

HIGH COURT OF MADHYA PRADESH, BENCH AT INDORE

Writ Petition No.14856/2019 (O)

(Shree Aastha Foundation for Education Society (SAFE) Vs. Union of India & Ors.)

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Indore, dated 10/09/2020

Mr. Rohit Kumar Mangal, learned counsel for the petitioner.

Mr. Himanshu Joshi, learned counsel for the respondent No.1.

Mr. Shrey Raj Saxena, learned counsel for the respondent No.2.

Mr. Sumersingh Chouhan, learned counsel for the respondent No.3 and 4.

Ms. Darshana Baghel, learned counsel for the respondent No.5 and 6.

The petitioner before this Court, Shree Aastha Foundation for Education Society (SAFE), has filed present petition being aggrieved by the action of Medical Council of India in encashing the Bank Guarantees furnished by the petitioner, stating that the petitioner Society is a registered Society registered under the provisions of Madhya Pradesh Society Registrakaran Adhiniyam, 1973. It has been further stated that the petitioner Society has taken steps for establishment of a Medical College i.e. Modern Institute of Medical Sciences & Sewakunj Hospital & Research Centre in the year 2016-17 and the Ministry of Health & Family Welfare forwarded the petitioner's application the Medical Council of India (MCI) for evaluation and making the recommendations to the Ministry under Section 10 of Indian Medical Council Act, 1956.

02- A Letter of Permission was issued on 20/08/2016 with annual

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intake of 150 MBBS students under the Madhya Pradesh Medical Science University Jabalpur under Section 10A of the Indian Medical Council Act, 1956 for the academic year 2016-17. The petitioner Society has further stated that initially the Society and Medical College was being run by some other group of members and due to mismanagement by the earlier Members and Chairman, the College was closed.

03- It has been further stated that on 30/11/2018 the new Chairman Mr. Puneet Agrawal took charge and then only he came to know about the mismanagement and irregularities in the College as well as in the Society. The petitioner has further stated that the petitioner Society, at the time an application was submitted for grant of approval to establish a Medical College, has submitted the following documents:-

- (a) An affidavit dated 30/08/2016 of the then Chairman and Dean of the Institute;
- (b) A Bank Guarantee dated 01/09/2016 of Rs.2 Crores issued by the Bank of India in favour of Medical Council of India;
- (c) A Bank Guarantee dated 01/09/2016 for a sum of Rs.9.5 Crores issued by Bank of India in favour of the Medical Council of India.

04- The petitioner has further stated that the Government of India has granted provisional Letter of Permission to run the College with 150 seats for MBBS students and the petitioner College started enrolling the students by participating in the counselling conducted by the State Government. The petitioner has further stated that the respondent No.3 Medical Council of India through its Executive Committee *vide* letter dated 26/12/2016 and has informed the Union of

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India that the College has failed to comply with the conditions laid down by the Oversight Committee and the recommendation was made to debar the College from admitting the students for two academic years i.e. for academic year 2017-18 and 2018-19 and also to encash the Bank Guarantees furnished by the petitioner College.

05- The petitioner has stated that the inspite of the aforesaid the College participated in counselling conducted by the State Government and 150 students were admitted. The petitioner has further stated that the Government of India in response to letter dated 26/12/2016 has issued a letter for withdrawing the conditional permission and directed the College not to admit any student in MBBS Course and has also informed that the College has been debarred from admitting students for the next two academic year i.e. the academic year 2017-18 and 2018-19. The College was also informed that next batch shall be admitted only after obtaining permission from the Central Government and a direction was also given to Medical Council of India for encashing the the Bank Guarantee.

06- The petitioner has further stated that a writ petition was preferred by the petitioner before this Court i.e. Writ Petition No.3582/2017 and the Division Bench of this Court *vide* order dated 05/09/2017 has directed the Central Government to consider the matter afresh on the basis of material available on record and reevaluate the recommendations / views of the Medical Council of

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India, Hearing Committee and the Oversight Committee that too after granting an opportunity of hearing to the petitioner.

07- After the directions were given by this Court the petitioner has approached the respondent No.1 Government of India and requested the Medical Council of India for re-inspection of Modern Institute of Medical Sciences. The petitioner has further stated that on 19/06/2019 the Medical Council of India has issued a letter to respondent No.5 – Chief Manager, Bank of India for encashment of Bank Guarantee of (Rs.9.5 Crores) and the respondent No.5 – Bank of India has issued a notice for encashment Bank Guarantee dated 27/06/2019.

