

(2014) 10 AP CK 0088

In the Andhra Pradesh High Court

Case No : Writ Petition No. 22344 of 2006

Atlantic Inter-trade Limited

APPELLANT

Vs

Canara Bank

RESPONDENT

Date of Decision : 31-10-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 41
Banking Regulation Act, 1949 — Section 35A
Civil Procedure Code, 1908 (CPC) — Section 141
Companies Act, 1956 — Section 4
Constitution of India, 1950 — Article 12, 136, 14, 19, 19(1)

Citation : (2015) 6 ALD 241 : (2015) 6 ALT 753

Hon'ble Judges : Akula Venkata Sesha Sai, J

Bench : Single Bench

Advocate : M.V. Suresh for P. Kiran, Advocate for the Appellant; K.S.R. Murthy and M. Sudheer Kumar, Advocate for the Respondent

Judgement

A.V. Sesha Sai, J.—This writ petition, filed under Article 226 of the Constitution of India, assails the action of the 1st Respondent-Canara Bank in not making payment of the remaining amount under the Bank Guarantee to a tune of Rs. 54,56,750/- as illegal, arbitrary and against the terms of the Bank Guarantee No. 2657BG:130 2003 dated 8.9.2003 and the writ petition further seeks a direction to 1st respondent-Bank to honour the Bank Guarantee No. 2657BG:130 2003 towards balance amount of Rs. 54,56,750/.

2. The pleaded case of the Petitioners is as under:

The Deponent of the affidavit filed in support of the writ petition is the Director of the 1st petitioner-Company and also the Managing Director of the 2nd Petitioner-Company and 2nd respondent-Company approached him in writing with a request to entrust the construction of E-Books, E-Magazines etc., and an agreement was entered into in between him and 2nd respondent Company on 18.11.2003. As per the terms of the same, 2nd respondent shall provide Bank Guarantee equal to 20% of the value of the work contract as Earnest Money

Deposit for faithful performance of the Contract. The 2nd respondent provided the Bank Guarantee for an amount of Rs. 1.00 Crore only in pursuance of the agreement dated 11.8.2003 and a work order contract was entered into on 9.9.2003, which stipulated the terms and conditions as to the nature and quantum of work, its execution, billing, mode of payment, confidentiality etc. The total value of the work, which the petitioners entrusted to the 2nd respondent was valued at Rs. 12.00 lakh U.S. Dollars (6.00 crores approximately) with its validity upto August, 2004. The 2nd respondent shall turn out work equivalent to 1.00 U.S. Dollars per month in the given circumstances. The 2nd respondent failed to fulfill the terms of the contract. On account of the breach of terms, the 1st respondent authorized the Deponent to invoke the Bank guarantee and consequently he invoked Earnest Money Deposit and Performance Guarantee given by 2nd respondent in accordance with the conditions agreed together. L.C. No. 7677 dated 22.9.2003 of Istrail Discount Bank in New York for 1.00 lakh U.S. Dollars was opened by the petitioners. The 2nd respondent failed to execute the works as per the Agreement, as such the Bank Guarantee given towards the EMD for faithful performance of the Contract was rightly invoked. After persuasion, the 1st respondent paid an amount of Rs. 45,43,250/- only on 8.1.2004 and deliberately withheld Rs. 54,56,750/-.

3. The 2nd respondent instituted a suit, O.S. No. 78 of 2004, before the III Additional Chief Judge, City Civil Court, Hyderabad on 17.7.2006 for a declaration that the payment of Rs. 45,43,250/- made to the petitioners as illegal and void and for permanent injunction to restrain the 1st respondent from paying the balance of Rs. 54,56,750/- in respect of the Bank Guarantee No. 2657BG:130 2003 dated 8.9.2003 and for refund of the amount of Rs. 45,43,250/-, already paid to 4th respondent. The said suit was partly decreed, declaring the payment made in favour of 4th respondent as illegal with a direction to the 2nd respondent to refund the amount and as against the said decree, an appeal in C.C.C.A. No. 212 of 2006 has been preferred before this Court and the same is pending.

