IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

BEFORE:
THE HON'BLE JUSTICE OM NARAYAN RAI

C.O. 4068 OF 2025

OFB TECH PRIVATE LIMITED
-VS-
REAN WATERTECH PRIVATE LIMITED & OTHERS

For the Petitioner	:	Mr. Ratnanko Banerjee, Sr. Adv. Mr. Jishnu Chowdhury, Sr. Adv. Mr. Nitesh Goyal, Adv. Mr. Arjun Ray, Adv. Mr. Abhishek Kabir, Adv.
For the Opposite Party No.1	:	Mr. Jishnu Saha, Sr. Adv. Mr. Suvasish Sengupta, Adv. Mr. Suvradal Chowdhury, Adv. Mr. Abhrajit Ray Chowdhury, Adv. Mr. Bhavesh Garodia, Adv. Ms. Rupsa Ganguli, Adv.
For the Opposite Party No.3	:	Mr. Anna Malhotra, Adv. Mr. Rishav Maity, Adv.
For the Opposite Party No.4	:	Mr. Rajdatta Chattopadhyay, Adv. Ms. Risha Das, Adv. Ms. Antara Dey, Adv. Mr. Somnath Guha, Adv. Mr. Kunal Ghosh, Adv.
Heard on	:	20.05.2026
Judgment on	:	14.08.2026

<u>OM NARAYAN RAI, J.</u> :-

1. This revisional application under Article 227 of the Constitution of India is directed against an order dated November 04, 2025 passed by the learned Judge, Commercial Court at Rajarhat, District- North 24 Parganas in Misc. Appeal (Com.) No. 02 of 2025 whereby the opposite party no.1's application praying for stay of the order dated October 30, 2025 passed by the learned Arbitral Tribunal has been allowed and the appeal has been posted for hearing.

<u>FACTUAL MATRIX:</u>

2. A summary of the case run in the application for stay filed by the opposite party no.1 (hereafter "the opposite party") before the learned Appellate Court on which the impugned order was passed is as follows:-

a. The petitioner had approached the opposite party with a proposal for supply of D.I. pipes to the opposite party for the *"Ghategaon – Vhiterwar MVS Project"* of the opposite party in the State of Madhya Pradesh.

b. Such supply was to be made on the basis of purchase orders to be issued by the opposite party to the petitioner from time to time. The opposite party used to send draft purchase orders and after considering the terms, quantity and rates, the petitioner used to send the Statement of Quantity and the rate for the confirmation and upload the BRFQ in their system generated WhatsApp platform.

c. Thereafter, the petitioner used to ask for confirmation of the quantity and rate and upon confirmation thereof by the opposite party, the petitioner used to act on the said purchase order. If the opposite party was not agreeable with the quantity and the rate and other terms, the opposite party would not confirm the same and the purchase orders would not be concluded.

d. In course of business, the opposite party furnished requisite numbers of bank guarantees aggregating to Rs. 8 crore in favour of the petitioner through opposite party nos.2 to 4 banks. Such bank guarantees had been issued in connection with the ongoing business relationship but not for any specific purchase order.

e. Although the petitioner had been paid for all the purchase orders and there was no amount outstanding, yet, the petitioner threatened the opposite party with invocation of the bank guarantees worth Rs.8 crore.

f. The opposite party therefore approached the learned Court under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter "the 1996 Act"). The learned Court passed an *ex parte* ad-interim order of injunction on November 29, 2024 thereby restraining the petitioner from invoking the bank guarantees. The petitioner sought for vacation of the said *ex parte* ad-interim order of injunction by filing an application under Order XXXIX Rule 4 of the Code of Civil Procedure, 1908 (hereafter "the Code").

g. The petitioner also approached this Court by way of an appeal under Section 37 of the 1996 Act. The said appeal was disposed of by an order dated February 27, 2025 thereby permitting the petitioner to invoke the bank guarantees to the extent of Rs. 4 crore and appointed a sole arbitrator for adjudication of the disputes between the parties. By the said order, the opposite party's application under Section 9 of the 1996 Act was directed to be treated as an application under Section 17 of the 1996 Act before the learned Arbitrator.

h. The said application under Section 17 of the 1996 Act was heard and disposed of by the learned Arbitrator by an order dated October 30, 2025 thereby permitting invocation of the remaining bank guarantees (worth Rs.4 crore) on condition that the amount covered by the bank guarantees would be kept in an interest bearing short term fixed deposit account.

i. Feeling aggrieved by the said order dated October 30, 2025, the opposite party has preferred Misc. Appeal (Com.) No. 02 of 2025 under Section 37(2) of the 1996 Act.

3. In the said appeal the opposite party took out an application praying for stay of operation of the order dated October 30, 2025 passed by the learned Arbitrator. The learned Appellate Court has agreed with the submissions made by the opposite party and stayed the operation of order of the learned Arbitral Tribunal until further orders.

4. Feeling aggrieved by the aforesaid order of stay, the petitioner has approached this Court by way of the present revisional application.

<u>PETITIONER'S ARGUMENTS:</u>

5. Mr. Banerjee, learned Senior Advocate appearing for the petitioner has made the following submissions (both orally as well as by way of written notes):-

a. The language of the subject bank guarantees is the only significant thing that is required to be seen while construction thereof and that upon a perusal of the same it would be clear that the bank guarantees are unconditional in nature.

b. The different bank guarantees annexed to the revisional application would reveal that the issuing banks have undertaken to make payment unconditionally and irrevocably without any contestation, protest or delay and without any demur, set-off or counterclaim.

c. The invocation clause of the bank guarantees would show that the obligation of the bank is independent of the disputes arising between the parties.

d. Courts should not interfere with invocation or encashment of unconditional bank guarantees except in cases of - (i) egregious fraud vitiating the foundation of the bank guarantee, (ii) irretrievable injustice or irreparable injury of an exceptional nature. Judgments of the Hon'ble Supreme Court in the cases of ***U.P. State Sugar Corporation vs. Sumac International Limited***[1], ***Himadri***

[1] **(1997) 1 SCC 568**

Chemicals Industries Limited vs. Coal Tar Refining Company[2] and ***Standard Chartered Bank vs. Heavy Engineering Corporation Limited & Another***[3] were relied on in support of such contention.

e. None of the conditions required for interference with invocation or encashment of bank guarantees has been satisfied in the present case. No case of fraud that went to the root of the bank guarantees has been made out. The disputes between the parties pertain to performance of the underlying contractual obligations and alleged breaches thereunder which are in no way concern the issuing bank.

f. No case of irretrievable injustice has either been pleaded or established. The opposite party has failed to demonstrate that any special equity or irreversible prejudice would arise if the bank guarantees are invoked. Mere financial hardship or apprehension of financial loss would not qualify for irretrievable injustice inasmuch as, if the opposite party ultimately succeeds, its remedy would sound in damages.

g. Scope of an appeal under Section 37 of the 1996 Act is very limited inasmuch as the Section 37 Court does not sit as Court of first appeal. Judgements of the Hon'ble Bombay High Court in the case of ***Ashok Himmatbhai Patel vs. Meera Himmatbhai Patel & Others***[4] and the Hon'ble Delhi High Court in the case of ***Suresh Shah vs. M/s. Tata Consultancy Services Limited***[5] were relied on to buttress such contention.

h. The order passed by the learned Appellate Court is contrary to several judgements of the Hon'ble Supreme Court and the well settled proposition that interpretation of contractual terms primarily falls within the domain of the learned Arbitral Tribunal which ought not to be interfered with, if the view of the learned Arbitral Tribunal is a plausible view.

i. The learned sole Arbitrator has not permitted invocation of the bank guarantees absolutely inasmuch as the invocation is conditioned upon deposit of an equivalent sum in an interest bearing short term fixed deposit.

j. An order interfering with invocation of bank guarantees would amount to unnecessary interference with unconditional bank guarantees and undermine the sanctity of commercial transactions.

