

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

COMMERCIAL ARBITRATION PETITION NO. 135 OF 2022

Ocean Sparkle Limited. ... Petitioner.
Vs.
1.Oil and Natural Gas Corporation Ltd.
2. State Bank of India. ... Respondents.

Mr. Prathmesh Kamat with Ms.Ashwini Sinha i/b. Bhatt & Saldana, for
the Petitioner.

Mr.Vishal Kanade with Nishit Dhruva, Kushbu Chhajed and Atharva
Diwe i/b. MDP & Partners, for the Respondents.

CORAM : G.S. KULKARNI, J.
DATE : 6 JUNE 2022.

JUDGMENT:

1. This is a petition filed under Section 9 of the Arbitration and Conciliation Act,1996 (for short '**the Act**') whereby the petitioner has prayed for interim reliefs pending the arbitral proceedings.

2. Perusal of the memo of the petition shows that the disputes and differences between the parties have arisen under the contract agreement dated 14 June 2018 (referred to as '**the contract agreement**') as awarded by respondent No.1 – Oil and Natural Gas Corporation Ltd (for short '**ONGC**') to the petitioner, under which the petitioner chartered its vessel i.e. 'OSL Glory' (for short '**the said vessel**') to ONGC for a period of three years (1095 days), commencing from 20

March 2018 at 12.18 hours. The parties agreed that the contract agreement would stand completed unless automatically extended for a period not exceeding 30 days under the same rates to the satisfaction of the ONGC.

3. It is the case of the petitioner that in furtherance of the contract agreement, the said vessel as chartered to the ONGC was to be utilized for the purpose of its off shore activities which were detailed in 'Schedule C' to the contract agreement. The contract agreement provides that the petitioner would raise invoices at the end of each month alongwith the photo copies of the relevant documents. The petitioner accordingly raised monthly invoices claiming charter-hire/remuneration as per the terms of the contract agreement. The petitioner has contended that the petitioner had raised invoices from 1 April 2019 upto May, 2021. The invoices raised by the petitioner from September, 2019 to March, 2020 were cleared by the ONGC without any demur.

4. It is contended by the petitioner that there is some significance in the ONGC clearing the petitioner's invoices after September,2019, for the reason that on 1 September 2019 an incident took place namely that the petitioner's said vessel (whilst on the ONGC charter) collided with the ONGC unmanned platform 'RS-21' when the vessel was approaching Rig Jindal Explorer.

5. The P&I Club of the petitioner [ShipOwners' Protection and Indemnity Association (*Luxembourg*)] appointed one 'UBA Insurance and Surveyor and Loss Assessors LLP' (for short 'UBA') to survey the cause of incident between between the ONGC's platform RS-21 and the petitioner's vessel. On 18 October 2019, UBA submitted its preliminary report to the petitioner under which the probable cause, *interalia*, was attributed to the Power Management System module of A/E 3 of the petitioner's vessel having malfunctioned. The report recorded that the module appeared to have sensed wrong frequency voltage and reduced the speed of A/E 3. This malfunctioning had caused the incident. On 5 December 2019 UBA submitted its damage survey Report, whereunder it was *interalia* observed by UBA that the joint inspection of Spyder Deck, Boat Landing was carried out and no apparent damages were noted. UBA also found that prevailing repair rate of an offshore contractor and the repair estimates were in the range of USD 30,000.

6. The ONGC, however, by its letter dated 17 December 2020 made a claim against the petitioner for a sum of USD 616,490/- towards the repair cost which would be payable by the petitioner to the ONGC for the damages to RS-21 which had occurred due to the incident involving the petitioner's vessel. ONGC alleged negligence on the part of the

petitioner. The said letter of the ONGC was replied by the petitioner through its Advocate's letter dated 12 January 2021 denying the allegations of the ONGC of any negligence and wilful misconduct on the part of the petitioner. The petitioner making a reference to Clause 16(B) and Clause 17(2) of the Contract Agreement contended that the petitioner was absolved of any liability. The petitioner, accordingly, denied its liability to make payment of such amount as claimed by the ONGC.

7. On 18 February 2021 the petitioner and ONGC executed a Contract Information Letter by which the contract agreement was extended from 20 March 2021 to 19 April 2021 (period of 30 days as agreed between the parties), as the contract agreement had come to an end on 18 March 2021. Accordingly, on 19 April 2021 the extended period of the contract agreement came to an end, the vessel of the petitioner stood de-hired by the ONGC at 8.48 hours and was returned to the petitioner. Also a survey of the Board fuel remaining was carried out on 18 April 2021.

