



## ISSUES AND FINDINGS

- Interestingly, in the hearing which was the subject matter of the present order dated April 20, 2020 the Petitioner limited its prayer to seeking an interim injunction until the expiry of one week from the lifting of the lockdown. The Petitioner maintained that the works pending under the Contract were minimal, and it was on course to complete the same by March 31, 2020. However, the works having been interrupted by the lockdown measures, the Petitioner stated it would nevertheless be able to complete the same shortly after lifting of the lockdown. Thus, in the Petitioner's view, the occasion would never arise for the Respondent to have any cause for dispute or invocation of the BGs.
- However, the Respondent resisted granting of the injunction on three grounds.
  - Firstly, the Respondent contended that the Contract envisaged that the works thereunder had to be completed by June 16, 2019 and the Respondent had never granted an extension of time until March 31, 2020 to the Petitioner. Hence, the Respondent would be within its rights to terminate the Contract and to encash the BGs due to the Petitioner's significant delay in performing its obligations.
  - Second, in the Respondent's submission, the Petitioner could have continued carrying out its activities under the Contract, as petroleum was an essential commodity, and production of petroleum was therefore exempted from the lockdown by the government.
  - Third, the Respondent contended that the only legal ground on which injunction against invocation of a BG can be granted is the existence of egregious fraud. To support this contention, the Respondent relied on the Supreme Court's judgments in *U.P. Cooperative*<sup>4</sup> and *Svenska Handelsbanken*<sup>5</sup>.
- The High Court while determining that an ad-interim injunction was merited pending the final decision, found against the Respondent on all three counts.
  - With respect to the dispute on extension of time until March 31, 2020 the High Court noted that, from the Respondent's letter dated March 31, 2020 it appeared that while the Petitioner may have defaulted in adhering to the original contractually stipulated timeline, parties had subsequently agreed that the project could be completed till March 31, 2020.
  - As to the purported exemption for the petroleum industry from lockdown, which, according to the Respondent, the Petitioner could have availed in order to perform its obligations, the High Court agreed with the Petitioner that even if production of petroleum was an exempted activity, the Petitioner itself was not strictly involved in petroleum production but, instead, in drilling of wells, which was directly impeded by the imposition of the lockdown.
  - Lastly, the High Court opined that it could not accept the Respondent's argument that the only ground for restraining invocation of BGs was a case of fraud. In fact, the very cases cited by the Respondent stated that such an injunction could be ordered if there existed egregious fraud, or 'special equities' to prevent irretrievable injustice between the parties. The High Court also noted that the Supreme Court's judgment in *Standard Chartered*<sup>6</sup> appeared to suggest that the 'special equities' could extend beyond cases of irretrievable injustice, as opposed to the understanding in *U.P. Cooperative* and *Svenska Handelsbanken*.
- Thus, in the High Court's view, the court has the power to grant an injunction against invocation of BG if special equities exist in a given set of facts and circumstances.
- In the present case, the High Court noted that at least from March 22, 2020 onwards (when the GOR imposed complete lockdown in the state), the movement of the Petitioner's labour/personnel was severely impeded, hence preventing further performance of works under the Contract. The High Court noted the human, economic and social devastation caused by the Covid-19 pandemic, and the suddenness of the unprecedented measures which the government had had to take for curbing the impact of the same. In the High Court's view, the lockdown was *prima facie* in the nature of *force majeure*.
- Hence, the High Court considered the Petitioner's submission on face value that, had it not been for the *force majeure* circumstances, the Petitioner could have completed the works by the extended deadline of March 31, 2020. It opined that if the BGs were allowed to be encashed at the present juncture, it would result in irretrievable injury to the Petitioner, given the prevailing situation across the world.
- The High Court noted that while it would require a detailed consideration of affidavits and all government orders to decide whether an injunction on the BGs was merited, it was *prima facie* of the view that given the sudden imposition of the lockdown, it was in the interests of justice for the Petitioner to be granted an ad-interim injunction till the expiry of one week from May 3, 2020 till which date the lockdown stood extended at present.

<sup>4</sup> *U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.*, (1988) 1 SCC 174.

<sup>5</sup> *Svenska Handelsbanken v. Indian Charge Chrome*, (1994) 1 SCC 502.

<sup>6</sup> *Standard Chartered Bank Ltd. v. Heavy Engineering Corporation Ltd.*, 2019 SCC Online SC 1638.

It did, however, clarify that the continuance of this ad-interim injunction was subject to examination on the next date of hearing, once the parties had completed pleadings and placed all relevant materials on the record.

## ANALYSIS

- While Indian courts have, historically, adopted a pattern of eschewing grant of injunctions against invocation of bank guarantees, this order makes it evident that they are well aware of the unprecedented gravity of the Covid-19 pandemic, and the significant disruption it has caused to businesses all over the world. Significantly, the High Court appears to have gleaned a broader definition of 'special equities' for granting such injunctions and has taken possibly a practical and equitable approach to the same. While this is an ad-interim injunction only, and the final hearing could yield a different result, until such time, parties who find themselves in similar circumstances can be hopeful that other Indian courts will also adopt such an approach, which may serve to mitigate adverse financial impacts in an already difficult time.
- Recently, the Bombay High Court<sup>7</sup> in different factual circumstances had declined to grant an ad-interim injunction restraining suppliers of steel products from invoking and encashing BGs. Thus, as rightly stated by the Delhi High Court, each matter will be considered on the basis of its unique facts and circumstances and whether the pandemic has created special equities therein will be dependent upon the same.

***Disclaimer:** The information provided in this update is intended for informational purposes only and does not constitute legal opinion or advice. Readers are requested to seek formal legal advice prior to acting upon any of the information provided herein. This update is not intended to address the circumstances of any particular individual or corporate body. There can be no assurance that the judicial/quasi-judicial authorities may not take a position contrary to the views mentioned herein.*

---

<sup>7</sup> Order dated 8 April 2020 in Comm Arb. Pet. Nos. 404 to 408 of 2020.