4. Contending that since the relief of injunction to restrain the payment of balance amount to the petitioners was rejected and as there is no injunction against the Bank from making the balance amount, the withholding of the balance is arbitrary, discriminatory and violative of Articles 14, 19(1) & (2) and 300-A of the Constitution of India, the present writ petition came to be filed. This Court issued rule-nisi on 30.10.2006. Counter affidavits have been filed, denying the averments made in the writ affidavit and in the direction of justifying the impugned action.

5. Submissions/contentions of learned counsel for petitioners, Sri M.V. Suresh.

5.1. The impugned action of the 2nd respondent in not paying the balance amount of Rs. 54,56,750/- is neither sustainable nor tenable in the eye of law.

5.2 In the absence of any order of injunction, the 1st respondent is not justified

in refusing to pay the balance of the amount and the said action is violative of Articles 14, 19 and 300A of the constitution of India.

5.3 In O.S. No. 78 of 2004, the 2nd respondent sought only the relief regarding the payment made by 1st respondent and did not seek the relief regarding payment of balance amount and the relief of injunction to restrain the payment of balance amount was rejected, as such the impugned action is untenable.

5.4 The impugned action is contrary to the well established norms, circulars, guidelines issued by the RBI/IBA from time to time with regard to the invocation of the Performance Guarantee and the law laid down by the Apex Court.

5.5 Without any authority of law and in an arbitrary and high handed manner, instead of making full payment, the 1st respondent permitted the petitioners to encash only part of the amount.

5.6. The plea of the respondents with regard to non-maintainability is not tenable as the very action of the 1st respondent transgresses the fundamental rights of the petitioners as enshrined under Chapter III of the Constitution of India. To bolster his submissions and contentions, the learned counsel takes the support of the following judgments;

(1) M/s. Mallikharjuna Chemicals, Piduguralla & others v. The Chief Marketing & Movements, Singareni Collieries Ltd., Hyderabad & others

(2) Bank of India v. Nangia Construction (India) Pvt. Ltd., & Others

(3) Babubhai Muljibhai Patel v. Nandlal Khodidas Barot and others

(4) ABL International Ltd. and another v. Export Credit Guarantee Corporation of India Ltd. and another

(5) Hyderabad Urban Development Authority, reconstituted as Hyderabad Metropolitan Development Authority, Secunderabad and another v. M/s. IBC Knowledge Park Pvt. Ltd., rep. by its Managing Director Yunus Zia and others

(6) Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.

(7) R.P. Kapur v. Union of India

(8) M/s. Deluxe Wines, Kachiguda, Hyderabad v. The State of Andhra Pradesh, rep. by its Secretary, Revenue Department, Hyderabad

(9) Edward Owen Engineering Ltd. v. Barclays Bank International Ltd

(10) United Commercial Bank v. Bank of India and others

(11) U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.

(12) Syndicate Bank v. Vijay Kumar and others

(13) The State Trading Corporation of India Ltd. v. Jainsons Clothing Corporation and another

(14) U.P. State Sugar Corporation v. M/s. Sumac International Ltd.

(15) National Thermal Power Corporation Ltd. v. Flowmore Pvt. Ltd. and another."

6. Submissions/contentions of the learned Standing Counsel for the 1st Respondent Bank and the learned counsel for 2nd respondent.

6.1 The present case is virtually a money suit and the Bank Guarantee is an autonomous contract and the parties are governed by the terms of the contract and for enforcing the same, the present writ petition filed under Article 226 of the Constitution of India is not maintainable and the issue for consideration is not amenable for jurisdiction of this Court and the proper remedy for the petitioners is a regular Civil Suit.