08- The petitioner's contention is that the action of the respondents in issuing notice for encashment of Bank Guarantee is *per se* illegal and arbitrary. The Medical College which is being run by the petitioner Institute has not violated any norms of Medical Council of India nor has caused any damage to Medical Council of India and therefore, the question of encashment of Bank Guarantee does not arise.

09- It has also been argued that the action of the Medical Council of India in encashing the Bank Guarantee is violative of Article 14, 16, 19 and 21 of the Constitution of India. It has also been stated that it is violative of the directive principles enshrined in Part-4 of the Constitution of India.

10- Another ground has been raised stating that the Hon'ble Supreme Court in the case of **Chintpurni Medical College and**

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Hospital and Anr. Vs. Union of India passed in **Writ Petition (C)**

No.423 of 2017 dated **23/06/2017** has granted stay in the matter of encashment of Bank Guarantee and even permission was granted to run the Medical College for two years. Learned counsel has argued before this Court that in the present case also permission be granted to run the Medical College and the respondents be restrained from encashing the Bank Guarantee.

11- Another ground raised by petitioner is that the action of the respondents is arbitrary, the respondents have not adopted the transparent procedure and the petitioner cannot be deprived of his legal right to get the Bank Guarantee released. Another ground has been raised by the petitioner stating that the Bank Guarantee was valid for five years and the College has been debarred from admitting the students only for a period of two years and therefore, the procedure adopted by the respondent is unfair procedure and the respondents be restrained from encashing the Bank Guarantee. The petitioner has prayed for the following reliefs:-

“A. That, the Impugned Letter dated 19.06.2019 **ANNEXURE-P/1** & letter dated 27.06.2019 **ANNEXURE-P/2** issued by the Respondents may kindly be quashed and the respondents be directed not to encash the Bank Guarantee No.8801IPEBG160002 dated 01.09.2016 of Rs.950 lakh given by Petitioner in favour of Respondent No.3 i.e. Medical Council of India.

B. That, the respondent may kindly be direct to consider and conduct the re-inspection application given by petitioner collage and after inspection if fits suitable then Petitioner may be granted permission to run the college after the ban period.

C. Any other relief which this Hon'ble Court may deem fit may

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also be kindly given to the petitioner along with cost and oblige.”

There is a prayer for interim relief also, however, this Court has not granted any interim relief in the matter.

12- A reply has been filed in the matter by Medical Council of India – respondents No.3 and 4 and it has been stated by the Medical Council of India that the petitioner has concealed the material facts before this Court and has selectively placed facts and documents. It has been further stated that the petitioner has played fraud with Medical Council of India and State Government as well as Central Government.

13- The respondents have stated that the State of Madhya Pradesh has initially issued the Desirability & Feasibility Certificate *vide* letter dated 27/09/2013 in respect of the petitioner Medical College and the Medical Council of India has received a letter dated 23/06/2018 informing the Medical Council of India that inspection was carried out by Madhya Pradesh Medical Science University, Jabalpur and on account of multiple irregularities the Desirability & Feasibility Certificate was cancelled by the State of Madhya Pradesh on 19th and 20th June, 2018.

14- The students admitted in the petitioner Medical College in respect of the academic session 2016-17 were reallocated to other Medical Colleges situated in the State.

15- It has been further stated that in order to protect the interest of the students, the Medical Council of India has accepted the proposal

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of State of Madhya Pradesh to shift total number of 295 students admitted in the petitioner Medical College and Advance Medical College, Bhopal in the academic year 2016-17 to other recognized private Medical Colleges situated in the State of Madhya Pradesh. It was decided by the Medical Council of India that the students should not be suffer and the students of petitioner Medical College and Advance Medical College, Bhopal admitted in the year 2016-17 as they have already undergone two years teaching were shifted / accommodated in the Government Medical Colleges of the State of Madhya Pradesh proportionately.