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[2] **(2007) 8 SCC 110**
[3] **(2020) 13 SCC 574**
[4] **2025 SCC OnLine Bom 3762**
[5] **2014 SCC OnLine Del 3395**

ARGUMENTS MADE ON BEHALF OF THE OPPOSITE PARTY:

6. Mr. Saha, learned Senior Advocate appearing for the opposite party while supporting the order impugned, has made the following submissions (both orally as well as by way of written notes):-

a. The bank guarantees were clearly intended only to secure non-payment of goods despatched by the petitioner to the opposite party after 30 days from the date of dispatch. The bank guarantees were not intended to secure any other claim of any nature.

b. The bank guarantees had been given to facilitate credit for supply of materials/services as per the agreed credit terms of the purchase agreement and payment under credit facility availed by the customer was to be made under the purchase agreement and accordingly, it was only on account of breach of the terms of the purchase agreement that the guarantees could be invoked.

c. The guarantees could be invoked only on account of payments under credit facilities availed by the opposite party under the purchase agreement. Although, the expressions unconditionally and irrevocably are used in the bank guarantees the same are conditional on assertion of the petitioner that money is due and owing to it upon expiry of 30 days from the date of supply of goods to the opposite party. The bank guarantees contain a clear reference to the purchase agreement and to the credit facilities required to be provided by the petitioner to the opposite party and as such, the bank guarantees are supposed to be read along with the contract.

d. Judgements of the Hon'ble Supreme Court in the cases of ***National Agricultural Cooperative Marketing Federation India Limited vs. Gains Trading Limited***[6] and ***Sudhir Kumar & Others vs. Baldev Krishna Thapar & Others***[7] were relied on to buttress the contention.

e. Relying on the judgement of the Hon'ble Supreme Court in the case of ***Hindustan Construction Company Limited vs. State of Bihar & Others***[8], it was contended that mere use of the expression *"agree unconditionally irrevocably"* would not mean that the bank guarantee is unconditional since the condition referred to the original contract between the parties and postulated the performance of express obligations under the same.

f. Referring to invocation letters dated November 28, 2024, August 26, 2024 and November 29, 2024, it was submitted that the fact that those letters of

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[6] **(2007) 5 SCC 692**
[7] **(1969) 3 SCC 611**
[8] **(1999) 8 SCC 436**

invocation were issued asserting that payments ought to have been received by a certain date had not been received, made it explicit that the bank guarantees could be invoked only if amounts payable by a certain date had not been paid. This Court was also taken through the ledger account of the opposite party maintained by the petitioner (page 527 and 530 of the revisional application) to show that a sum of Rs. 4,87,50,000/- was debited by the petitioner as order cancellation charges only on November 29, 2024.

g. It was contended that the petitioner seeks to invoke the bank guarantees in a manner contrary to the purchase order, the terms of the bank guarantees contrary to the contract, contrary to the petitioner's own terms for invocation of the bank guarantees and contrary to the decision of the Hon'ble Division Bench and the Hon'ble Supreme Court as regards the propriety of invocation of bank guarantees.

h. This Court was taken through the purchase order dated July 05, 2024 and its payment term was placed which provides for *"payment by 30 days usance BG[9], with 30 days' credit"*.

i. No usance bank guarantee has been issued in respect of the said purchase order dated July 05, 2024 and no goods has been supplied thereunder and that being so, question of securing payments of such goods which were never supplied cannot arise.

j. Judgements of the Hon'ble Supreme Court in the cases of ***Kailash Nath Associates vs. Delhi Development Authority & Another[10]*** and ***Gangotri Enterprises Limited vs. Union of India & Others[11]*** were cited in support of the contention that a claim for damages cannot be made if there is no sum due or payable.

k. Terms of the contract can always be looked into for the purpose of deciding the true nature of the bank guarantees and the nature of obligations of the bank under the bank guarantees. ***Gangotri Enterprises Limited*** (supra), ***Crest Communications Limited vs. State Bank of India & Another[12]*** and an unreported order of a Co-ordinate Bench of this Court in the case of ***M/s. KSE Electrical Private Limited vs. The Project Director, Bangladesh Rural Electrification Board & Another[13]***, were cited to prop the argument that contract can be looked at in cases relating to invocation of bank guarantees.

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[9] **Bank Guarantee**
[10] **(2015) 4 SCC 136**
[11] **(2016) 11 SCC 720**
[12] **1999 SCC OnLine Bom 794**
[13] **AP No. 229 of 2021, decided on May 07, 2021**

l. The contracts for which bank guarantees had been furnished had been clearly fulfilled by payment and the petitioner could not be permitted to invoke the remaining bank guarantees for claim of damages.

m. The petitioner's contention as regards invocation of the subject bank guarantee has been conclusively determined by the Hon'ble Division Bench of this court by its order February 27, 2025 which was left untouched by the Hon'ble Supreme Court in SLP which was dismissed on March 26, 2025. The Hon'ble Division Bench referred the merits of the rival claims of the parties to be adjudicated by the learned Arbitrator and the propriety of invocation of bank guarantees was no longer open to be decided by the learned Arbitrator.

REPLY BY THE PETITIONER:

7. Mr. Banerjee further reiterated his submissions in reply and argued that the opposite party's reliance on the judgement of ***Gangotri Enterprises Limited*** (supra) is misplaced inasmuch as the said judgement has been held to be *per incuriam* by the Hon'ble Supreme Court in the case of ***State of Gujarat Through Chief Secretary & Another vs. Amber Builders***[14]. It was submitted that ***Gangotri Enterprises Limited*** (supra) had been rendered based on the judgement of ***Union of India vs. Raman Iron Foundry***[15], which was overruled by the Hon'ble Supreme Court in ***H.M Kamaluddin Ansari and Company vs. Union of India & Others***[16].