8. The petitioner has contended that the petitioner had raised an invoice for the month of March 2021 as also for the month of April 2021, on 31 March 2021 and 30 April 2021 respectively, however, such

invoices were not honoured by the ONGC. It is contended by the petitioner that on 26 April 2021 the ONGC by its letter once again claimed an amount of USD 616,490 towards compensation for repairs of the damaged property RS-21. The petitioner by its Advocate's letter dated 3 June 2021 denied the ONGC's claim as made in its letter dated 26 April 2021 *interalia* contending that there was no break-up of an amount of USD 616,490 as set out by the ONGC in making such claim. It was also stated that there was no document to support such claim. The petitioner also denied the liability by inviting attention to Clause 16(B) and 17.2(b) of the contract agreement which according to the petitioner exempted the petitioner of any liability towards damage caused to the ONGC's property. Petitioner also denied any gross negligence or any willful misconduct in the happening of such incident. The petitioner has also referred to Clause 16.3 of the Special Conditions of Contract, which according to the petitioner, absolves the petitioner from any liability arising from the said incident.

9. The petitioner by a further letter of its Advocate dated 24 June 2021 addressed to the ONGC recorded that the contract agreement had come to an end and the vessel was redelivered to the petitioner. It was stated that hence, the ONGC was to pay the petitioner a sum of USD 706028.17 equivalent to Rs.5,17,73,076.34/- which despite several

requests, the ONGC had not remitted such amount. Such letter addressed on behalf of the petitioner was responded by ONGC by its Advocate's letter dated 28 June 2021 *inter alia* stating that there was deliberate and gross negligence on the part of the petitioner and the petitioner was liable to compensate the ONGC, referring to various clauses of the contract agreement. The petitioner's advocate replied to the said letter of the ONGC's Advocate by its letter dated 29 July 2021 denying the allegations of any gross negligence and demanding payment of outstanding amount USD 706,028.17, which was again denied by the ONGC by its Advocate's letter dated 24 September 2021.

10. On the above backdrop, the ONGC addressed another letter dated 10 November 2021 to the petitioner reiterating that on account of gross negligence on the part of the petitioner, its vessel collided with the ONGC's unmanned platform RS-21 causing damages. ONGC alleged that as there was negligence on the part of the petitioner, Clause 16 of the General Condition of the Contract would become applicable and the petitioner would be liable to make good loss to the ONGC. It was recorded that the invoices for the month of March to June, 2021 which were withheld, were pertaining to the contract with another vessel 'OSL Triumph'. It was recorded that the invoices for the months of March-April, 2021 and for differential fuel amounts were also withheld for the

contract pertaining to the vessel in question 'OSL Glory' for ONGC's claim of USD 727,458.20, as suffered by it due to alleged negligence of the petitioner for the incident which had taken place on 1 September 2019. The petitioner responded to the said letter of the ONGC by its Advocate's letter dated 13 January 2022 *interalia* stating that for the alleged claim of ONGC of USD 727,458.20, ONGC had withheld a sum of USD 1098967.07 as entitled to the petitioner. The petitioner also offered a letter of undertaking from its P&I Club (supra) to compensate ONGC in case damages caused to the ONGC were proved. However, the ONGC by its letter dated 18 January 2022 rejected the letter of undertaking of the petitioner's P&I Club on the ground that the same was conditional.

11. The matter has rested at this. However, another facet of the matter as placed on record by the petitioner is that under the contract in question of which performance had come to an end, the petitioner had issued a performance bank guarantee of respondent no.2/State Bank of India (for short '**SBI**') as agreed between the parties under Clause 10.0 of the Contract Agreement. The performance bank guarantee was a security to seek performance of the contract agreement, and as provided under Clause (5) of such performance bank guarantee, it was to remain in force during the period that was taken for performance of the

contract. It is the case of the petitioner that as the payments under the contract agreement were not being settled due to the position taken by the ONGC that its platform RS-21 had suffered damages due to the incident which had taken place on 1 September 2019, and as the petitioner wanted to be optimistic of the settlement, the petitioner at the request of the ONGC had extended the performance bank guarantee from time to time and last of such extension was upto 6 June 2022. The correspondence in that regard has been referred by the petitioner which is between 19 May 2021 to 7 February 2022 in relation to extension of the bank guarantee. The contention of the petitioner is that there is likelihood that the ONGC may invoke this bank guarantee so as to appropriate the amounts under the bank guarantee towards the alleged damages suffered by it as caused due to such incident which had taken place on 1 September 2019.