16- The decision of the Medical Council of India was communicated to the Government of India *vide* letter dated 14/08/2018 and the Government of India has approved the proposal, meaning thereby, the petitioner Medical College has played a fraud with the State of Madhya Pradesh, with Government of India as well as Medical Council of India. The State Government was forced to withdraw the Desirability & Feasibility Certificate. The students were adjusted in the Medical Colleges of State of Madhya Pradesh and in those circumstances, the Bank Guarantees furnished by the petitioner are being encashed.

17- The respondents have also stated that the petitioner has placed reliance on a judgment delivered by Hon'ble Supreme Court on 23/06/2017 and 10/05/2018 passed by Hon'ble Supreme Court in Writ Petition (C) No.423 of 2017 (Chintpurni Medical College and Hospital

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and Anr. Vs. Union of India). The respondents have stated that the Hon'ble Supreme Court by an order dated 11/09/2017 passed in SLP(C) No.16676 of 2015 along with Writ Petition (C) No.431 of 2015 had permitted the Medical Council of India to encash the Bank Guarantee of Rs.10 Crores submitted by Medical Colleges since Medical Colleges was found to be in violation of order dated 18/09/2014 and 25/09/2014 passed by the Hon'ble Supreme Court in Writ Petition (C) No.469 of 2014 (Hind Charitable Trust Shekhar Hospital Pvt. Ltd. Vs. Union of India and Others).

18- The respondents have stated that the petitioner has concealed the vital fact that no student is being taught in the Medical College as the batch of student admitted during academic session 2016-17 has already been shifted to other Medical College by the State of Madhya Pradesh and therefore, as there is concealment of material fact by the petitioner, the petition deserves to be dismissed.

19- The respondents have also stated before this Court that the petitioner has suppressed the judgment delivered by this Court in respect of Desirability & Feasibility Certificate and the petition preferred by the College has been dismissed by this Court. The respondents have also stated that the Bank Guarantee constitutes an independent contract and its a contract between the respondent / MCI and the Bank and the respondent is certainly entitled for encashment of the Bank Guarantee and no case for interference is made out in the

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matter.

20- Heard learned counsel for the parties at length and perused the record. The matter is being disposed of at admission stage itself with the consent of the parties.

21- The respondent No.3 – Medical Council of India is a body constituted under the provisions of Medical Council Act, 1956 and has been given responsibility of discharging the duty of maintenance of the highest standards of medical education throughout the country. Section 33 of the Indian Medical Council Act, 1956 empowers the Medical Council of India with prior approval of the Central Government to frame regulations to laying down the minimum standards of infrastructure, teaching and other requirements for conducting the medicine courses and Medical Council of India regulations have been framed by the respondents.

22- Section 10A of the Medical Council Act, 1956 provides for prescribed procedure for establishing a Medical College. Regulations have been framed by the respondents for establishing a Medical College known as Establishment of Medical College Regulations, 1999. The relevant regulations for establishing a Medical College are quoted as under:-

“.....

3. The establishment of a medical college –

No person shall establish a medical college except after obtaining prior permission from the Central Government by submitting a Scheme annexed with these regulations.

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SCHEME FOR OBTAINING PERMISSION OF THE CENTRAL GOVERNMENT TO ESTABLISH A MEDICAL COLLEGE.

ALL APPLICATIONS UNDER THIS SCHEME SHALL BE SUBMITTED TO THE SECRETARY TO THE GOVERNMENT OF INDIA, MINISTRY OF HEALTH & FAMILY WELFARE, NIRMAN BHAVAN, NEW DELHI – 110 011 FROM 1ST AUGUST TO 31ST AUGUST (BOTH DAYS INCLUSIVE) OF ANY YEAR.

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2. QUALIFYING CRITERIA-

The eligible persons shall qualify to apply for permission to establish a medical college if the following conditions are fulfilled:-

(1) **that medical education is one of the objectives of the applicant in case the applicant is an autonomous body, registered society, charitable trust & companies registered under Company Act.**

(2) **that a suitable single plot of land measuring not less than 25 acres is owned and possessed by the person or is possessed by the applicant by way of 99 years lease for the construction of the college.**

(3) **that Essentiality Certificate in Form 2 regarding No objection of the State Government/Union Territory Administration for the establishment of the proposed medical college at the proposed site and availability of adequate clinical material as per the council regulations, have been obtained by the person from the concerned State Government/ Union Territory Administration.**

(4) **that Consent of affiliation in Form-3 for the proposed medical college has been obtained by the applicant from a University.**

(5) **that the person owns and manages a hospital of not less than 300 beds with necessary infrastructural facilities capable of being developed into teaching institution in the campus of the proposed medical college.**

.....

