with the Plaintiff Bank and none has been shown during the course of hearing. Once the contract between the Plaintiff and MoRTH did not incorporate any term of Escrow Account, the question of variation under Section 133 of 1872 Act does not arise and consequently, it cannot be urged that since the variation was without surety's consent, it stood discharged. Opening the Escrow Account was at the highest an agreement/arrangement between the Plaintiff and Defendant No.3. On this score, the judgment relied on by the Plaintiff in ***Indo-Afghan Agencies Ltd. (supra),*** where it was held that unilateral alteration of payment methodology is violation of Doctrine of Promissory Estoppel, is inapplicable.

60. Reliance was placed by Mr. Sethi on the judgment of this Court in ***M/s D.S. Constructions Ltd. (supra),*** to argue that Plaintiff's liability stood

discharged by virtue of Section 133 of the 1872 Act as a contract of guarantee is not entirely independent of the underlying contract between the principal-debtor and the creditor and/or of their acts of omission or commission resulting in any variation or modification or discharge of the principal-debtor, as held in the said decision. As can be seen from the judgment, the two issues before the Court were: (a) whether any agreement came into existence between the Plaintiff and Defendant No.1; and (b) whether Defendant No.1 was entitled to invoke the BGs. Defendant No.1 in the said case had issued letter inviting tender for construction in a project and it was a condition of the Letter Inviting Tender that bid must be accompanied by earnest money deposit of Rs.15 lacs and/or BG for the said amount. After the bids were opened, Defendant No.1 informed the Plaintiff that finalisation of the tender would take time and requested the Plaintiff to extend the validity of the offer unconditionally upto a certain period to which the Plaintiff agreed, subject to reduction in the rebate. Plaintiff was also informed that Defendant No.1 had agreed to treat the earnest money in the form of Bank Guarantee as total security deposit and that Plaintiff should sign on the Letter of Award in token of its unconditional acceptance, which the Plaintiff did not do and instead filed the suit. Defendant No. 2 was the Bank which had furnished the BG as surety. Plaintiff argued that there was no enforceable contract between the parties and Defendant No.1 was thus not entitled to forfeit the EMD or invoke the BG. Defendant No.1, on the other hand, argued that it was entitled to forfeit the EMD and invoke the BG in view of Clauses 8.1 and 8.2 of the 'Instructions to Tenderers' as Clause 8.2 did not permit a conditional acceptance. It was interpretation of this clause which became the subject matter of discussion and in this context, the

Court held as follows:-

> *"**17.** I shall now examine the relevant provisions of the Contract Act. Section 126 of the said Act, which defines the terms 'contract of guarantee', 'surety'. 'principal-debtor' and 'creditor', provides that a 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'. The person in respect of whose default the guarantee is given is called the 'principal-debtor' and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written. In the context of the present case, the bank guarantee is a contract of guarantee. The bank (defendant No. 2) is the surety inasmuch as it has extended the guarantee and the plaintiff and the defendant No.1 are the principal-debtor and creditor respectively. The transaction between the aforesaid three parties is essentially a matter of three separate contracts. The first and main being the underlying contract between the principal-debtor and the creditor, i.e. between the plaintiff and the defendant No.1. The second being the contract of guarantee or the bank guarantee which is between the surety and the creditor, i.e. the defendant No. 2 and the defendant No.1. The third is the contract between the principal-debtor and the surety, i.e. between the plaintiff and the defendant No. 2. Although, the three contracts are independent in one sense, they are also inter-related in another sense and are founded upon the underlying contract. Section 128 of the Contract Act stipulates that the liability of the surety is co-extensive with that of the principal-debtor, unless it is otherwise provided by the contract. Section 133 makes it clear that any variance made without the surety's consent in the terms of the contract between the principal-debtor and the creditor, discharges the surety as to transactions subsequent to the variance. Section 134 stipulates that the surety is discharged by any contract between the creditor and the principal-debtor, by which the principal-debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal-debtor. However, certain kinds of discharge of the principal-debtor which may operate by operation of law may not enure to the benefit of the Surety. Such instances being the bankruptcy of the principal-debtor or liquidation in the case the principal-debtor is a company. Construing the aforesaid provisions, it is apparent that although there are three separate relationships and contracts between the three parties, the contract of guarantee does, to a large extent, depend upon the relationship between the creditor and the principal-debtor under the underlying contract. This is so because firstly, the liability of the surety under a contract of guarantee is co-extensive with that of the principal-debtor unless, of course, otherwise provided by the contract. Secondly, any variation brought about by the principal-debtor and the creditor in the terms of the contract between them, without the surety's consent, would discharge the surety as regards all transactions subsequent to the*