12. Thus, It is the petitioner's contention that there is no dispute that under the invoices as raised by the petitioner on the ONGC, the amounts are due and payable which pertained to the successful performance of the contract. It is contended that even ONGC has no dispute whatsoever on successful performance of the contract, having come to an end. The petitioner says that once the amounts under the invoices are undisputed, such amounts either need to be paid to the petitioner by the respondent

or they need to be deposited in this Court pending the arbitral proceedings. According to the petitioner, such amount cannot be withheld as also the purported damages as claimed by the ONGC cannot be appropriated in any other manner including invoking of the performance bank guarantee to claim the amount which is neither a claim for liquidated damages nor a claim for an ascertained adjudicated amount of damages suffered by the ONGC. On such conspectus, the petitioner has prayed for the following reliefs:-

- “(a) that pending the commencement and culmination of the arbitral proceedings between the Petitioner and Respondent No.1, this Hon’ble Court be pleased to direct the Respondent No.1 to deposit in this Hon’ble Court a sum of USD 340,126.85 as amounts outstanding under the Invoices with interest @ 18% per annum;
- (b) that pending the commencement and culmination of the arbitral proceedings between the Petitioner and Respondent No.1, this Hon’ble Court be pleased to direct the Respondent No.1 to discharge and return the Performance Bank Guarantee bearing No.0192118FG0000185 dated 7th March 2018 was to remain in force until 6 June 2022;
- (c) That pending the hearing and final disposal of the present Petition, this Hon’ble Court be pleased to restrain the Respondent, their servants, agents, officers, person or persons claiming through or under it from in any manner invoking and/or encashing the Performance Bank Guarantee bearing No.0192118FG0000185 dated 7th March 2018 was to remain in force until 6 June 2022;
- (d) for ad-interim reliefs in terms of prayer clauses (a) to (c) above;
- (e) for costs;
- (f) for such further and other reliefs as this Hon’ble Court may deem fit considering the nature and circumstances of the case.”

13. A reply affidavit has been filed on behalf of the ONGC *interalia*

stating that there are two separate contract agreements between the petitioner and the ONGC for charter of two vessels namely 'OSL Glory' and 'OSL Triumph' respectively, to be utilized for carrying out ONGC's offshore activities. It is contended that the petitioner is not entitled to any reliefs for the reason that even considering the report of UBA as relied on behalf of the petitioner, the incident was the result of an inadequate maintenance of the petitioner's vessel and lack of expertise on the part of its crew stationed thereunder to handle the situation, being the probable cause of incident which had occurred on 1 September 2019. It is contended that the ONGC also conducted an inquiry to find out the cause of incident which reveals that the incident had occurred due to lapse on the part of the petitioner. Referring to clauses (8), (13) and (15) of the contract agreement, it is contended that the petitioner was blatantly defying its responsibilities under the contract agreement. ONGC states that as the petitioner had failed to maintain the seaworthiness of the vessel, ONGC had suffered damages and for which ONGC by its letters dated 17 December 2020, 26 April 2021, 28 June 2021 and 24 September 2021, had called upon the petitioner to pay damages of USD 616,490 plus applicable taxes, as caused to its platform, which according to the ONGC, the petitioner is liable to pay and has denied such payment. ONGC has also contended that it was not prepared to accept the letter of undertaking of the P&I

Club of the petitioner as a condition for release of the payment of invoices of March 2021 and April 2021. ONGC has also contended that the performance bank guarantee could not have been discharged unless the ONGC's claims were satisfied. This more particularly referring to Clause (5) of the performance bank guarantee. It is contended that as the bank guarantee is an independent contract, the petitioner cannot pray for an injunction restricting invocation of the bank guarantee and an obligation on the bank to honour its invocation. ONGC has accordingly prayed for dismissal of this petition.

14. Mr.Kamat, learned Counsel for the petitioner has made submissions to support the prayers as made in the petition. In so far as the prayer for direction to the ONGC to deposit an amount under the invoices is concerned, Mr.Kamat would submit that the ONGC cannot set off its claim for any unliquidated damages against the admitted claim of the petitioner payable under the invoices which have been withheld by the ONGC. It is submitted that the petitioner's claim has arisen under the admitted invoices for the work performed under the contract agreement in question. It is submitted that the ONGC's claim being unascertained and unsubstantiated, is not a debt *in presenti* payable by the petitioner to the respondent. It is submitted that, if at all, the ONGC needs to prove such damages by adducing evidence in an arbitral trial

and cannot seek set off of an admitted claim of the petitioner under the invoices. It is contended that Clause 8 of the contract agreement when it provides that the petitioner agreed to all claims, taxes and fees for equipment, labour, materials, services and supplies to be furnished by it etc., would not have any application in the context of any claim for unliquidated damages. It is submitted that on a holistic reading of such clause, when the clause uses the word 'all claims', it would necessarily mean a claim made by a third party, as words 'all claims' would be required to be read in the context of the group of words as contained in the clause that is payment of taxes, fees for equipment, labour, materials, services and supplies etc. It is hence the petitioner's submission that such clause does not talk about any such claim as made by the ONGC. It is submitted that there is no dispute on the ONGC's liability to pay invoices as raised by the petitioner (Exhibit A to C) and hence, there was no question of ONGC refusing to pay the invoices by invoking its claim on unliquidated damages. It is thus submitted that the claim as made by the petitioner against the ONGC for payment under the invoices is undisputed and liable to be secured by depositing the amount in this Court. It is submitted that in regard to the claim of the ONGC in relation to the damages suffered by it, even otherwise, the petitioner is not liable under Clause 16B read with Clause 17.2(b) of the contract agreement and Clause 16.3 of the Special Conditions of