3. FORM AND PROCEDURE:-

Subject to the fulfillment of the above eligibility and qualifying criteria, the application to establishment of medical college in Form-1 shall be submitted by the person in the following parts, namely: -

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5. REGISTRATION:

Applications referred by the Ministry of Health & Family Welfare to the Council will be registered in the Council for evaluation and recommendations. Registration of the application will only signify the acceptance of the application for evaluation. Incomplete applications will not be registered and will be returned to the Ministry of Health & Family Welfare alongwith enclosures and processing fee stating the deficiencies in such applications. The Council shall register such incomplete applications, if so directed by the Central Government for evaluation but shall submit only a factual report in respect of them and shall not make any recommendations.

FORM – 1 **FORMAT OF APPLICATION FOR PERMISSION OF** **THE CENTRAL GOVERNMENT TO** **ESTABLISH A NEW MEDICAL COLLEGE**

PARTICULARS OF THE APPLICANT

1. NAME OF THE APPLICANT

.....
.....

LIST OF ENCLOSURES:

- a. Certified copy of Bye Laws/Memorandum and Articles of Association/ Trust deed.
- b. Certified copy of Certificate of registration/incorporation.
- c. Annual reports and Audited Balance sheets for the last three years
- d. Certified copy of the title deeds of the total available land as proof of ownership.
- e. Certified copy of zoning plans of the available sites indicating their land use.
- f. Proof of ownership of existing hospital
- g. Certified copy of the essentiality certificate issued by the respective State Government/Union territory Administration.
- h. Certified copy of the consent of affiliation issued by a

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recognised University.

- i. Authorization letter addressed to the bankers of the applicant authorising the Central Government/Medical Council of India to make independent enquiries regarding the financial track record of the applicant.
- j. Other enclosures as per the various parts of applications. (Please indicate details).

.....”

The regulation provides for certain Mandatory / Statutory Preconditions, Essentiality Certificate and Consent of Affiliation required for establishing the Medical College. The Medical College so established is under an obligation to continue to possess the Essentiality Certificate and the Consent of Affiliation.

23- The regulations framed by Medical Council of India makes it mandatory to possess the valid Essentiality Certificate issued by the State Government and Consent of Affiliation from the concerned University. In case of the petitioner, the petitioner Trust submitted an application to the State of Madhya Pradesh for grant of Desirability & Feasibility Certificate and the Desirability & Feasibility Certificate was issued by the State of Madhya Pradesh on 27/09/2013. The State of Madhya Pradesh *vide* letter dated 23/06/2018 has informed the Medical Council of India that on account of multiple irregularities committed by the College reported in the inspection carried out by the Madhya Pradesh Medical Science University, the Desirability & Feasibility Certificate has been cancelled on 19th and 20th June, 2018.

24- The students studying in the Medical College in respect of academic session 2016-17 and the students admitted in Advance

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Medical College, Bhopal, which is again a private Medical College, for the academic session 2016-17 in identical circumstances were reallocated to other recognized private Medical Colleges / Government Medical Colleges situated in the State of Madhya Pradesh, meaning thereby, the State of Madhya Pradesh was burdened with 295 students who were granted admission in petitioner Medical College i.e. Modern Medical College and Advance Medical College, Bhopal for the academic year 2016-17 and on account of intervention of this Court they were granted admission in various private Medical Colleges and most of the students studying in the petitioner's Medical College were accommodated in another premium Institution namely M. Y. Medical College, Indore.

25- The Government of India was informed about the development which took place in the matter and the Executive Committee of Medical Council of India also accorded approval for shifting of the students and also for transfer of fees paid by the students to State of Madhya Pradesh so that additional revenue generated from fees can be utilized to upgrade the infrastructure in the Government Medical Colleges in which the students were transferred.

26- The decision of the Executive Committee was communicated to Government of India – respondent No.1 and State of Madhya Pradesh – respondent No.2 on 14/08/2018. The Central Government on 29/08/2018 granted approval to the decision taken by the Medical

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Council of India. The Medical College which was established by the petitioner Society is not at all functional. Students have been shifted to other Medical Colleges and the Desirability & Feasibility Certificate have also been cancelled.