SURREJOINDER SUBMISSIONS BY THE OPPOSITE PARTY:

8. Mr. Saha countered such submission by asserting that the judgement in ***Amber Builders*** (supra) held ***Gangotri Enterprises Limited*** (supra) to be *per incuriam* only in respect of the one issue which was decided in ***Gangotri Enterprises Limited*** (supra) by relying on ***Raman Iron Foundry*** (supra). It was submitted that claim on account of damages which had not been adjudicated upon cannot be said to be claims due *in praesenti.*

9. Placing reliance on a judgement of the Hon'ble Delhi High Court in the case ***Belvedere Resources DMCC vs. OCL Iron and Steel Limited & Another***[17] and the Hon'ble Calcutta High Court in the case of ***Khaitan Winding Wire Private Limited & Others vs. Steel Authority of India & Others***[18], it was contended that ***Raman Iron Foundry*** (supra) is still holding the field and it is good law on the

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[14] **(2020) 2 SCC 540**
[15] **(1974) 2 SCC 231**
[16] **(1983) 4 SCC 417**
[17] **2025 SCC Online Del 4652**
[18] **Manu/WB/2953/2019**

point that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages are assessed by a decree or order of a Court or other adjudicatory authority.

ANALYSIS & DECISION:

10. Heard the learned Senior Advocates appearing for the respective parties and considered the material on record.

11. The order impugned in the present revisional application has been passed on an interlocutory application which was filed in connection with an appeal against an order passed under Section 17 of the 1996 Act.

12. Before proceeding further, the contours of the power which this Court can exercise under Article 227 of the Constitution of India while dealing with a challenge thrown to an interlocutory order passed in an appeal under Section 37 of the 1996 Act must be noted. While it is well settled that the High Court's plenary supervisory jurisdiction under Article 227 of the Constitution of India cannot be trammelled by any legislation, it is equally trite law that such jurisdiction needs to be exercised sparingly - all the more so in matters where the legislative intent is to minimise judicial intervention.

13. The 1996 Act overwhelmingly restricts judicial intervention in the progress of arbitral matters. The said aspect has been decisively noted by the Hon'ble Supreme Court in several cases. However, the decision of the Hon'ble Supreme Court in the case of ***Deep Industries Limited vs. Oil and Natural Gas Corporation Limited & Another***[19] is of utmost significance for the present case. The following paragraphs of the said judgment are very apposite to the present context:-

> *"**16.** Most significant of all is the non obstante clause contained in Section 5 which states that notwithstanding anything contained in any other law, in matters that arise under Part I of the Arbitration Act, no judicial authority shall intervene except where so provided in this Part. Section 37 grants a constricted right of first appeal against certain judgments and orders and no others. Further, the statutory mandate also provides for one bite at the cherry, and interdicts a second appeal being filed [see Section 37(2) of the Act].*
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> ***17.** This being the case, there is no doubt whatsoever that if petitions were to be filed under Articles 226/227 of the Constitution against orders passed in appeals under Section 37, the entire arbitral process would be derailed and would not come to fruition for many years. At the same time, we cannot forget that Article 227 is a constitutional provision which remains untouched by the non obstante clause of Section 5 of the Act. In these circumstances, what is important to note is that though petitions can be filed under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the Act, yet the High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumbrated by us hereinabove so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction.*

[19] **(2020) 15 SCC 706**

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24. *Mr Rohatgi is also correct in pointing out that the legislative policy qua the general revisional jurisdiction that is contained by the amendments made to Section 115 CPC should also be kept in mind when the High Courts dispose of petitions filed under Article 227. The legislative policy is that no revision lies if an alternative remedy of appeal is available. Further, even when a revision does lie, it lies only against a final disposal of the entire matter and not against interlocutory orders. These amendments were considered in Tek Singh v. Shashi Verma [Tek Singh v. Shashi Verma, (2019) 16 SCC 678 : (2020) 2 SCC (Civ) 753] in which this Court adverted to these amendments and then stated: (SCC p. 681, paras 5-6)*

"5. … A reading of this proviso will show that, after 1999, revision petitions filed under Section 115 CPC are not maintainable against interlocutory orders.

\6. … Even otherwise, it is well settled that the revisional jurisdiction under Section 115 CPC is to be exercised to correct jurisdictional errors only. This is well settled. In DLF Housing & Construction Co. (P) Ltd. v. Sarup Singh [DLF Housing & Construction Co. (P) Ltd. v. Sarup Singh, (1969) 3 SCC 807] this Court held: (SCC pp. 811-12, para 5)

'5. … The position thus seems to be firmly established that while exercising the jurisdiction under Section 115, it is not competent to the High Court to correct errors of fact however gross or even errors of law unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. Clauses (a) and (b) of this section on their plain reading quite clearly do not cover the present case. It was not contended, as indeed it was not possible to contend, that the learned Additional District Judge had either exercised a jurisdiction not vested in him by law or had failed to exercise a jurisdiction so vested in him, in recording the order that the proceedings under reference be stayed till the decision of the appeal by the High Court in the proceedings for specific performance of the agreement in question. Clause (c) also does not seem to apply to the case in hand. The words "illegally" and "with material irregularity" as used in this clause do not cover either errors of fact or of law; they do not refer to the decision arrived at but merely to the manner in which it is reached. The errors contemplated by this clause may, in our view, relate either to breach of some provision of law or to material defects of procedure affecting the ultimate decision, and not to errors either of fact or of law, after the prescribed formalities have been complied with. The High Court does not seem to have adverted to the limitation imposed on its power under Section 115 of the Code. Merely because the High Court would have felt inclined, had it dealt with the matter initially, to come to a different conclusion on the question of continuing stay of the reference proceedings pending decision of the appeal, could hardly justify interference on revision under Section 115 of the Code when there was no illegality or material irregularity committed by the learned Additional District Judge in his manner of dealing with this question. It seems to us that in this matter the High Court treated the revision virtually as if it was an appeal.' (SCR at p. 373)"

14. A little later, in the case of ***Navayuga Engineering Company vs. Bangalore Metro Rail Corporation Limited***[20], the Hon'ble Supreme Court held as follows:-

*"**4.** Despite this Court repeatedly referring to Section 5 of the Arbitration Act in particular and the Arbitration Act in general and despite this Court having laid down in Deep Industries Ltd. v. ONGC (2020) 15 SCC 706 that the High Court under Article 226 and 227 should be extremely circumspect in interfering with orders passed under the Arbitration Act, such interference being only in cases of exceptional rarity or cases which are stated to be patently lacking in inherent jurisdiction, we find that High Courts are*

[20] **2021 SCC OnLine SC 469**

> *interfering with deposit orders that have been made. This is not a case of exceptional rarity or of any patent lack of inherent jurisdiction."*

15. In a slightly different context, in the case of ***Punjab State Power Corporation Limited vs. Emta Coal Limited & Another***[21], where the order passed by the arbitrator was carried to the High Court under its writ jurisdiction, the Hon'ble Supreme Court explained the meaning of *patent lack of inherent jurisdiction* thus:-