Contract. It is submitted that the principles of law are absolutely clear when a claim of a Section 9 petitioner is in regard to undisputed amounts, as in the facts of the present case. It is submitted that in such situation the Courts considering such nature of the claim, have passed orders recognizing such undisputed/ admitted claims and have passed orders directing deposit of the undisputed amounts. In supporting this submission Mr.Kamat has placed reliance on the decisions in (i) **Kreuz Subsea Pte. Ltd. Vs. Valentine Maritime Ltd. & Anr., in LD VC-COMM Arbitration Petition No.138 of 2020 (G.S.Patel, J.) decided on 11/11/2020;** (ii) **Valentine Maritime Ltd. Vs. Kreuz Subsea Pte Ltd., 2021 SCC OnLine Bom 75;** (iii) **Kotak Mahindra Bank Ltd. Vs. Williamson Magor & Co., Ltd. & Anr., 2021 SCC OnLine Bom 305;** (iv) **Affluence Media vs. Pinaka Studios Pvt.Ltd., Arbitration Petition (L) No.16504 of 2021 – Order dt.15/09/2021.**

15. Mr.Kamat has submitted that the ONGC is also not entitled to invoke the bank guarantee in question as the bank guarantee as furnished is clearly in the nature of a performance bank guarantee. It is submitted that as per Clause 10 of the contract agreement, such bank guarantee was issued to guarantee the performance of the contract, and once the contract stood performed and that too without any demur, there was no question of the ONGC invoking the performance bank

guarantee. It is submitted that in the present facts, the general principles of fraud and irretrievable injustice are clearly not applicable and hence, the petitioner would be justified in seeking discharge of the bank guarantee as there exists no performance which needs to be guaranteed. It is submitted that there is no breach alleged at any given time during completion of the contract. Mr.Kamat has submitted that in fact continuation of the performance bank guarantee is contrary to the terms of the contract agreement as well as the terms of the bank guarantee which was restricted to guarantee performance of the contract and any invocation of the bank guarantee would be contrary to its terms. In support of such contention, reliance is placed on the decisions in (i) **M/s.KSE Electricals Pvt.Ltd. Vs. The Project Director, Bangladesh Rural Electrification Board and Anr. (Cal HC) (Moushami Bhattacharya, J.) - A.P 230 of 2021;** and (ii) **Larsen and Toubro Limited Vs. Allahabad Bank & Ors., 2016 SCC OnLine Bom 5311.**

16. Per contra Mr.Kanade, learned Counsel for the ONGC has justified the actions of the ONGC withholding the payment under the invoices in question on the grounds as set out in the reply affidavit. Mr.Kanade would submit that the petitioner unconditionally and without any protest extended the bank guarantee on four occasions after April,2021 and the latest upto 6 June 2022. It is his contention that the petitioner

cannot approbate and reprobate on its stand that the bank guarantee being performance bank guarantee, cannot be extended beyond April,2021, when the petitioner's conduct is *ex facie* contrary to its pleaded case in the petition, when it has extended the period of bank guarantee unconditionally and which is undisputed position. Mr.Kanade referring to Clause 5 of the bank guarantee would contend that such clause clearly provides that the bank guarantee shall remain in force during the period of performance and till all claims of the ONGC are satisfied. It is submitted that being an independent contract, the petitioner has not made out any case of fraud or special equities in order to seek an order of stay on invocation of bank guarantee. It is submitted that Clause 10 of the contract agreement in question itself grants ONGC an unconditional option to invoke the same in respect of any amount due from the petitioner, and for which the bank guarantee was unconditionally extended by the petitioner till June,2022. It is submitted that on account of its own conduct, the petitioner is estopped from contending that the said bank guarantee cannot be invoked. It is submitted that if such a stand was taken earlier in writing and unequivocally, the ONGC would have taken appropriate step at the contemporaneous time under the subject contract. Mr.Kanade has accordingly prayed for dismissal of the petition.

17. I have heard learned Counsel for the parties as also with their assistance I have perused the record.

18. Before embarking on the question to be decided, it may be appropriate to notice some of the relevant clauses of the contract agreement as referred by the parties which are primarily Clause Nos.3.0, 8, 10, 16(B), 18.6 which read thus:

3.0 DURATION OF THE CONTRACT:

The duration of contract shall be for a period of 3 years (1095) from **20.03.2018;12.18 hrs.** the date of mobilization for all the vessels.

