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Lockdown and Force Majeure – Delhi High Court restrains invocation of Bank Guarantees

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In a significant development today, the Hon'ble Delhi High Court vide order dated 20.04.2020 passed in **M/S Halliburton Offshore Services Inc. vs. Vedanta Limited & Anr.**^[1] granted an ad-interim injunction against invocation of eight performance bank guarantees issued by the Petitioner in favour of the Respondent, in view of the lockdown imposed due to COVID-19. The Petitioner had approached the court vide an application under section 9 of the Arbitration and Conciliation Act, seeking to restrain Vedanta Limited (“**Respondent No. 1**”) from encashing eight performance bank guarantees issued by ICICI Bank (“**Respondent No. 2**”) in favour of Respondent No. 1 (under instructions of the Petitioner) to secure performance of obligations under a contract for drilling of petroleum wells. The injunction was granted based on the exception of “*special equities*”.

The performance under the contract, between the parties, was due for completion on 31.03.2020. In view of the COVID-19 Pandemic, the Petitioner issued a “*Force Majeure*” notice to the Respondent No. 1 on 18.03.2020, citing restrictions on movement of personnel and material. The Petitioner issued further communication in view of the lockdown imposed by the Rajasthan Government on 22.03.2020 and the nationwide lockdown with effect from 24.03.2020. The Respondent No. 1 insisted on performance basis the fact that the production of petroleum which is an “*essential commodity*”, was exempted under various lockdown orders relating to COVID-19. The Petitioner on the other hand, rebutted the contention by stating that the Petitioner was not engaged *stricto sensu* in the production of petroleum, but was rather engaged in the drilling of wells.

The Respondents contended that the invocation of bank guarantee can only be stayed on the ground of egregious fraud. The Hon'ble Justice Hari Shankar, by placing reliance on the exception of “*special equities*” as expounded by the Hon'ble Apex Court in **Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.**^[2] and further in **Standard Chartered Bank Ltd. vs. Heavy Engineering Corporation Ltd.**^[3] observed that “*special equities*” existed in light of the unprecedented circumstances due to COVID-19 pandemic, which impeded the performance of the contract. The Hon'ble Court granted an ad-interim injunction on invocation of the bank guarantees until the next date of hearing. The Hon'ble Court in paragraph 20 of the order *prima facie* categorised the country wise lockdown as “*force majeure*” and observed that:

Para 20: *The countrywide lockdown, which came into place on 24 th March, 2020 was, in my opinion, prima facie in the nature of force majeure. Such a lockdown is unprecedented, and was incapable of having been predicted either by the respondent or by the petitioner. Mr. Sethi has submitted, categorically, that, till the date of clamping of the lockdown, on 22nd March, 2020, his client was in the process of proceeding with the project, and that, had the lockdown not be imposed, the project might have been completed by 31st March, 2020. Prima facie, in my view, special equities do exist, as would justify grant of the prayer, of the petitioner, to injunct the respondent from invoking the bank guarantees of the petitioner, forming subject matter of these proceedings, till the expiry of a period of one week from 3rd May, 2020, till which date the lockdown has been imposed.”*

The Hon'ble Court further laid emphasis on the unprecedented and unforeseen nature of the COVID-19 pandemic and observed thus in paragraph 22 of the order:

Para 22: *We are placed, today, in uncomfortably peculiar circumstances. A pandemic, of the nature which affects the world today, has not visited us during the lifetime of any of us and, hopefully, would not visit us hereinafter either. The devastation, human, economic, social and political, that has resulted as a consequence thereof, is unprecedented. The measures, to which the executive administration has had to resort, to somehow contain the fury of the pandemic, are equally unprecedented. The situation of nationwide lockdown, in which we find ourselves today, has never, earlier, been imposed on the country. The imposition of the lockdown was by way of a sudden and emergent measure, of which no advance knowledge could be credited to the petitioner – or, indeed, to anyone else.”*

After the order from the Bombay High Court dated 08.04.2020^[4], where the Hon'ble Court refused to give the benefit of “force majeure” exemption to steel importers (which can very well be differentiated on facts from the instant order), the order by the Hon'ble Delhi High Court comes as a respite to various contractors who fear invocation of bank guarantees stuck in various projects, due to impact on performance of contracts in view of COVID-19.

^[1] O.M.P (I) (Comm) & I.A. 3697/ 2020.

^[2] (2007) 8 Scc 110.

^[3] 2019 SCC Online SC 1638.

^[4] Commercial Arbitration Petition (L) No. 404 Of 2020