6.2 For enforcement of monetary claims, writ petition is not the proper remedy.

6.3 The petitioners are not entitled for the balance amount of Bank Guarantee as they were not the openers of the Second LC as per clause 7 of the Bank Guarantee and the opener of the second LC is M/s. Wareenby Ltd. UK and it did not invoke the Bank Guarantee and the Deponent of the writ affidavit clearly stated in the suit as D.W. 1, that the person who opened the LC becomes the beneficiary under the Bank Guarantee.

6.4 In view of pendency of the civil dispute in C.C.C.A. No. 212 of 2006 before this Court, the petitioners herein cannot maintain the present parallel proceedings in the form of writ petition.

6.5 Having suffered a decree passed by the Civil Court in O.S. No. 78 of 2004, it is not open for the petitioners to file the Present writ petition. In support of their contentions and submissions, the learned Advocates for the Respondents relied on the following judgments;

"(1) Canara Bank, Secunderabad v. Power Grid Corporation of India Ltd., New Delhi and others

(2) Kerala State Electricity Board and another v. Kurien E. Kalathil and others

(3) Indian Bank v. Godhra Nagrik Cooperative Credit Society Ltd. and another

(4) Rajasthan State Industrial Development and Investment Corporation and another v. Diamond & Gem Development Corporation Limited and another."

7. In the light of the above pleadings, submissions and contentions, now the issue which this Court is called upon to answer are;

Whether the present writ petition is maintainable under Article 226 of the Constitution of India and whether the petitioners are entitled for any relief from this Court?

8. The material available before this Court manifestly reveals that the 2nd respondent herein instituted O.S. No. 78 of 2004 against the 1st respondent and

the petitioners herein on the file of the Court of the III Additional Chief Judge, City Civil Court, Hyderabad, seeking the following reliefs:

"(1) To declare that the action of the defendant No. 1 in paying Rs. 45,43,250/- to defendants 2 and 3 on the basis of invocation of Bank Guarantee No. 2657BG:130 2003 dated 8.9.2003 as illegal and void

(2) To issue permanent injunction against defendant No. 1 from paying the balance amount of Rs. 54,56,750/- to defendants 2 and 3 in respect of Bank Guarantee No. 2657BG:130 2003 dated 8.9.2003 and to direct the defendants 1 to 3 jointly and severally to refund Rs. 45,43,250/- to the plaintiff together with interest from the date of suit till the payment of realization and also for costs of suit."

9. In the said suit, the Court framed the following Issues for trial:

"(1) Whether the plaintiff is entitled that the action on the 1st defendant is paying Rs. 45,43,250/- to the 2nd and 3rd defendant on the basis of invocation of bank guarantee No. 2657BG:130 2003 dated 8.9.2003 as illegal and void?

(2) Whether the plaintiff is entitled to permanent injunction against the 1st defendant from paying balance amount of Rs. 54,56,750/- to D2 and D3 in respect of bank guarantee No. 2657BG:130 2003 dated 8.9.2003?

(3) Whether the plaintiff is entitled to a direction to D1 and D3 jointly and severally to refund Rs. 45,43,250/- to the plaintiff together with interest from the date of suit till the payment on realization?

(4) To what relief?"

10. The learned Chief Judge, City Civil Court, Hyderabad on 17.7.2006 passed the following decree:

"(1) That the suit of the plaintiff be and the same is hereby decree as follows:

That the payment of Rs. 45,43,250/- made by the 1st defendant to 2nd defendant, 3rd defendant is declared as illegal and

(2) That the 1st defendant, 2nd defendant and 3rd defendant shall pay Rs. 45,43,250/- to the plaintiff with interest at 7.5% p.a. from 8.1.2004 till the date of realization jointly and several and

(3) That the relief of permanent injunction against the 1st defendant paying Rs. 54,56,750 to 2nd and 3rd defendant is dismissed, and

(4) This Court further orders and directed that the 1st, 2nd and 3rd defendants shall pay Rs. 2,89,101/- to the plaintiff towards costs of this suit and bearing their own costs."