The contract will stand automatically extended for a period not exceeding 30 days under the same rates, terms and conditions to cover the time necessary to complete, to the satisfaction of ONGC, the work in progress at the end of the term of the contract.

ONGC shall have the exclusive right to terminate the contract for the chartered vessel by giving to the Contractor thirty (30) days written notice without assigning any reason therefore. However, this clause would apply after first 12 months of the contract.

8.0 CLAIMS, TAXES & DUTIES, FEES AND ACCOUNTING :

8.1 CLAIMS

CONTRACTOR agrees to pay all claims, taxes and fees for equipment, labour, materials, services and supplies to be furnished by it hereunder and agrees to allow no lien or charge resulting from such claims to be fixed upon any property of CORPORATION. CORPORATION may, at its option, pay and discharge any liens or overdue charges for CONTRACTOR's equipment, labour, materials, services and supplies under this CONTRACT and may thereupon deduct the amount or amounts so paid from any sum due, or thereafter becomes due, to CONTRACTOR hereunder.

10 PERFORMANCE:-

The CONTRACTOR has submitted Performance Bank Guarantee No.0192118FG0000185 dtd. 07.03.2018 for USD Valid up;to 06.06.2021 from State bank of India Overseas Branch, Plot No.214A, 2nd floor, Rajala Towers road, No.36, Jubilee Hills Hyderabad-500 033, Tel.No. 91-40-23147503 towards performance under this CONTRACT.

In the event CONTRACTOR fails to honour any of the commitments entered into under this agreement or in the event of termination of the contract under provisions of Integrity Pact and / or in respect of any amount due from the CONTRACTOR to the CORPORATION, the CORPORATION shall have unconditional option under the guarantee to invoke the above bank guarantee and claim the amount from the bank. The bank shall be obliged to pay the amount to the CORPORATION on demand.

16. INSURANCE

B) Protection & Indemnity (P&I) cover for the vessel.

The contractor shall carry P&I cover for the vessel deployed by them and the indemnification under the P&I cover shall include indemnification of damage/loss to corporation's existing property and the property of any other party, caused by the Contractor's vessel. The above P&I cover shall also indemnify the CORPORATION against any pollution liability caused by the vessel(s). *Contractor needs to effect with Protection & Indemnity Insurance with a member from International Group of Mutual P&I Clubs or insurance company approved/accepted by Indian ports for the purpose of Port entry.* The indemnity for damages caused to corporation's property by the vessel shall be US\$20 million on any one accident/occurrence.

Notwithstanding anything contained in any provision of this CONTRACT, save as specified above in this Clause CORPORATION shall defend, indemnify and hold Contractor harmless from and against any losses, damages, cost or claims relating to CORPORATION's existing property except in case of gross negligence or willful misconduct of the Contractor, its sub-contractor their agents or employees, in which case the Contractor shall be liable to bear any loss or damage occurring to the Property of the CORPORATION as a result of its gross negligence or willful misconduct (there shall be no limit for loss/damage due to gross negligence/willful misconduct).

"Gross Negligence" means: any act or failure to act (whether sole, joint or concurrent) by a person or entity which was intended to cause, or which was in reckless disregard of or wanton indifference to, avoidable and harmful consequences such person or entity knew, or should have known, would result from such act or failure to act. Notwithstanding the foregoing. Gross negligence shall not include any action take in good faith for the safeguard of life or property, "willful misconduct" means: "intentional disregard of good and prudent standards of performance or proper conduct under the CONTRACT with knowledge that it is likely to result in any injury to any person or persons or loss or damage of property.

18.6 Consequences of termination

In all case of termination herein set forth, the obligation of the ONGC to pay shall be limited to the period upto the date of termination. Notwithstanding the termination of this Agreement, the parties shall continue to be bound by the provisions of this Agreement that reasonable require some action or forbearance after such termination.

In case of termination of Contract herein set forth, except under 18.1 and 18.2, and / or annulment of the contract due to non-submission of Performance Security, following actions shall be taken against the Contractor:

i. ONGC shall conduct an inquiry against the Contractor and consequent to the conclusion of the inquiry, if it is found that the fault is on the part of the Contractor, then they shall be put on holiday [i.e neither any tender enquiry will be issued to such a Contractor by ONGC against any type of tender nor their offer will be considered by ONGC against any ongoing tender(s) where contract between ONGC and that particular Contractor (as a bidder) has not been concluded] for a period of two years from the date the order for putting the Contractor on holiday is issued. However, the action taken by ONGC for putting that Contractor on holiday shall not have any effect on other ongoing contract(s), if any with that Contractor which shall continue till expiry of their term(s).

ii. Pending completion of the enquiry process for putting the Contractor on holiday, ONGC shall neither issue any tender enquiry to the defaulting Contractor nor shall consider their offer in any ongoing tender.