27- The petitioner has preferred a writ petition being aggrieved by the action of the State Government in cancelling the Desirability & Feasibility and the writ petition was registered as Writ Petition No.14496/2018 (Modern Institute of Medical Sciences Vs. State of Madhya Pradesh & Others). This Court *vide* order dated 14/11/2018 has upheld the action of the respondent in cancelling the Desirability & Feasibility Certificate. The relevant paragraphs of the order dated 14/11/2018 passed by this Court writ petition reads as under:-

“The petitioner College was not granted permission to establish a new medical college for the academic year 2015- 2016 and finally the Writ Petition was disposed of by this Court by order dated 25/4/2016 as the academic year was over. The case of the petitioner was again taken up in the light of the judgment delivered in the case of Modern Dental College and Research Centre Vs. State of Madhya Pradesh reported in **(2016) SCC 353** and in the light of the order passed by oversight committee – respondent No.2 *vide* order dated 20/8/2016 issued Letter of Permission (L.O.P.) for establishment of Medical College for the Academic Year 2016-2017, u/S. 10A of the Medical Council of India Act, 1956 for only intake of 150 MBBS seats, subject to furnishing a Bank Guarantee. Permission was valid for only one year and an inspection was carried out in the month of November. Large number of deficiencies were pointed out and the petitioner Institute was debarred from admitting students for the academic year 2017-2018 and 2018-2019. Thus, only for one academic year students were admitted and no classes were being conducted, there were acute shortage of Professors and the career of the students who were admitted for only one particular batch was at stake. On 19/4/2018 a First Information Report was lodged against the Institute and the person who has filed the present petition has been arrested and he is still in Jail for offence punishable u/Ss. 420 and 406 of the Indian Penal Code. Fee was collected from the students running into lacs, but no facility was given to them and

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ultimately as there was a huge protest by the students, by number of public and even Writ Petitions were filed before this Court, the State Government was forced to grant admissions to all those 150 students in Government Medical Colleges in second year.

The reply filed by the State Government reveals that the petitioner has played a fraud upon the State. The petitioner has played a fraud with the students and the person who has filed the present Writ Petition Dr. Ramesh Chandra Badlani, who is Chairman of the Society is in Jail on account of the fraud committed by him, the State Government was forced to admit all 150 students of the Medical College in Government Medical College, hence the petitioner is certainly not entitled for any relief of whatsoever kind.

It is true that the Hon'ble Supreme Court has decided the issue in respect of withdrawal of desirability and feasibility certificate and has held that the power does not lie with the Government to withdraw the desirability and feasibility certificate, however, at the same time, the Hon'ble Supreme Court in the case of Chintpurni Medical College and Hospital (supra), in paragraph 35, has held as under :

35. We may not be understood to be laying down that under no circumstances can an Essentiality Certificate be withdrawn. The State Government would be entitled to withdraw such certificate where it is obtained by playing fraud on it or any circumstances where the very substratum on which the Essentiality Certificate was granted disappears or any other reason of like nature.

This is a case where the petitioner has played fraud in the matter. The College was not having infrastructure, the College was not having Teachers, the College was not having proper Hospital and on account of various litigation succeeded in obtaining the permission to run a medical college and the conduct of the Chairman of the petitioner College has finally shown him the way to Jail. He has collected heavy fees from young children and has played with their career and the State Government was forced to admit 150 students in Government Medical Colleges in the second year irrespective of their merit and, therefore, the present case is fully covered under paragraph 35 of the judgment delivered by the Hon'ble Supreme Court in the case of Chintpurni Medical College and Hospital (supra) and, therefore, this Court is of the considered opinion that no case is made out for interference by this Court.

Accordingly, the admission is declined.”

The aforesaid judgment delivered by the Division Bench of this Court makes it very clear that the petitioner has played fraud upon the students. Fees were collected from the students but no teaching took

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place in the Medical College established by the petitioner Institution.

The present case reflects a very sorry state of affairs prevalent in the field of medical education. Colleges are established, fee / capitalization fee is collected from the students and then no teaching takes place. The College played with the carrier of the students and in those circumstances, in the present case, the Desirability & Feasibility Certificate was cancelled. At present, the College does not have any kind of permission and therefore, merely there is change in the Society, new office bearers have come, it does not mean that College has become functional.