> *"**4.** We are of the view that a foray to the writ court from a Section 16 application being dismissed by the arbitrator can only be if the order passed is so perverse that the only possible conclusion is that there is a patent lack in inherent jurisdiction. A patent lack of inherent jurisdiction requires no argument whatsoever — it must be the perversity of the order that must stare one in the face."*
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> (Emphasis supplied)

16. Yet again in the case of ***Bhaven Construction vs. Executive Engineer, Sardar Sarovar Narmada Nigam Limited & Another***[22], the Hon'ble Supreme Court reminded the Hon'ble High Courts that the power of superintendence "*needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear "bad faith" shown by one of the parties. This high standard set by this Court is in terms of the legislative intention to make the arbitration fair and efficient.*"

17. This Court has noticed that the observations made by the Hon'ble Supreme in ***Deep Industries Limited*** (supra) were (are) in the context of a final order passed on an appeal under Section 37 of the 1996 Act, but since the same indicate the legislative intent and the statutory policy pertaining to the 1996 Act, therefore, there is no reason why the same observations would not apply to a case where an interlocutory order passed under Section 37 of the 1996 Act has been challenged.

18. This Court is, therefore, required to examine the impugned order keeping in mind the high threshold set by the Hon'ble Supreme Court for interfering with orders passed under the 1996 Act and especially the ones under Section 37 thereof.

19. The learned Appellate Court (i.e. the Section 37 Court) has while passing the impugned order reasoned thus:-

> *"Hence, the learned Advocate for the appellant preferred this Appeal being dissatisfied with the Order dated 30.10.2025 and as an interim measure prayed for stay of operation of the impugned order dated 30.10.2025 passed by the Hon'ble Justice Subrata Talukdar (Retd.) the learned Sole Arbitrator till disposal of the Appeal.*
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> *This Court is mindful that the scope for judicial interference with interim orders passed by the Arbitral Tribunal is limited. It is also well-settled that in matters of unconditional bank guarantee, injunction can be passed only in exceptional circumstances and Courts do not intervene unless the party seeking injunction demonstrate a clear and egregious case of fraud, irretrievable injury or special equity are in its favour. At this stage, this Court is*

[21] **(2020) 17 SCC 93**
[22] **(2022) 1 SCC 75**

only deciding the application for stay of the order dated 30.10.2025 whereby the stay on the invocation on the bank guarantees presently lying with IndusInd Bank and Kotak Mahindra Bank has been lifted, until disposal of the Appeal.

Perusal of the case record and the impugned order dated 30.10.2025 passed by the learned Arbitral Tribunal makes it apparent that the Hon'ble High Court in order dated 27.02.2025 passed in FMA 269 of 2025 had modified the interim order of injunction dated 29.11.2024 passed by this Court in a Section 9 application whereby the respondent was restrained from invoking the bank guarantees worth rupees eight crores and the Hon'ble High Court permitted the invocation of the bank guarantees worth rupees four crores (out of total of rupees eight crores), towards the undisputed due amount payable by the petitioner/appellant to the respondent in course of their business dealings and also left the question on the remaining four bank guarantees to be decided by the learned Arbitral Tribunal and directed those four bank guarantees (amounting to rupees four crores) to be kept alive till disposal of the interim application under Section 17 of the Arbitration & Conciliation Act, 1996. The learned Tribunal in its order dated 30.10.2025, while disposing of the Section 17 application had lifted the stay on the invocation of the bank guarantees presently lying with IndusInd Bank and Kotak Mahindra Bank.

*So far as the propriety and correctness of the impugned order of the learned Arbitral Tribunal dated 30.10.2025 whereby the invocation of the remaining four bank guarantees worth rupees four crores were lifted are concerned, the same can be inferred only upon hearing both sides. However, as of now, the appellant has prima facie showed from the impugned order of the learned Arbitral Tribunal that the bank guarantees worth rupees four crores which are sought to be invoked by the respondent are towards order cancellation charges and not for goods supplied/delivered i.e. in the nature of compensation/damages for loss suffered for non-lifting of the supply by the appellant against the purchase order dated 05.07.2024. The learned Senior Counsel Mr. Jishnu Saha has relied upon (**2016) 11 SCC 720 (Gangotri Enterprises Ltd. vs. Union of India and Ors.) and (2015) 4 SCC 136 (Kailash Nath Associates vs. Delhi Development Authority)**, who urged before this Court that the bank guarantees amounting to rupees four crores were not furnished for payment towards damages or compensation.*

Having regard to the prima-facie case pointed out above and also considering that the purpose of the filing of the Appeal will be frustrated prior to deciding the same on merits in the event stay order for a limited period is not granted, this Court thinks it proper to stay the operation of the Order dated 30.10.2025 passed by the learned Tribunal until further order."

20. The learned Appellate Court has thus tersely found a *prima facie* case in favour of the opposite party on the basis of the learned Arbitrator's finding that the bank guarantees were invoked for the purpose of making good the loss or damages suffered due to the cancellation of the purchase order and not for non- lifting of supplies.

21. Since the learned Appellate Court has - for the purpose of testing the opposite party's *prima facie* case – referred to the findings of the learned Arbitral Tribunal that the bank guarantees had been invoked for order cancellation charges and not for supply of goods, the order under Section 17 of the 1996 Act must now be noted. In paragraphs 1 to 9 thereof, the learned Arbitrator has briefly noted the facts of the case and then the arguments made by the respective parties. The reasoning begins from paragraph 10. The learned Arbitrator has quoted the relevant pleadings of the parties in paragraphs 10A and 10B thereof and has thereafter reached an interim conclusion thus:-

*"**C)** From the pleadings of the parties, it is therefore apparent to this Tribunal that the underlying contract between them for supply of DI Pipes was running, open, mutual and continuous. Qua such underlying contract specific Purchase Orders (POs) were issued from time to time by **C** to **R-1**. Against such POs, supplies were effected by **R-1** upon observing the necessary formal procedures related to the said POS.*

***D)** As the parties have submitted both through their written pleadings and in their oral submissions before this Learned Tribunal, the necessary formal procedures were required to be observed inclusive of time-bound issuance of Quality Assessment Plan (QAP) and, following such confirmation arrangement for the despatch of the Di Pipes.*

***E)** It is also apparent to this Tribunal that non-confirmation of a particular PO, in this case the PO dated 5th July, 2024 by **C**, does not ipso facto mean or imply that there has been a cessation of the running, open, mutual and continuous underlying contract by and between the parties. It is an admitted position that the parties have been fulfilling their underlying contractual obligations on the basis of a series of POs forming and/or constituting the operational side of such underlying contract. Therefore, to argue that non-confirmation of a single PO can be interpreted as the prerogative of one party, in this case **C**, for recusing from its contractual obligations would be, in the considered view of this Tribunal, to be a misreading of the underlying contract.*