19. It clearly appears that ONGC has not disputed the petitioner performing the contract agreement which was a charter party agreement for hire of the petitioner's vessel for ONGC's offshore activities for a specific period of three years commencing from 20 March 2018, extendable for a further period not exceeding 30 days as noted above. It also appears to be not in dispute that the petitioner had raised monthly invoices for the period from September 2019 upto March 2020 which were cleared by the ONGC without any objection. It also appears to be an admitted position that the contract agreement as per its terms and conditions had come to an end on 18 March 2021 on which day the vessel was de-hired by the ONGC and returned to the petitioner. On 18 February 2021 the petitioner and the ONGC executed a Contract Information Letter by which a contract agreement was extended from

20 March 2021 to 19 April 2021. In regard to the agreed contract period, the petitioner had raised invoices for the month of March 2021 (Exhibit A) dated 31 March 2021 and the invoices for the month of April, 2021 (Exhibit B) dated 30 April 2021 for the amounts of USD 134662.50 and USD 78147 respectively. These amounts under the said invoices as claimed by the petitioner from the ONGC, were admittedly for the work having been performed by the petitioner for the ONGC under the contract agreement in question. It needs to be noted that the ONGC *per se* has not disputed the performance of the contractual work which was primarily charter of the petitioner's vessel. It is clear from these facts that the case of the ONGC to withhold the admitted amounts under the invoices as raised by the petitioner, is solely for the reason that the ONGC claims to have suffered a loss of USD 616490 on account of the incident which had taken place on 1 September 2019 in which the petitioner's vessel had collided with the ONGC's unmanned platform RS-21. There is no other claim except for such damages being claimed by the ONGC on account of the said incident.

20. The question before the Court in considering the prayers as made in the present proceedings filed under Section 9 would be whether the petitioner is justified in seeking an order of deposit, and an injunction against the ONGC from invoking the performance of bank guarantee or

its return in the facts in hand. In my opinion, there is much substance in the contention as urged on behalf of the petitioner that the claim of USD 616490 as being asserted by the ONGC which is a claim for damages as the ONGC claims to have suffered on account of the petitioner's neglect in maintaining the vessel resulting into the vessel colliding with the ONGC's unmanned platform RS-21, is admittedly a claim for unliquidated damages. From the record, it clearly appears that there are different reports, one referred and submitted on behalf of the petitioner and the other an assertion of the ONGC referring to different amounts of claim in respect of such damages which had occurred due to the incident which had taken place on 1 September 2019. In this situation, certainly being a claim not of liquidated damages, the correct quantum of damages as suffered by the ONGC would be required to be ascertained considering the clear provisions of Section 73 and 74 of the Indian Contract Act and till such amount of damages as claimed to be suffered by ONGC is proved, it cannot be accepted that the amount of USD 616490 as claimed by the ONGC is an ascertained, correct and an undisputed claim. ONGC needs to prove such claim only in the arbitral proceedings and on the basis of evidence on which the arbitral tribunal on the basis of evidence and the contractual clauses in question, would be required to make an appropriate award.

21. The question, however, is whether on the basis of such unascertained claim for damages as made by the ONGC and which appears to be not directly connected with the actual contractual work under such charter party agreement, can the ONGC deny and/or withhold payment of the invoice amounts as claimed by the petitioner ?

22. Prima facie to my mind, the ONGC would not be correct to withhold the payments of the invoices amount to the petitioner for more than one reason. Firstly, for the reason that although the incident had taken place on 1 September 2019 and the probable loss suffered by the ONGC could be almost immediately known or ascertained soon after the incident, the ONGC for the first time almost after 16 months from the date of the incident by its letter dated 17 December 2020 made a claim against the petitioner for an amount of USD 616490 as damages suffered by it. This despite the fact that after three months of the incident, the petitioner's expert UBA Insurance and Surveyor and Loss Assessors LLP submitted their damage survey report dated 5 December 2019. Secondly, the ONGC continued with the charter of the petitioner vessel subsequent to the period 1 September 2019 as also having taken services of the petitioner's vessels entertained and honoured the invoices as raised by the petitioner for the period September 2019 to March 2020. Such contractual conduct of the ONGC makes it quite clear that

the ONGC never had any grievance with regard to performance of the charter party agreement by the petitioner. Thirdly, it is not in dispute that till the expiry of the contract period i.e. upto 18 March 2021, the ONGC indisputedly utilized the petitioner's vessel and handed over the same to the petitioner on expiry of the period of charter. This being the case, in my opinion, there is no justification for the ONGC to withhold payment of invoice amounts payable to the petitioner.