28- The present petition is only in respect of encashment of Bank Guarantee. The law in respect of encashment of Bank Guarantee has already been crystallized by the Hon'ble Supreme Court and the Bank Guarantee is an independent contract between the Bank and the person in whose favour Bank Guarantee has been executed. The Hon'ble Supreme Court in the case of **Standard Chartered Bank Vs. Heavy Engineering Corporation Ltd. and Others** reported in **2020 (1) ALT 62 : MANU/SC/1775/2019** in paragraphs No.19 to 24 and 26 has held as under:-

“19. The law relating to invocation of bank guarantees with the consistent line of precedents of this Court is well settled and a three Judge Bench of this Court in *Ansal Engineering Projects Ltd. Vs. Tehri Hydro Development Corporation Ltd. and Another*³ held thus:-

4. It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract

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between the person at whose instance the bank guarantee was given and the beneficiary. Unless fraud or special equity exists, is pleaded and prima facie established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in performance of the contract or execution of the works undertaken in furtherance thereof. The bank unconditionally and irrevocably promised to pay, on demand, the amount of liability undertaken in the guarantee without any demur or dispute in terms of the bank guarantee. The object behind is to inculcate respect for free flow of commerce and trade and faith in the commercial banking transactions unhedged by pending disputes between the beneficiary and the contractor.

5.The court exercising its power cannot interfere with enforcement of bank guarantee/letters of credit except only in cases where fraud or special equity is prima facie made out in the case as triable issue by strong evidence so as to prevent irretrievable injustice to the parties." (emphasis supplied)

20. A bank guarantee constitutes an independent contract. In Hindustan Construction Co. Ltd. Vs. State of Bihar and Others(supra), a two Judge Bench of this Court formulated the condition upon which the invocation of the bank guarantee depends in the following terms:-

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.

21. The same principle was followed in State Bank of India and Another Vs. Mula Sahakari Sakhar Karkhana Ltd. MANU/SC/3353/2006 : 2006 (6) SCC 293 wherein a two-Judge Bench held thus:-

33. It is beyond any cavil that a bank guarantee must be construed on its own terms. It is considered to be a separate transaction.

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34. If a construction, as was suggested by Mr Naphade, is to be accepted, it would also be open to a banker to put forward a case that absolute and unequivocal bank guarantee should be read as a conditional one having regard to circumstances attending thereto. It is, to our mind, impermissible in law.

22 Taking note of the exposition of law on the subject in Himadri Chemicals Industries Limited Vs. Coal Tar Refining Co. MANU/SC/3256/2007 : 2007 (8) SCC 110, a two-Judge Bench of this Court in Gujarat Maritime Board Vs. Larsen & Toubro Infrastructure Development Projects Limited and Another MANU/SC/1105/2016 : 2016 (10) SCC 46 has laid down the principles for grant or refusal for invocation of bank guarantee or a letter of credit. The relevant paragraph is as under:-

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 5 2007(8) SCC 110 6 2016(10) SCC 46 dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.
- (ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.
- (iii) The courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit.
- (iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.
- (v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage of the

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situation.

(v) 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.

23. The settled position in law that emerges from the precedents of this Court is that the bank guarantee is an independent contract between bank and the beneficiary and the bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and is of no consequence. There are, however, exceptions to this Rule when there is a clear case of fraud, irretrievable injustice or special equities. The Court ordinarily should not interfere with the invocation or encashment of the bank guarantee so long as the invocation is in terms of the bank guarantee.

24. The guarantees in the instant case were unconditional, specific in nature and limited in amount. The terms of the guarantee categorically covered money which the 1st respondent had advanced against supply of the plant and equipment by SCIL. The said guarantees covered any loss and damage caused to or suffered by the 1st respondent-plaintiff in due performance of the contract for supply of plant and equipment. The guarantee documents dated 16th February, 1983 and 29th August, 1984, as a whole and clause 2 of the guarantee document in particular cover the advance which had been paid by the 1st respondent-plaintiff by reason of any breach or failure by SCIL in due performance of the aforesaid contracts i.e. against the contract for supply of plant and equipment.