***F)** In the further view of this Tribunal, it would be necessary to examine on merits the facts and circumstances surrounding the non-confirmation of the PO dated 5th July, 2024, thereby triggering invocation of the Bank Guarantees (BGs). To the mind of this Tribunal, the stand of **R-1** to the effect that **C** was obliged to furnish the QAP against the PO dated 5th July, 2024 on and by the 10th of July, 2024 and, non-compliance thereof has resulted in causing loss to **R-1** since **R-1** is acting as the supply platform for arranging the materials through several manufacturers/suppliers, is a point requiring examination on merits. In the event the argument of **C** is accepted that its obligation to lift materials stops upon the non-confirmation of the solitary PO dated 5th July, 2024, the same would amount to an abrupt cessation of the underlying running, open, mutual and continuous contractual relationship between the parties which, at this stage, without examining the contractual relationship on merits, is an inadvisable exercise. It is apparent that the PO dated 5th July, 2024 is one amongst several manifestations of the underlying contract. Accordingly, to accept the argument of **C** that with the non-confirmation of the single PO dated 5th July, 2024, the underlying contract and/or the entire contractual relationship between the parties came to a grinding halt, without further examining the entirety of the underlying contract on merits, will be prejudicial to the ends of justice.*

***G)** In this connection, it is further relevant to mention that each PO, inter alia, contains Payment Terms which provide for a window of thirty days from the date of despatch and such payment (by **C** to **R-1** against supplies made by the latter to the former) are secured against BGs unconditionally in favour of **R-1** (the Beneficiary) by **C** (the Guarantor). It has been noticed by this Tribunal earlier in this discussion that **C** has admitted to issuing BGs for a total amount of Rs.8 crores pursuant to the underlying contract and/or arrangement between the parties citing running, open, mutual and continuous supplies of DI Pipes. <u>It does transpire at this stage from the terms put on paper by the parties that the said amount of Rs.8 crores spans not a single PO but a series of POs and, is intended to act as a security for non-payment, if any, against supplies in relation to a PO if not paid within thirty days from the date of despatch of the materials (viz. the Payment Terms incorporated in the individual POs.)</u>*

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K) *At the same time, this Tribunal must further notice the unconditional nature of the BGs, which permit the beneficiary to invoke the same irrespective of other disputes between the parties. The exceptions of egregious fraud and special equity are, prima facie, subject to unimpeachable proof, since the actions on record of **R-1** have revolved around the failed PO dated 5th July, 2024 and duly communicated to **C** by way of raising repeated requests to confirm the PO dated 5th July, 2024.*

*At the same time the simple expression Order Cancellation Cheque does not ipso facto translate itself into invocation of an amount of Rs.4 crores without substantiating the loss claimed to be arising out of such cancellation. This Tribunal must again notice that the developments surrounding the failed PO dated 5th July, 2024 were not brought by **C** to the notice of the Learned Commercial Court at Rajarhat, thereby failing to convey a complete picture to the adjudicating authority.*

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N) *While the law on the invocation of unconditional BGs stands fairly settled as already discussed at Paragraphs **9(c1) and 9(d1)** (supra), at the same time this Tribunal cannot lose sight of the fact that R-1 is required to substantiate in this Arbitral Reference its claim to completely appropriate the said sum of Rs. 4 crores sought to be invoked on the basis of the single ledger entry dated 29th November, 2024 simply citing Order Cancellation Charge. While it may not be far from accurate to appreciate that the individual POs transactionally worked upon by the parties are open-ended in the sense that they constitute part of a running, open, mutual and continuous underlying contract, at the same time the BGs which **R-1** claims to deduct as Order Cancellation Charge as a percentage of the quantity/value of the DI Pipes ordered under each PO including the PO dated 5th July, 2024, does not find any mention in the Terms specified in the said individual POs.*

O) *Accordingly, while permitting **R-1** to invoke the BGs in issue in this Arbitral Reference for the amount of Rs.4 crores lying with IndusInd Bank, and Kotak Mahindra Bank, at the same time applying the 'just and convenient' principle embodied in Section 17(1)(e) (supra), this Tribunal finds it fit considering this dispute between private entities, to put **R-1** on terms. While doing so, this Tribunal is required to fortify its conclusion with the observation that at this stage of the Arbitral Reference and qua the running, open, mutual and continuous colour of their contractual relationship, both parties stand equally poised on merits to prove their case and/or disprove the contentions of the other.*

11. *In the backdrop of the above findings, this Tribunal directs as follows:*

I) *That the stay on the invocation of the remaining Bank Guarantees presently lying with IndusInd Bank and Kotak Mahindra Bank stands lifted.*

II) *The Respondent No.1 shall keep the said sum of Rs.4 crores in an interest bearing Short-Term Fixed Deposit Account to be renewed from time to time and to be produced before the Ld. Tribunal, as and when required, until the close of this Arbitral Reference.*

This Arbitral Reference shall be now heard on merits.

All parties to act on the basis of this order."

(Emphasis supplied)

22. The learned Arbitrator has thus found that the bank guarantees worth Rs.8 crore cover a series of POs and are *intended to act as a security for non-payment, if any, against supplies in relation to a PO if not paid within thirty days from the date of despatch of the materials (viz. the Payment Terms incorporated in the individual POs*).

23. Thus there is a finding, *prima facie* though, that the bank guarantees were to act as securities for non-payment of supplies in relation to a PO. In such context the language of the bank guarantees may be noticed once. Since all the bank guarantees are similarly worded therefore some of the relevant terms of the one appearing at page 242 of the revisional application are quoted hereinbelow:-

"BG Number: OGT0016240001862
Issuance Date: June 28, 2024

8. *BG Expiry Date : 30.09.2024*
9. *BG Claim Expire Date : 30.09.2026*
10. *Ladies and Gentlemen:*
11. *At the request of, REAN WATERTECH PVT.LIMITED, having its registered office at 906, 9TH*
12. *FLOOR, DLF GALLERIA, ACTION AREA1, NEW TOWN, KOLKATA-700156 (hereinafter referred*
13. *to as Customer). We Indusind Bank Limited, a banking company incorporated and registered*
14. *under Companies Act, 1956 and having license to carry on banking business under the Banking*
15. *Regulation Act, 1849 having its Registered Office at 2401, General Thimmayya Road,*
16. *Cantonment, Pune - 411 001 and its Corporate Office at 8th Floor, Tower – 1, One India-Bulls*
17. *Centre, 841, S.B. Marg, Elphistone Road, Mumbai - 400 013 and its one of Branch Office at*
18. *Indusind Bank Limited, Savitri Towers, 3A, Upper Wood Street, Kolkata- 700017 (hereinafter)*
19. *referred to as Bank) hereby issue Bank Guarantee in favour of OFB Tech Private Limited having*
20. *Registered office at Shop No. G-22 C (UGF) D-1 (K-84) Green Park Main New Delhi South Delhi*
21. *-110016 (hereinafter referred to as Beneficiary or OEB)* ***under the terms of the agreement***
22. ***(hereinafter referred to as the Purchase Agreement) to supply and/or facilitate credit for supply***
23. *of Material/Services from OFB or its Group of companies or its network of suppliers as per*
24. *agreed credit terms of the Purchase Agreement.*
25. *We hereby irrevocably agree and undertake to immediately, on-your first written-demand, credit*
26. *the full amount(s) demanded from us (the Demand Amount) to your account no. 002105023612*
27. *BANK NAME: ICICI BANK LTD SCO 18 & 19, HUDA SHOPPING CENTRE, MARKET COMPLEX,*
28. *SECTOR 14, GURUGRAM, HARYANA 122001, BANK IFSC CODE: ICIC0000021 ACCOUNT*
29. *NAME: OFB TECH PRIVATE LIMITED or any other account as speclfied in your demand.* ***Such***
30. ***payment under any credit facility availed by the customer will be made by us to you absolutely,***
31. ***unconditionally, and irrevocably under the Purchase Agreement****, without any contestation,*