variance. Thirdly, if the principal-debtor and the creditor enter into an arrangement whereby the principal-debtor is released or because of any act or omission on the part of the creditor the legal consequence of which is the discharge of the principal-debtor, the surety is also automatically discharged. Therefore, under the scheme of the provisions under the Contract Act itself, the contract of guarantee is not entirely independent of the underlying contract between the principal-debtor and the creditor and/or of their acts of omission or commission resulting in any variation or modification or discharge of the principal-debtor. Going strictly by these provisions, it would be seen that when a principal-debtor is discharged or released of its liability, then, the surety is also so discharged. In the context of the present case, it would mean that if the plaintiff is discharged of its liability, then, the surety (defendant No. 2) would also stand discharged under the contract of guarantee. As I have held while discussing Issue No.1 that there was no contract between the plaintiff and the defendant No.1 and the period of validity of the offer had also expired on 23-9-2003, the defendant No.1 (creditor) could not forfeit the earnest money amount and, therefore, could not insist upon the defendant No. 2 (surety) to discharge its liability under the bank guarantee. Clearly, therefore, the defendant No.1 would not be entitled to invoke the bank guarantee and seek payment thereunder when by its own act and omission the principal-debtor has been discharged."

61. The question of discharge of Defendant No. 2 as a surety was one of the issues that the Court decided in the aforesaid paragraph in the facts of the said case and observed that when a principal-debtor is discharged or released of its liability, then the surety is also so discharged. In the facts of the case, the Court first rendered a finding under Issue No.1 that there was no contract between Plaintiff and Defendant No.1 and the period of validity of the offer had expired. In this backdrop, it was held that Defendant No.1 i.e. the creditor could not forfeit the EMD and therefore could not insist on the surety/Defendant No. 2 to discharge its liability under the BG. In stark contrast to these facts, in the present case, the liability of the principal-debtor is not discharged. Plaintiff had clearly undertaken by furnishing unconditional BGs to indemnify MoRTH in the event of default by Defendant No.3/ Joint Venture and there is no variation to any terms of the

contract between the principal-debtor and the creditor with respect to the Escrow Account, which was never a condition of the Agreements. It is also not the Plaintiff's case that MoRTH has committed any act or omission, legal consequences of which is the discharge of the principal-debtor so as to result in discharging the Plaintiff. The judgment, therefore, does not inure to the advantage of the Plaintiff.

62. Reliance on the judgment in ***Machine Well Industries (supra)*** is equally misplaced. The narrative of the facts in the said case show that State Bank of India filed a suit for recovery basis a cash credit facility taken by Defendants No. 2 and 3 from the erstwhile National Bank of Lahore Limited by pledging movable properties etc. The said Defendants executed fresh loan documents later in favour of the Bank as the balance in their account exceeded the original sanctioned limit. Plaintiff Bank thereafter gave fresh overdraft facility on the hypothecation of machinery and stocks. Defendant No.4 executed a Guarantee Deed in favour of the Bank undertaking to become liable for the amounts payable by Defendants No.1 to 3. Liability was sought to be fastened on Defendant No. 5 on the ground that it had undertaken the liability of Defendant No.1 under some internal arrangement.