23. Even otherwise the invoices in no manner are disputed by the ONGC, thus, when the amounts payable to the petitioner are undisputed, the Court exercising power under Section 9 of the Act would certainly be empowered to grant interim measures as Section 9 would mandate that the arbitral interest of the parties be protected. It is well settled that the ambit of Section 9 of the Act confers a wide discretion on the Court to grant expansive interim measures, as may appear to the Court just and convenient, keeping in mind the arbitral interest of the parties and following all judicious principles. Although, the Court would be guided by the principles for grant of injunctions as provided for under Order 39 Rule 1 and 2 or the provisions of Order 38 Rule 5 of the Code of Civil Procedure for securing the amounts, however, the Court would not be required to follow the strict rigours of these provisions in considering the reliefs under Section 9 of the Act. A reference can be made to a

decision of the Division Bench of this Court in **Nimbus Communications Ltd v BCCI, (2012 (5) Bom CR 114)**. Dr.Justice D.Y.Chandrachud (as His Lordship then was) speaking for the Bench observed that the power under Section 9 cannot be carried out in an uncharted territory ignoring the basic principles of procedural law contained in the Code of Civil Procedure, 1908, however, the rigors of every procedural provision in the Code of Civil Procedure cannot be put into place to defeat the grant of relief which would subserve the paramount interests of justice and a balance has to be drawn between the two considerations in the facts of each case.

24. A learned Single Judge of this Court (G.S.Patel, J.) in **Kreuz Subsea Pte. Ltd. Vs. Valentine Maritime Ltd. & Anr.** (supra) referring to a decision of the Division Bench of this Court in the case Jagdish Ahuja v Cupino Ltd. [2020 SCC OnLine Bom 849] following the decision in **Nimbus Communications Ltd.** (supra) has held that the scope of Section 9 is very broad. It was observed that the court has discretion, to be exercised judiciously, and the principles of Order 38 Rule 5 and Order 39 Rules 1 and 2 although would guide the Courts, however, a Section 9 Court would not be unduly bound by these provisions, the underlying principle being to make arbitration an effective form of dispute resolution. In such decision, the Court has directed the ONGC to deposit

the amounts, although the amounts were payable by the ONGC in its capacity as a garnishee.

25. An appeal before the Division Bench against the decision of the learned Single Judge in **Kreuz Subsea Pte.Ltd. & Anr. (supra)**, came to be dismissed. The Division Bench confirmed the orders passed by the learned Single Judge in directing deposit of the amounts observing that it was a case where the appellant-Valentine Maritime Ltd. has wrongly withheld the admitted invoices by raising untenable conditions and when the contractual work was admittedly carried out and only thereafter the invoices were raised, for which payments were also already made by the ONGC in favour of Valentine Maritime Ltd., who was liable to make payment of the amount to respondent no.1-Kreuz Subsea Pte.Ltd.-the sub-contractor.

26. I do not intend to delve on the other decisions as cited on behalf of the petitioner as they reflect a similar position in law as discussed above.

27. Thus adverting to the above principles of law in their applicability to the facts of the present case, in my opinion, the petitioner has clearly made out a prima facie case for the relief, that the ONGC needs to deposit the undisputed invoice amounts in this Court pending the

arbitral proceedings. There cannot be any justification for the ONGC to withhold such amount and more particularly on the premise that it has a claim of unliquidated damages against the petitioner on account of the incident which had taken place on 1 September 2019. The damages so claimed by the ONGC are certainly neither admitted nor ascertained in a manner known to law.

28. In so far as the reliefs concerning invocation of performance bank guarantee is concerned, it would be necessary to note some of the relevant clauses of the bank guarantee. The bank guarantee in question itself is titled as 'Performance Guarantee'. Clause (5) provides that the guarantee of the bank shall remain in force during the period that is taken for the performance of the contract. Clause (5) reads thus:

“5. The Bank further agrees that the Guarantee herein contained shall remain in full force during the period that is taken for the performance of the CONTRACT and all dues of ONGC under or by virtue of this CONTRACT have been fully paid and its claim satisfied or discharged or till ONGC discharges this guarantee in writing, whichever is earlier.”

29. It is thus clear that by the very terms of such bank guarantee, it has to remain in force during the period that was taken for the performance of the contract, namely the contract agreement period from 20 March 2018 till 18 March 2021 and the extended period, and it is during such period all dues of the ONGC as borne out by the words 'by virtue of this contract' are to be fully paid by the bank, and accordingly on such claim of the ONGC being satisfied and/or discharged or till

ONGC discharges the guarantee in writing, whichever is earlier, the bank guarantee would remain in force. The ONGC has not discharged the bank guarantee in writing, however, the earlier event namely, the expiry of the period for which such performance guarantee was extended has taken place, by virtue of the operation of clause 3 of the contract agreement. Although it is a settled law that judicial interference in the matter of enforcement of a bank guarantee is limited and subject to the exception of fraud of an egregious nature and where special equities which imply an irretrievable injury or injustice would occur; and where the bank guarantee was not invoked strictly in terms and tenor of the bank guarantee, the terms of the bank guarantee would be required to be honoured and complied. It is also a settled principle of law that the invocation of the bank guarantee will have to be in accordance with the terms of the bank guarantee or the invocation itself would be bad. The test of special equities or irretrievable injury is a matter assessible by the Court and the issue would be decided on the facts as presented by the parties before the Court when prayer for stay of notice of invocation is made. (See. **Hindustan Construction Co. Ltd. vs. State of Bihar & Ors., (1999)8 SCC 436**).