11. While dealing with Issue Nos. 1 & 2 the learned Chief Judge, in O.S. No. 78 of 2004, held as follows:

"Here, in the case of hand, the 1st defendant is aware of the fact that unless it receives a letter in writing invoking the bank guarantees payment cannot be made, yet it proceeded to pay the amount of Rs. 45,43,250/- and despite the fact it being a Government of India enterprise, replaced Ex. B2 and B3 evidently with antidate to cover up its lapses. So, it is a clear case of fraud not only played by the beneficiary but is perpetuated by the bank in utter violation of condition No. 2 of Ex. A1. Therefore, the bank, which had issued the bank guarantee on deposit of equal amount by the plaintiff and also charged the plaintiff with some commission, placed itself in the place of a trustee for the money of plaintiff had violated its duty and therefore, from the date of payment wrongfully to defendant 2 and 3 it is liable to repay the said amount of Rs. 45,43,250/- with interest to plaintiff."

12. While dealing with Issue No. 3, the learned Chief Judge held as under:

"Admittedly, the second LC for a sum of Rs. 54,56,750/- was established by Barclays Bank, PLC, London opened on behalf of M/s. Warrenby Limited U.K. for 117000 US dollars on 30.9.2003. As per the evidence of both D.W. 1 and D.W. 2 the 1st defendant refused to accept the invocation of that part of bank guarantee because Warrenby Limited did not sign the letter of invocation. There may be a sub contract between the 2nd defendant and Warrenby Limited. When the bank is refusing the payment and in the absence of Warrenby Limited as the party to the suit, permanent injunction cannot be granted restrain in the 1st defendant bank accepting the invocation of bank guarantee for Rs. 54,56,750/- because even according to the 1st defendant it is not going to make payment to the 2nd defendant and 3rd defendant, more interestingly, the time of bank guarantee is admittedly expired by 30.9.2004. Therefore, this relief of permanent injunction is so far as the bank guarantee for Rs. 54,56,750/- with reference to LC for US dollars 117000 opened on behalf of M/s. Warren by Limited, U.K. became infructuous. This issue is answered against the plaintiff though not adverse to him in effect."

13. A perusal of the finding on Issue No. 3, as extracted, cannot be construed as a finding adverse to the plaintiff nor it can be construed or understood as a finding in favour of the defendants/petitioners herein. The learned Chief Judge recorded the said finding, taking into consideration the factum of refusal of payment of balance amount by the 1st respondent Bank. Significant to note is that the defendants 2 and 3, who are the petitioners herein preferred C.C.C.A. No. 212 of 2006 against the said decree and this Court on 9.10.2006 in C.C.C.A.M.P. No. 574 of 2006 passed the following order:

"Heard both sides.

There shall be interim stay on condition of the petitioners-appellants depositing half of the decretal amount along with the suit cost within a period of four weeks from today. On such deposit, the respondents are permitted to withdraw half of the deposited decretal amount without furnishing any security and another half

by furnishing security. However, the respondents are permitted to withdraw the suit costs without furnishing any security."

14. The said Appeal is pending consideration before this Court and while the situation being so, the petitioners herein filed the present writ petition on 26.10.2006, seeking a direction for payment of the balance amount. It is an admitted fact that the very payment of Rs. 45,43,250/- was found erroneous and faulty by the learned Chief Judge in O.S. No. 78 of 2004, as such there is absolutely no justification on the part of the petitioners in asking for the balance amount pending the Appeal Suit before this Court.

15. Coming to the Judgments cited by the Counsel for the Petitioners.

"(1) In *M/s. Mallikharjuna Chemicals, Piduguralla v. The Chief Marketing & Movements, Singareni Collieries Ltd., Hyderabad* 1989 (2) APLJ 384, this Court at paragraph 29, held as under:

From a resume of the above discussion, the following principles would emerge: (1) The State, its instrumentalities, Corporations or agencies are free to enter into contracts with the citizens or legal persons. Before entry into the contract at the threshold the constitutional requirement of giving fair treatment to the citizen or persons is mandatory. (2) On entering into the contract-quia the contract, the State, its instrumentalities, Corporations or agencies while acting in public interest should see that they act on the basis of the terms and conditions of the covenants of the contract. It is not free like a private citizen to terminate contract arbitrarily or unreasonably or capriciously. (3) The State, its instrumentalities or agencies statutory Corporations or other authorities must have public duty to perform in its dealings with the citizen or the person with whom it entered into contractual relations. The distinction between public law remedy and private law field has become gradually thin. The arms of the Court are long enough to reach injustice wherever it is found. (4) The actions of the State, its instrumentalities, Corporations, agencies or authorities must be supported by reasons. (5) Each case must be considered on its own facts and find whether the impugned action is in the public interest. (6) If complicated questions of fact, which are the foundation for grant of relief, are involved for adjudication, the Court would refuse to grant the relief and relegate the party to civil suit. Alternative remedy is not always a test for the obvious reason that the remedy for a civil injury is always available in a civil court. But if the facts are undisputed and the disputation is one of law, the Court would make a declaration of law on the admitted facts. A citizen or the person need not be denied of the efficacious or expeditious adjudication and remedy by the Court under Article 226. (7) The action of the State, its instrumentalities, statutory corporation or agencies must not be arbitrary or unreasonable, whimsical or capricious. The order must be based on reasons. Reasons need not necessarily be communicated if so chosen, but normally may be communicated. But however, the record must disclose the reasons on the basis of which the action was taken. (8) No notice before termination of contract need be issued and principles of natural justice

need not be observed. But fair play must be observed. (9) A host of other considerations relevant and germane may enter in a given case calling for examination. In the light of these principles, in an appropriate case, a writ petition even in relation to contractual arena would lie and the Court would examine each case on its own facts.

(2) In *Bank of India Vs. Nangia Constructions (I) Pvt. Ltd. and Others*, , the Hon''ble Apex Court, at paragraph 14, held as under:

It is unfortunate that a nationalized bank is finding excuses for refusing to make the payment on totally untenable and frivolous grounds. The Division Bench was fully justified in making observations regarding the conduct of the nationalized bank. The entire trust, faith and confidence of people depend on the conduct and credibility of the nationalized bank. In the present day world, the national and international commercial transactions largely depend on bank guarantees. In case the banks are permitted to dishonour their commitments by adopting such subterfuges, the entire commercial and business transactions will come to a grinding halt. This principle has been reiterated in large number of cases by this Court. We do not deem it appropriate to burden this judgment by reiterating all those judgments.

(3) In *Babubhai Muljibhai Patel v. Nandlal Khodidas Barot*, the Hon''ble Supreme Court, at paragraph 9, held as under:

It is not necessary for this case to express an opinion on the point as whether the various provisions of the CPC apply to petitions under Article 226 of the Constitution. Section 141 of the Code, to which reference has been made, makes it clear that the provisions of the Code in regard to suits shall be followed in all proceedings in any court of civil jurisdiction as far as it can be made applicable. The words "as far as it can be made applicable" make it clear that, in applying the various provisions of the Code to proceedings other than those of a suit, the court must take into account the nature of those proceedings and the relief sought. The object of Article 226 is to provide a quick and inexpensive remedy to aggrieved parties. Power has consequently been vested in, the High Courts to issue to any person or authority, including in appropriate cases any government, within the jurisdiction of the High Court, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. It is plain that if the procedure of a suit had also to be adhered to in the case of writ petitions, the entire purpose of having a quick and inexpensive remedy would be defeated. A writ petition under Article 226, it needs to be emphasised, is essentially different from a suit and it would be incorrect to assimilate and incorporate the procedure of a suit into the proceedings of a petition under Article 226. The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right of relief, questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is no doubt discretionary, but the discretion must be exercised on

sound judicial principles. When the petition raises complex questions of fact, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute should not appropriately be tried in a writ petition, the High Court may decline to try a petition (see *Smt. Gunwant Kaur and Others Vs. Municipal Committee, Bhatinda and Others*, . If, however, on consideration of the nature of the controversy, the High Court decides, as in the present case, that it should go into a disputed question of fact and the discretion exercised by the High Court appears to be sound and in conformity with judicial principles, this Court would not interfere in appeal with the order made by the High Court in this respect.