32. *protest, or delay on our part and without any demur, set off, counter-claims, deductions or*
33. *withholding charges or taxes of any kind now or hereafter imposed, levied, collected, withheld,*
34. *or addressed by any governmental and/or any other authority whatsoever. In the event of any*
35. *tax/other deductions being mandatory under law, the amounts being-paid by us shall be*
36. *grossed up/increased by us to ensure that you receive an amount equivalent to the Demand*
37. *Amount, net of any such deductions. However, our liability under this Bank Guarantee shall be*
38. *restricted to an amount not exceeding Rs. .1,00,000,00/- (Rupees One Crore Only).*
39. *We further agree that the Beneficiary shall be sole Judge whether Customer has committed any*
40. *breach or breached any of the terms and conditions of the Agreement and the extent of loss,*
41. *damage, cost, charges and expenses suffered due to any default/delay on the part of Customer*
42. *in payment of Beneficiary's dues, charges, Costs expenses or payment demanded by the*
43. *Beneficiary in the said Agreement. To give effect to. this guarantee, as per the provisions of the*
44. *Indian Contract Act, as amended from time to time, the Bank shall be considered as Principal*
45. *Debtor.*
46. *We further agree and undertake to pay to the Beneficiary any money so demanded irrespective*
47. *of any dispute or disputes raised by the Customer.*
48. *We further agree that the Beneficiary shall have the fullest liberty without its consent and*
49. *without affecting in any manner its obligation hereunder to vary any of the terms and conditions*
50. *of the Agreement. The Bank shall not be relieved from its liability by reason of any such*
51. *variation or extension.*

(Emphasis supplied)

24. It, *prima facie,* appears that the learned Arbitrator has tethered the bank guarantees with the purchase order as per the terms of the bank guarantees. The express terms of the guarantee- "*under the terms of the agreement (hereinafter referred to as the Purchase Agreement) to supply and/or facilitate credit for supply"* and "*Such payment under any credit facility availed by the customer will be made by us to you absolutely, unconditionally, and irrevocably under the Purchase Agreement" prima facie* align with the learned Arbitrator's conclusion.

25. If such were the terms of the bank guarantees could it be invoked for loss suffered due to the cancellation of the purchase order dated July 05, 2024?

26. The learned Arbitrator has considered that aspect as well and has observed that "*the simple expression Order Cancellation Cheque does not ipso facto translate itself into invocation of an amount of Rs.4 crores without substantiating the loss claimed to be arising out of such cancellation.*"

27. The question that would then arise is - why did the learned Arbitrator permit invocation of the bank guarantees. The answer has been given by the learned Arbitrator himself in the opening sentences of paragraph 10K which has already been quoted hereinabove. He has found that bank guarantees are unconditional *which permit the beneficiary to invoke the same irrespective of other disputes between the parties*. The learned Tribunal has thus allowed the invocation going by the unconditional nature of the bank guarantees.

28. The impugned order passed by the learned Appellate Court is required to be tested in such context keeping in mind the threshold tests prescribed by the authoritative *dicta* in the cases of ***Deep Industries Limited*** (supra), ***Navayuga Engineering Company*** (supra) ***Punjab State Power Corporation Limited*** (supra) and ***Bhaven Construction*** (supra).

29. The learned Appellate Court has halted the invocation of bank guarantees on the *prima facie* observation that the same had not been invoked for supply of goods but for order cancellation charges. It has been noted above that the learned Arbitrator has also found that the bank guarantees were intended to act as securities for non-payment against supplies and that the same could not have been invoked for order cancellation charges. However, the learned Arbitral Tribunal has proceeded to allow the invocation going by the unconditional nature of the guarantees. Whether such a view can still be possible is a question that has to be answered by the Section 37 Court.

30. Sanctity of a bank guarantee and its financial autonomy are beyond doubt. It is well settled that a bank guarantee is an independent contract between the bank and the beneficiary named therein and the beneficiary is entitled to realize such guarantee. However, it is equally well settled that the invocation of the bank guarantee must be in terms thereof. The bank would always be obliged to honour its guarantee if it is unconditional and irrevocable. However, since the guarantee instrument is a text-based contract, therefore, when a dispute is brought before a Court, the validity of the invocation is assessed strictly in the light of the literal text of the guarantee, which defines the specific parameters and purpose for which it was issued. It is trite law that a commercial document must primarily be construed strictly on the basis of the terms and conditions contained therein[23].

31. The judgments of the Hon'ble Supreme Court in the case of ***U.P. State Sugar Corporation*** (supra), ***Himadri Chemicals Industries Limited*** (supra) and ***Standard Chartered Bank*** (supra) cited by the petitioner clearly instruct that the invocation must be according to the terms of the guarantee. In such context paragraph 14 of ***Himadri Chemicals Industries Limited*** (supra) may be noted:-

> *"**14.** From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank guarantee or a letter of credit:*
>
> *(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, <u>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.</u>*
>
> *(ii) <u>The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.</u>*
>
> *(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."*

(Emphasis supplied)

32. Similarly, in the case of ***Standard Chartered Bank*** (supra) the Hon'ble Supreme Court once again reiterated the position thus:-

> *"**26.** In our considered view, once the demand was made in due compliance with bank guarantees, it was not open for the appellant Bank to determine as to whether the invocation of the bank guarantee was justified so long as the invocation was in terms of the bank guarantee. The demand once made would oblige the bank to pay under the terms of the bank guarantee and it is not the case of the appellant Bank that its defence falls in any of the exception to the rule of case of fraud, irretrievable injustice and special equities. <u>In absence thereof, it is not even open for the Court to interfere with the invocation and encashment of the bank guarantee</u> <u>**so long as the invocation was in terms of the bank guarantee**</u> and this is what has been observed by the Division Bench of the High Court in the impugned judgment [Heavy Engg. Corpn. Ltd. v. Standard Chartered Bank, 2019 SCC OnLine Cal 617 : (2019) 3 Cal LT 133] and that reflected the correct legal position."*

(Emphasis supplied)

[23] **State Bank of India & Another vs. Mula Sahakari Sakhar Karkhana Ltd., reported at (2006) 6 SCC 293**

33. Thus the financial autonomy of the bank guarantees must operate within its contours. For example, if a bank issues an unconditional guarantee whose terms indicate that the same has been issued to secure someone's rental dues, can the beneficiary invoke it against such person to enforce a car loan debt *dehors* the terms of the guarantee, simply because the guarantee uses the expression "unconditional"? If it so means and if by reason of the expression "unconditional", it can be so invoked for any cause then the term indicated therein would be rendered meaningless. However, if it is invoked for the cause stated in the terms of the guarantee, then the unconditionality attached to the guarantee would compel the bank to honour it irrespective of a dispute as regards the merits of the cause or the falsity of the cause if raised. The bank would then not be entitled to enter into an audit exercise as regards the validity of the invocation.

