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C&M e-Alert: *Special equities* arising out of COVID-19 empower the court to injunct invocation of bank guarantees

The High Court of Delhi recently passed an *ad interim order*¹ restraining Vedanta Limited (“Respondent”) from invoking or encashing bank guarantees furnished by Halliburton Offshore Services Inc. (“Petitioner”). While granting interim relief to the Petitioner till the next date of hearing, the High Court observed *inter alia* that:

- the ongoing national lockdown is *prima facie* in the nature of a *force majeure* event;
- the unprecedented lockdown due to COVID-19 creates *special equities* in favour of the Petitioner; and
- if the bank guarantees are allowed to be invoked during the lockdown, irretrievable injury and prejudice would be caused to the Petitioner.

Facts and Contentions

The Petitioner filed an application under Section 9 of the Arbitration and Conciliation Act, 1996, seeking to injunct/ restrain the Respondent from encashing bank guarantees issued in its favour. Such bank guarantees were furnished to secure the performance of contractual obligations in relation to the integrated development of three sites for drilling of petroleum wells.

It was the Petitioner’s case that the development of the three sites would have been completed by 31 March 2020. However, owing to the complete lockdown on industrial activities as well as on movement of persons in the country – consequent to the COVID-19 pandemic – the Petitioner was constrained from performing its contractual obligations. Consequently, the Petitioner invoked the *force majeure* clause and sought relaxation from the Respondent. However, the Respondent refused to accommodate the Petitioner, and threatened to terminate the contract and have the balance activities performed by alternate sources at the cost of the Petitioner.

Countering the claims of the Petitioner, the Respondent stated that invocation of bank guarantees could only be stayed in the face of an egregious fraud. The Respondent also questioned the invocation of the *force majeure* clause as the Petitioner had already delayed the performance of the contract by several months, even prior to the lockdown. It was therefore contended by the Respondent that the Petitioner was merely seeking to piggyback on the COVID-19 crisis to reap benefits from it.

Decision of the High Court

Referring to decisions of the Supreme Court, the High Court observed that judicial interference with invocation or encashment of unconditional bank guarantee(s) is not limited to cases of egregious

¹ *M/s Halliburton Offshore Services Inc. v. Vedanta Ltd. & Anr.*, O.M.P. (I) (COMM) & I.A. 3697/2020



fraud. The court relied on *U. P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.*² and *Svenska Handelsbanken v. Indian Charge Chrome*,³ to hold that in order to restrain the operation of an unconditional bank guarantee, there should be a good *prima facie* case of fraud and *special equities in the form of preventing irretrievable injustice/injury to the party(s)*. The court also referred to the recent decision of the Supreme Court in *Standard Chartered Bank Limited v. Heavy Engineering Corporation Limited*⁴ ("**Standard Chartered**") and stated that *irretrievable injustice* and *special equities*, are distinct circumstances, and the existence of either would independently justify an order of injunction.

Even while culling out the above exceptions to the general principle of a bank being bound to honour the guarantee(s) furnished by it, the court noted that every case has to be decided on its own peculiar facts and circumstances. The facts and circumstances noted in the present case were:

- a) The Petitioner claimed that development of the three sites was in the last stages of completion and ideally would have been finished by 31 March 2020, if the lockdown had not been imposed;
- b) The Petitioner categorically limited its prayer – seeking an injunction till expiry of one week from lifting of the national lockdown;
- c) The country-wide lockdown was wholly unprecedented and thus in the nature of a *force majeure* event and neither of the parties could have predicted it; and
- d) The Petitioner was not *stricto sensu* engaged in the production of petroleum but was rather engaged in the drilling of wells, and therefore impeded as a result of the lockdown.

The High Court thus reasoned that the nation-wide lockdown had *prima facie* resulted in *special equities* in favour of the Petitioner, and justified injuncting the Respondent from invoking the bank guarantees till one week from 03 May 2020, the date till which the lockdown has been imposed.

Our Thoughts

Without delving into the *Force Majeure* clause in the contract between the parties, the court has *prima facie* opined that the country-wide lockdown was in the nature of a '*force majeure*' event. This makes it in line with recent cases⁵, where the court has deferred the contractual obligations/ rights of the parties on account of unprecedented circumstances arising out of COVID-19. Thereby, consigning the circumstances to the narrow confines of "special equities" and granted the ad interim relief.

This order is *ad interim* in nature, and thus does not hold any precedential value. However, given the current situation of deprivation and hardship, it maybe safe to presume that the courts would adopt a lenient outlook and lean towards an equity-based approach while deciding cases involving commercial hardships in the wake of this pandemic.

² (1998) 1 SCC 174

³ (1994) 1 SCC 502

⁴ 2019 SCC Online SC 1638

⁵ Order of Bombay High Court in *Rural Fairprice Wholesale Ltd. v. IDBI Trusteeship Services Ltd.* dated 30 March 2020



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