(4) In *ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd.* (4 *supra*), the Hon'ble Supreme Court, at paragraphs 8, 9, 10, 16, 17, 19, 23, 25, 26, 27, 28 and 53, held as under:

8. As could be seen from the arguments addressed in this appeal and as also from the divergent views of the two courts below, one of the questions that falls for our consideration is whether a writ petition under Article 226 of the Constitution of India is maintainable to enforce a contractual obligation of the State or its instrumentality, by an aggrieved party.

9. In our opinion this question is no more *res integra* and is settled by a large number of judicial pronouncements of this Court. In *K.N. Guruswamy v. State of Mysore* this Court held: (AIR pp. 595-96, para 20)

20. The next question is whether the appellant can complain of this by way of a writ. In our opinion, he could have done so in an ordinary case. The appellant is interested in these contracts and has a right under the laws of the State to receive the same treatment and be given the same chance as anybody else.

We would therefore in the ordinary course have given the appellant the writ he seeks. But, owing to the time which this matter has taken to reach us (a consequence for which the appellant is in no way to blame, for he has done all he could to have an early hearing), there is barely a fortnight of the contract left to go. A writ would therefore be ineffective and as it is not our practice to issue meaningless writs we must dismiss this appeal and leave the appellant content with an enunciation of the law."

10. It is clear from the above observations of this Court in the said case, though a writ was not issued on the facts of that case, this Court has held that on a given set of facts if a State acts in an arbitrary manner even in a matter of contract, an aggrieved party can approach the court by way of writ under Article 226 of the Constitution and the court depending on facts of the said case is empowered to grant the relief. This judgment in *K.N. Guruswamy v. State of Mysore* was followed subsequently by this Court in the case of *D.F.O. v. Ram Sanahi Singh* wherein this Court held: (SCC p. 865, para 4)

By that order he has deprived the respondent of a valuable right. We are unable

to hold that merely because the source of the right which the respondent claims was initially in a contract, for obtaining relief against any arbitrary and unlawful action on the part of a public authority he must resort to a suit and not to a petition by way of a writ. In view of the judgment of this Court in K.N. Guruswamy case there can be no doubt that the petition was maintainable, even if the right to relief arose out of an alleged breach of contract, where the action challenged was of a public authority invested with statutory power.

(emphasis supplied)

16. A perusal of this judgment though shows that a writ petition involving serious disputed questions of facts which requires consideration of evidence which is not on record, will not normally be entertained by a court in the exercise of its jurisdiction under Article 226 of the Constitution of India. This decision again, in our opinion, does not lay down an absolute rule that in all cases involving disputed questions of fact the parties should be relegated to a civil suit. In this view of ours, we are supported by a judgment of this Court in the case of Gunwant Kaur v. Municipal Committee, Bhatinda 1990 (2) ALT 121 (DB) where dealing with such a situation of disputed questions of fact in a writ petition this Court held: (SCC p. 774, paras 14-16)

"14. The High Court observed that they will not determine disputed question of fact in a writ petition. But what facts were in dispute and what were admitted could only be determined after an affidavit-in-reply was filed by the State. The High Court, however, proceeded to dismiss the petition in limine. The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioners right to relief questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made dispute sought to be agitated, or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the writ jurisdiction, or for analogous reasons.

15. From the averments made in the petition filed by the appellants it is clear that in proof of a large number of allegations the appellants relied upon documentary evidence and the only matter in respect of which conflict of facts may possibly arise related to the due publication of the notification under Section 4 by the Collector.