34. In such context the observations of the Hon'ble Supreme Court in the case of ***Hindustan Construction Company Limited*** (supra) may be noted:-

> *"**9.** What is important, therefore, is that the bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the bank guarantee or the person on whose behalf the guarantee was furnished. The terms of the bank guarantee are, therefore, extremely material. Since the bank guarantee represents an independent contract between the bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the bank guarantee, or else, the invocation itself would be bad."*

(Emphasis supplied)

35. However, in the case at hand, the learned Arbitral Tribunal has *prima facie* found that the bank guarantees are intended to act as security for supplies and that order cancellation charges *"does not ipso facto translate itself into invocation",* yet allowed invocation observing that the bank guarantees are unconditional. While the learned Arbitrator's "short-term deposit" solution is an excellent attempt to balance equities under Section 17 of the 1996 Act, it does not solve the fundamental textual roadblock that the learned Tribunal's own finding as regards the terms of the guarantee has apparently created. In such circumstances can the learned Arbitrator's view said to be a possible view? This requires a resolution by the Section 37 Court.

36. This Court is cognisant of the law laid down by the Hon'ble Supreme Court in the cases of ***Ansal Engineering Projects Limited vs. Tehri Hydro Development Corporation Limited & Another***[24] and ***Hindustan Construction Company Limited*** (supra) that final adjudication of a matter is not a precondition to invoke

[24] **(1996) 5 SCC 450**

the bank guarantee and that is not a ground to issue injunction restraining the beneficiary to enforce the bank guarantee but then even in such cases it was noted that invocation must be **in terms of the guarantee**. The present case is one where there is a *prima facie* finding by the learned Arbitrator that the terms of the bank guarantees indicate that the same were intended to secure payment on supplies and the invocation could not be done on the ground of order cancellation. It is not in dispute that the supplies were never made or could not be made as the purchase order was cancelled. Invocation of a bank guarantee cannot be stopped on the grounds that the buyer and seller are fighting over defective goods, but it can be paused if the beneficiary attempts to use it for something not reasonably inferable from the text of the guarantee. It is clarified that while observing as above, this Court does not for a moment mean to express any opinion on the correctness of the *prima facie* finding of the learned Arbitrator that the terms of the guarantee indicate what the learned Arbitrator has *prima facie* found and that the observations made in this order are only for the purpose of deciding the present petition.

37. Looked at from that angle, it cannot be said that the Commercial Court was entirely wrong in pausing the invocation which needs to be scotched under Article 227 of the Constitution of India. The enquiry indicated above is a relevant enquiry and should be conducted by the learned Section 37 Court. In any case, it cannot be said that the impugned order passed by the Appellate Court is one which is *patently lacking in inherent jurisdiction.*

38. The Section 37 Court did not perform a forbidden audit on the deep merits of who broke the contract. It simply looked at the active arbitral record where the learned Arbitrator himself had already recorded that the bank guarantees were intended to act as securities and that the petitioner's actual claim was for an unsubstantiated purchase order cancellation loss. The Appellate Court has simply observed a patent variance of the invocation with the text of the guarantee in terms of the learned Arbitrator's *prima facie* findings which made it apparent that the money was being demanded for order cancellation charges rather than credit facilities *availed on* supply of goods.

39. In view of the specific *prima facie* findings of the learned Arbitrator as pointed out hereinabove, the impugned order cannot also be said to be so perverse that its perversity stares in the face. For the same reason (i.e., going by the *prima facie* findings of the learned Arbitrator) the order does not also lead to "*a case of exceptional rarity".* In the specific facts of the present case as discussed hereinabove, Appellate Court's ultimate conclusion appears to be a possible view, which ought not to be interfered with in revision under the superintendential jurisdiction of this Court.

40. It is noticed that the Section 37 Court has referred to the judgement in the case of ***Gangotri Enterprises Limited*** (supra) which has been held to be *per incuriam* by the Hon'ble Supreme Court in the case of ***Amber Builders*** (supra). However, the point on which it was held to be *per incuriam* is not the same for what it had been relied on by the opposite party in the present case. In such regard, the following observations of the Hon'ble Delhi High Court in the case of ***Thar Camps Pvt. Ltd. vs. Indus River Cruises Pvt. Ltd.***[25] deserve notice:-

> "***84.*** *The Supreme Court was, thus, concerned, in Amber Builders[23], with the power of the Gujarat Public Works Contract Disputes Arbitration Tribunal ("the Tribunal", in short) to pass an interim order under Section 17 of the 1996 Act. In that case, Amber Builders ("Amber", in short) was awarded a contract for strengthening a section of the National Highway on 31st July, 2007. Amber claimed to have completed the contract at work on 30th April, 2008. Premised on this date, Amber claimed that it was required to remove defects only for three years therefrom, which period ended on 30th April, 2011. Amber, therefore, requested the State of Gujarat to release the security amounts deposited by it. The State responded vide letter dated 11th November, 2014, claiming an amount of Rs. 1,09,00,092/- from Amber on the ground that the road repair work carried out by Amber was not in accordance with the contract. The State also threatened to withhold the security deposit as well as payments due to Amber against the bills raised by it in other contracts. Amber challenged the notice before the High Court, under Article 226 of the Constitution of India, on the ground that the State could withhold the amount payable to it under other contracts, till the liability of Amber, under the said contracts, was duly adjudicated by a forum of competent jurisdiction. The High Court accepted the case set up by Amber, and held that, without quantification or crystallisation of the amount claimed to be recoverable from Amber under other contracts, the State could not unilaterally recover the said amounts from the ongoing contract by withholding payments. The State appealed to the Supreme Court, contesting the jurisdiction of the High Court to pass such an order. Before the Supreme Court, the State contended that the remedy, for Amber, was before the Tribunal, and not before the High Court in writ jurisdiction.*
>
> ***85.*** *The Supreme Court accepted the contention advanced by the State, and held that the proper remedy for Amber was before the Tribunal, which had the jurisdiction to decide whether the State was entitled to recover any amount from Amber, as also to pass an interim orders in that regard.*
>
> **************** **************** ****************
>
> ***87.*** *The points on which Kamaluddin Ansari overruled Raman Iron Foundry were, therefore, according to Amber Builders, the right of the Government to withhold payments, stated to be due from the contractor, against dues of the contractor under other contracts, and the power of the Court to grant an injunction in that regard. <u>The findings in Raman Iron Foundry regarding the nature of liquidated and unliquidated damages, and the liability in that regard crystallising only when adjudicated by a court, continue, however, to remain undisturbed.</u> Status quo, regarding the observations made in that context, by*

[25] **2021 SCC OnLine Del 3150**

> *Muralidhar, J., in Intertoll and Lanco Infratech, therefore, continues to prevail. On all points that concern us, Raman Iron Foundry is still good law."*

41. This Court agrees with the view of the Hon'ble Delhi High Court that the legal position that liability as regards unliquidated damages would crystallise only when the same is adjudicated by the Court remains the same.