26. In our considered view, once the demand was made in due compliance of 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. In absence thereof, it is not even open for the Court to interfere with the invocation and encashment of the bank guarantee so long as the invocation was in terms of the bank guarantee and this what has been observed by the Division Bench of the High Court in the impugned judgment and that reflected the correct legal position.”

In light of the aforesaid judgment, the Court exercising its power

cannot interfere with the enforcement of Bank Guarantee / Letters of

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Credit, except only in cases where fraud or special equity is *prima-facie* made out in the case as triable issue by strong evidence so as to prevent irretrievable injustice to the parties.

29- In the present case, no such contingency is involved. In fact it is the petitioner, who has played fraud upon the State of Madhya Pradesh, upon the Union of India, upon the students and upon the public at large and therefore, this Court does not find any reason to interfere in the matter. The respondent No.4 - Medical Council of India is justified in requesting encashment of Bank Guarantee.

30- The apex court in the case of **State Bank of India Vs. Mula Sahakari** reported in **(2006) 6 SCC 293** in paragraphs 24 to 28 has held as under :-

“24. The said document, in our opinion, constitutes a document of indemnity and not a document of guarantee as is clear from the fact that by reason thereof the Appellant was to indemnify the cooperative society against all losses, claims, damages, actions and costs which may be suffered by it. The document does not contain the usual words found in a bank guarantee furnished by a Bank as, for example, "unequivocal condition", "the cooperative society would be entitled to claim the damages without any delay or demur" or the guarantee was "unconditional and absolute" as was held by the High Court.

25. The High Court, thus, misread and misinterpreted the document as on scrutiny thereof, it had opined that it was a contract of guarantee and not a contract of indemnity.

26. The document was executed by the Bank in favour of the cooperative society. The said document indisputably was executed at the instance of Pentagon.

27. We have hereinbefore noticed the surrounding circumstances as pointed out by Mr. Naphade as contained in Clauses 15.2.4 and 15.2.5 of the contract vis-a-vis the letters exchanged between the parties dated 6.4.1985, 11.4.1985, 16.4.1985 leading to execution of the document dated 07.09.1985 by the First Appellant in favour of the cooperative society.

28. We are, however, unable to accept the submissions of the

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learned Senior Counsel that the bank guarantee must be construed in the light of other purported contemporaneous documents. A contract indisputably may be contained in more than one document. Such a document, however, must be a subject matter of contract by and between the parties. The correspondences referred to hereinbefore were between the cooperative society and Pentagon. The said correspondences were not exchanged between the parties hereto as a part of the same transaction. The Appellant understood that it would stand as a surety and not as a guarantor.”

Keeping in view the aforesaid judgment and the Bank Guarantee in question and also keeping in view the fact that Desirability & Feasibility Certificate has been cancelled by the State Government way back on 20/06/2018, the College has played fraud upon the State as well as with the students and also keeping in view the settled preposition of law that Bank Guarantee is a contract between Bank and beneficiaries, the question of restraining the Medical Council of India from invoking the Bank Guarantees does not arise.

31- The Hon'ble Supreme Court in the case of Vinitec Electronics (P) Ltd. Vs. HCL Infosystems Ltd., reported in (2008) 1 SCC 544 in paragraph No.1 has held as under:-

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

“**10.** There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second

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exception to the general rule of non-intervention is when there are 'special equities' in favour of injunction, such as when 'irretrievable injury' or "irretrievable injustice" would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this Court, that in U.P. State Sugar Corpn. V. Sumac International Ltd. (hereinafter 'U.P. State Sugar Corpn.') this Court, correctly declared that the law was 'settled'."

In light of the aforesaid judgment, as the Bank Guarantee is an independent contract between the Bank and beneficiary thereof, the question of restraining the Medical Council of India (beneficiary) from encashing the Bank Guarantees does not arise.

32- The petition was filed before this Court on 23/07/2019 and no interim order was granted in favour of the petitioner. It is really strange that the Bank Guarantee without there being any interim order has not been encashed and therefore, the Bank is directed to encash the Bank Guarantee and to transfer the account in the account of Medical Council of India immediately, preferably within a week from today.

33- With the aforesaid, writ petition stands dismissed.

Certified copy as per rules.

(S. C. SHARMA)
J U D G E

Tej

Digitally signed by
Tej Prakash Vyas
Date: 2020.09.11
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