63. Defendant No.4 contested his liability and sought discharge under Section 133 of 1872 Act on the ground that he was a guarantor vide Agreement of Guarantee dated 01.02.1964, however, the Bank got new loan documents executed from the Defendants on 01.05.1964, subsequent to the Guarantee Agreement and there was thus a novation and variance of the contract between creditors and Defendants No.1 to 3 without his consent. One of the issues settled by the Court was whether liability of Defendant

No.4 stood discharged by virtue of Section 133 of 1872 Act and on this issue, the Court held as follows:-

> *"Issue No. 5:*
>
> ***22.*** *It appears that it is on account of typographical mistake that s. 33 of the Contract Act has been mentioned in the issue instead of s. 133. It is only s. 133 which deals with the discharge of liability of a guarantor in certain circumstances. That provision reads as under:*
>
> > *"Any variance, made without the surety's consent, in the terms of the contract, between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance."*
>
> ***23.*** *In the present case, there is no dispute about the facts. The agreement of guarantee, ex. PW-2/13, which is sought to be enforced against defendant No.4, was executed on February 1, 1964. Vide that agreement, defendant No.4 undertook to pay up to the extent of Rs. 1,50,000 principal, interest, costs, charges and expenses due or which might at any time become due to the National Bank of Lahore on account of the operation of the cash credit account by defendants Nos. 1 to 3. Before that date cash credit facilities were already available to defendants No.1 to 3. After that agreement of guarantee, the National Bank of Lahore Ltd. raised the cash credit limit to Rs. 2 lakhs and got the following loaning documents executed from defendants Nos. 2 and 3 on May 1, 1964:*
>
> > *(a) Promissory note, ex. PW-2/2.*
> >
> > *(b) Letter of continuity, ex; PW-2/3*
> >
> > *(c) Letter, ex. PW-2/4, assuring payment of the amount mentioned in the promissory note.*
> >
> > *(d) Letter, ex. PW-2/5, regarding interest payable on the loan.*
> >
> > *(e) Agreement for cash credit/overdraft, ex. PW-2/6.*
>
> ***24.*** *In addition to the said documents, defendants Nos. 2 and 3 on behalf of themselves and defendant No.1 executed an agreement of pledge of goods, ex. PW-2/7, on April 26, 1964.*
>
> ***25.*** *It is apparent from the above that there was variance in terms of the contract between principal debtors, defendants Nos. 1 to 3 on the one hand, and the creditor being the National Bank of Lahore on the other and inasmuch as, firstly, the limit of overdrafting was increased from Rs. 1,50,000 to Rs. 2 lakhs and, secondly, the original contract was substituted by a fresh one by getting fresh loaning documents executed. It may be emphasised that the aforesaid variance took place three months after the execution of of the agreement of guarantee. There is no dispute that the aforesaid variance was without the consent of defendant No.4. On that account s. 133 of the Contract Act discharges the surety, i.e., defendant No.4.*

26. *The learned counsel for the plaintiff, however, relied upon cl. 4 of the agreement of guarantee, which reads as under:*

> *"The guarantors hereby consent to the bank making any variance that it may think fit in the terms of the contract with the borrower, to the bank determining, enlarging or varying any credit to him or making any composition with him or promising to give him time or not to sue him and to the bank parting with only security it may hold for the guaranteed debt. The guarantors also agree that they shall not be discharged from their liability by the bank releasing the borrower or by any act or omission of the bank the legal consequence of which may be to discharge the borrower or by any act of the bank which would, but for this present provision, be inconsistent with their rights as guarantors or by the bank's omission to do any act which but for this present provision the bank's duty to the guarantors would have required the bank to do. Though as between the borrower and guarantors they are guarantors only, the guarantors agree that as between the bank and the guarantors they are debtors jointly with the borrower and, accordingly, they shall not be entitled to any of the rights conferred on guarantors and surety by sections 133, 134, 135, 139 and 141 of the Contract Act."*

27. *The learned counsel for the plaintiff contended that the said clause clearly indicated that defendant No.4 undertook that he would not claim benefit of the provisions of s. 133 of the Contract Act and that, therefore, he was not exonerated or discharged from liability. The learned counsel relied upon a judgment of the Madras High Court in A.R. Krishnaswamy Aiyar v. Travancore National Bank Ltd., [1940] 10 Comp Cas 162 (Mad); AIR 1940 Mad 437, in support of his contention that a surety could waive his rights available to him under the provisions of the Contract Act. The following was held by the Madras High Court [at p. 438 of AIR's head note].*