42. However, even if for the sake of arguments, it is assumed that ***Gangotri Enterprises Limited*** (supra) cannot be cited as a precedent on any point at all, then also reference to that judgment does not render the impugned order either one that is *patently lacking in inherent jurisdiction* or so perverse that its perversity stares in the face or one that results in "*a case of exceptional rarity".* In such a case it would be a serious error of law but would still be an error within jurisdiction.

43. It is well settled that *supervisory jurisdiction is not to correct every error of fact or even a legal flaw when the final finding is justified or can be supported.*[26] Clearly, in view of the binding mandate issued by the Hon'ble Supreme Court in the cases of ***Deep Industries Limited*** (supra), ***Navayuga Engineering Company*** (supra) ***Punjab State Power Corporation Limited*** (supra) and ***Bhaven Construction*** (supra), in the light of the legislative intent and statutory policy behind the 1996 Act, the already sparingly exercisable authority under Article 227 of the Constitution of India has been further restricted. The order impugned does not fall under the restricted zone.

44. Furthermore, the petitioner is not remediless. The Section 37 appeal is live and active. There was never an order of stay on the hearing of the appeal and there is none now. It is open to the petitioner to argue all points available to it including the point that the terms of the bank guarantee do not indicate that the bank guarantees were intended to act as security for the payment on supplies. Likewise it will also be open to the petitioner to satisfy the learned Appellate Court that the learned Arbitrator's view is a possible view which should not be interfered with under Section 37 of the 1996 Act.

45. Coming to the other judgments cited by the parties, as regards the judgments in the cases of ***Ashok Himmatbhai Patel*** (supra) and ***Suresh Shah*** (supra), the same reiterate the strict boundaries of the appellate forum under Section 37 of the 197 Act and reaffirm that the bar of Section 5 of the 1996 Act should be adhered to. The said judgments reaffirm that a Section 37 Court should defer to an arbitrator's discretion unless there is patent inequity.

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[26] **Garment Craft vs. Prakash Chand Goel reported at (2022) 4 SCC 181**

46. Although, some judgments do not form part of the written notes and have not been cited before this Court yet, a bunch of judgments filed by the petitioner in Court also includes ***Concrete Developers LLP vs. Gaurav Churiwal & Others***[27]***, Dinesh Gupta vs. Anand Gupta***[28]***, Heavy Engineering Corporation Limited vs. Standard Chartered Bank***[29]***, Bharat Heavy Electricals Limited Electronics Division vs. West Bengal State Electricity Distribution Company Limited & Another***[30] and ***Larsen & Toubro Ltd. vs. Visa Power Ltd.***[31].

47. While ***Concrete Developers LLP*** (supra) and ***Dinesh Gupta*** (supra) reassert restricted interference with interim orders under Section 37 of the 1996 Act, ***Heavy Engineering Corporation Limited***. (supra) and ***Larsen & Toubro Ltd.*** (supra) and ***Bharat Heavy Electricals Limited Electronics Division*** (supra) reiterate that Courts should be reluctant to injunct invocation of unconditional guarantees.

48. The said judgments do not aid the petitioner in the present case since, in this case while on the one hand the learned Arbitrator has *prima facie* found that the terms of the bank guarantees indicate that the same are intended to act as security for payment in respect of supplies, on the other hand the learned Arbitral Tribunal has allowed invocation of the said guarantees for a claim on account of loss suffered due to cancellation of purchase order on the basis that the guarantees are unconditional. It has been held in ***Hindustan Construction Company Limited*** (supra) invocation of bank guarantee must be *"in accordance with the terms of the bank guarantee, or else, the invocation itself would be bad."* The matter therefore requires to be heard. In any case the opposite party's appeal is at the interim stage and the appeal has not yet been decided. The order of the learned Arbitrator has not been set aside and if the order remains intact invocation of the bank guarantees would be consequential. Both the parties will have opportunity to assert their respective cases. Therefore, in the specific facts of this case postponement of bank guarantee invocation does not render the order passed by the Section 37 Court amenable to interference under Article 227 of the Constitution of India in terms of the exceptional threshold mandated by ***Deep Industries Limited*** (supra), ***Navayuga Engineering Company*** (supra) ***Punjab State Power Corporation Limited*** (supra) and ***Bhaven Construction*** (supra).

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[27] **2023 SCC OnLine Cal 4685**
[28] **2020 SCC OnLine Del 2099,**
[29] **2019 SCC OnLine Cal 617**
[30] **2023 SCC OnLine Cal 767**
[31] **2012 SCC OnLine Cal 6769**

49. ***National Agricultural Cooperative Marketing Federation India Limited*** (supra) ***Sudhir Kumar & Others*** (supra) cited by the opposite party hold that no clause in a contract should be considered meaningless or surplusage.

50. ***Kailash Nath Associates*** (supra) asserts that actual loss or damages must be proved. ***M/s. KSE Electrical Private Limited.*** (supra) has turned on its own facts and it does not aid the opposite party in the facts of this case.

CONCLUSION:

51. For all the reasons aforesaid, the impugned order dated November 04, 2025 passed by the learned Judge, Commercial Court at Rajarhat, District- North 24 Parganas in Misc. Appeal (Com.) No. 02 of 2025 is not interfered with. The petitioner will be at liberty to pray for preponement of the date of hearing of the appeal. If such an application is made, the learned Appellate Court is requested to prepone the date and dispose of the appeal upon hearing the parties, as expeditiously as possible, preferably within a month from the preponed date.

52. It is reiterated that this Court has not expressed any opinion on the merits of the cases of the respective parties. All observations made hereinabove are wholly tentative and *prima facie* and are only meant for the purpose of deciding the present petition. It will entirely be in the domain of the Section 37 Court to take a decision on the matter remaining wholly uninfluenced and uninhibited by the observations made hereinabove.

53. C.O. 4068 of 2025 stands disposed of with the above observations. No costs.

54. Urgent photostat certified copy of this order, if applied for, be supplied to the parties on urgent basis after completion of necessary formalities.

(Om Narayan Rai, J.)