30. In **Larsen and Toubro Ltd. vs. Allahabad Bank & Ors., (2016 SCC OnLine Bom 5311)**, a Division Bench of this Court was considering an appeal arising from an ad-interim order passed by the learned Single

Judge in the matter of invocation of a performance bank guarantee and against the directions to deposit the proceeds in the account of a third party and not of the beneficiary. Learned Single Judge pending the decision on the notice of motion granted an ad-interim protective relief. The bank guarantee in question in the said case was a performance bank guarantee which came to be invoked and in a manner not in consonance with the terms of the performance bank guarantee. In such context the Division Bench considering the submissions that the performance bank guarantee was for due performance of the respective obligation under the contract and that respondent Nos.2 and 3 having abandoned the project, there could not be one side performance of the contract by the appellant and as there was no failure of performance, it was observed that the judicial intervention was permissible. The Court observed that the terms and conditions of the performance bank guarantee were required to be followed strictly and that the bank was under an obligation to discharge its liability under those terms only, specifically when, there is no case of any assignment of the performance bank guarantee. The Division Bench approving the observations as made by the learned Single Judge, continued the grant of the protective reliefs.

31. In **M/s.KSE Electricals Pvt. Ltd. Vs. The Project Director, Bangladesh Rural Electrification Board & Anr.,(A.P 231 OF 2021, decided on 23.11.2021)**, the learned Single Judge of Calcutta High Court also

considering the case of performance bank guarantee construing the provisions of such bank guarantee observed that the clauses of the contract clearly demonstrate that the bank guarantee was furnished towards performance security. It was observed that there can be no issue with regard to performance since the petitioner has already received 90% of the contract price. It was observed that the letter invoking the bank guarantee also demonstrates that there cannot be any performance issue under the contract, as also the invocation letter did not contain any allegation of a breach of performance/obligations by the petitioner therein. It is in these circumstances, the Court confirmed the injunction granted by the ad-interim order passed on the said proceedings restraining the bank from making payment under the bank guarantee.

32. In my opinion, applying the above principles, the only conclusion which can be drawn in the facts of the present case is that the ONGC would not be authorized to invoke the performance bank guarantee (PBG) for the plain reason that the contract agreement stands fully performed as also the vessel of the petitioner under the contract agreement has also been de-hired and handed over to the petitioner. If this be the case as to what has been agreed by the bank in terms of clause (5) of the performance bank guarantee, and as noted above, the bank guarantee itself was to lapse when the performance of the contract agreement itself had come to an end and no further obligation under the contract was required to be discharged by

the petitioner. Hence, even considering the terms and conditions of the PBG, it would not be permissible for the ONGC to invoke the performance bank guarantee (PBG). It may be observed that in terms of the plain wordings of clause (5) of the bank guarantee, the bank guarantee was to remain in force during the period that was taken for the performance of the contract, and as the amount being claimed by the ONGC was a claim in the nature of unliquidated damages, it would be required to be presumed the same being outside the scope of the performance of the contract, which itself stood discharged, the performance bank guarantee had ceased to remain in force. For such reason, there would not be any further obligation on the petitioner to extend the performance bank guarantee.

33. As a result of the above discussion, the petition is partly allowed in terms of the following order:-

ORDER

- (i) Pending the arbitral proceedings, respondent No.1 ONGC is directed to deposit in this Court, within a period of four weeks from today, the amount payable to the petitioner under the unpaid invoices dated 31 March 2021 and 30 April 2021, 'Exhibit A' and 'Exhibit B' respectively.
- (ii) After the deposit of the above amounts is received by the Prothonotary and Senior Master of this Court, the Prothonotary and Senior Master of this Court shall invest the said amount in a

fixed deposit in a nationalized bank initially for a period of three years.

- (iii) Respondent No.1-ONGC is directed not to invoke the performance bank guarantee dated 7 March 2018 as extended.
- (iv) The petitioner is directed to invoke the arbitral proceedings within a period of one month from today.
- (v) All contentions of the parties on the arbitral proceedings are expressly kept open.
- (vi) Disposed of in the above terms. No costs.

[G.S. KULKARNI, J.]