> *"Although a composition bond between the principal debtor and the creditor extinguishes the debt to the principal debtor it does not absolve the sureties from their liability under surety bond, where the surety had expressly contracted to remain liable notwithstanding the discharge of the principal and, therefore, the discharge of the principal cannot be said to be implied discharge of the surety."*

28. *It is not mentioned in the judgment of the Madras High Court as to the interpretation of which provision of the Contract Act was involved in that case. But it was not a case of variance of the terms of the contract which was before that court. The case before the Madras High Court was of composition of a debt by a creditor with the principal debtor. Such a situation is dealt with by s. 135 and not s. 133 of the Contract Act. Section 135 of the Contract Act reads as under:*

> *"A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract."*
>
> ***29.*** *As such the authority has no application on the provisions of s. 133 of the Contract Act.*
>
> ***30.*** *But the question still remains as to whether a surety can waive his rights under s. 133 or 135 of the Contract Act and give consent in advance to the future acts in contravention of the provisions of those sections. The language of those sections indicates that a consent in advance could not be given. The language of s. 133 debars a creditor from making a variance in the terms of the contract without the consent of the surety. That means that if there is a variance, the surety must consent to the same simultaneously and not in advance. The words "without the surety's consent" clearly indicate that the consent should be given along with or at the time of the variance and there could not be any such consent when no variance had been made or even though the same was not in contemplation. Similarly, words "unless the surety assents to such contract" occurring in s. 135 also indicate that the consent should exist at the time of the acts mentioned in the said provision. The word "assent" suggests present tense which is indicative of the fact that the assent should be simultaneous with the composition, etc., mentioned in s. 135. In fact the statutory rights of a surety or guarantor cannot be abridged by a contractual provision in the deed of guarantee unless it had been specifically provided in s. 133 or s. 135 of the Contract Act that such rights were subject to a contract.*
>
> ***31.*** *Under these circumstances not only the judgment of the Madras High Court has no application to the facts of the present case, Ieven beg to differ with the view expressed by the said High Court. The view expressed by the said High Court does not take note of the reasons whatever have been mentioned by me above and, in fact, any of the provisions of the Contract Act have not been specifically mentioned or commented upon in the judgment.*
>
> ***32.*** *Hence I find that the liability of defendant No.4 stands discharged by virtue of the provisions of s. 133 of the Contract Act. Issue is decided, accordingly, in favour of defendant No.4."*

64. As for the proposition of law brought forth in the aforesaid judgment, there can be no debate that the surety does not waive his rights by virtue of Sections 133 or 135 and give consent in advance to the future acts and that Section 133 debars a creditor from making a variance in the terms of the contract without consent of the surety, which is what the Court has held. The

Court further held that if there is a variance, surety must consent to the same simultaneously and not in advance. However, the conclusion of the Court that liability of Defendant No.4 stood discharged by virtue of Section 133 was based on a finding rendered on the basis of evidence on record substantiating that there was variance in terms of the contract between principal-debtors i.e. Defendants No.1 to 3 on one hand and creditor being the Bank on the other hand, inasmuch as firstly the limit of overdraft was increased from Rs.1,50,000/- to Rs.2,00,000/- and secondly, original contract was substituted by a fresh one by executing fresh loan documents and this variation which took place three months after execution of the Agreement of Guarantee, was without the consent of Defendant No.4. In the present case, there is no variance in the terms of the contract between the principal-debtor i.e. Defendant No.3 and the creditor i.e. MoRTH since opening of the Escrow Account was not a term of the Agreements between the two parties. Once there is no variance *inter se* between the Defendants, Section 133 of the 1872 Act does not come into play and Plaintiff cannot seek discharge of its liability under the unconditional BGs issued in favour of MoRTH, as the beneficiary.

65. In view of the aforesaid observations, the suit is dismissed. Liberty is, however, reserved to the Plaintiff to pursue its claims before the Liquidator, which are stated to be pending and/or to take recourse to such legal remedies as may be available to it against Defendant No.3.

JYOTI SINGH, J

JULY 24, 2025*/shivam*