16. In the present case, in our judgment, the High Court was not justified in

dismissing the petition on the ground that it will not determine disputed question of fact. The High Court has jurisdiction to determine questions of fact, even if they are in dispute and the present, in our judgment, is a case in which in the interests of both the parties the High Court should have entertained the petition and called for an affidavit-in-reply from the respondents, and should have proceeded to try the petition instead of relegating the appellants to a separate suit.

17. The above judgment of *Gunwant Kaur* 1990 (2) ALT 121 (DB) finds support from another judgment of this Court in the case of *Century Spg. and Mfg. Co. Ltd. v. Ulhasnagar Municipal Council* (1978) 1 All. E.R. 976 wherein this Court held: (SCC p. 587, para 13)

Merely because a question of fact is raised, the High Court will not be justified in requiring the party to seek relief by the somewhat lengthy, dilatory and expensive process by a civil suit against a public body. The questions of fact raised by the petition in this case are elementary.

19. Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of *Gunwant Kaur* 1990 (2) ALT 121 (DB) this Court even went to the extent of holding that in a writ petition, if the facts require, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact.

23. It is clear from the above observations of this Court, once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the abovesaid requirement of Article 14, then we have no hesitation in holding that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent. In this context, we may note that though the first respondent is a company registered under the Companies Act, it is wholly owned by the Government of India. The total subscribed share capital of this Company is 2,50,000 shares out of which 2,49,998 shares are held by the President of India while one share each is held by the Joint Secretary, Ministry of Commerce and Industry and Officer on Special Duty, Ministry of Commerce and Industry respectively. The objects enumerated in the memorandum of association of the first respondent at para 10 read:

To undertake such functions as may be entrusted to it by the Government from time to time, including grant of credits and guarantees in foreign currency for the

purpose of facilitating the import of raw materials and semi-finished goods for manufacture or processing goods for export.

Para 11 of the said object reads thus:

To act as agent of the Government, or with the sanction of the Government on its own account, to give the guarantees, undertake such responsibilities and discharge such functions as are considered by the Government as necessary in national interest.

25. The learned counsel for the respondent then contended that though the principal prayer in the writ petition is for quashing the letters of repudiation by the first respondent, in fact the writ petition is one for a money claim which cannot be granted in a writ petition under Article 226 of the Constitution of India. In our opinion, this argument of the learned counsel also cannot be accepted in its absolute terms. This Court in the case of *The State Trading Corporation of India Ltd. Vs. Jainsons Clothing Corporation and another*, while dealing with the question of refund of money in a writ petition after discussing the earlier case-law on this subject held: (SCC pp. 556-58, paras 12 & 16-17)

12. In the para extracted above, in a similar situation as arising in the present cases relating to the very question of refund, while answering the said question affirmatively, this Court pointed out that the courts have made distinction between those cases where a claimant approached a High Court seeking relief of obtaining refund only and those where refund was sought as a consequential relief after striking down of the order of assessment etc. In these cases also the claims made for refund in the writ petitions were consequent upon declaration of law made by this Court. Hence, the High Court committed no error in entertaining the writ petitions.

16. In support of the submission that a writ petition seeking mandamus for mere refund of money was not maintainable, the decision in *U.P. State Sugar Corporation Vs. M/s. Sumac International Ltd.*, was cited. In AIR para 6 of the said judgment, it is stated that we are of the opinion that though the High Courts have power to pass any appropriate order in the exercise of the powers conferred under Article 226 of the Constitution, such a petition solely praying for the issue of a writ of mandamus directing the State to refund the money is not ordinarily maintainable for the simple reason that a claim for such a refund can always be made in a suit against the authority which had illegally collected the money as a tax.

17. Again in AIR para 9, the Court held:

We, therefore, hold that normally petitions solely praying for the refund of money against the State by a writ of mandamus are not to be entertained. The aggrieved party has the right of going to the civil court for claiming the amount and it is open to the State to raise all possible defences to the claim, defences which cannot, in most cases, be appropriately raised and considered in the

exercise of writ jurisdiction.

This judgment cannot be read as laying down the law that no writ petition at all can be entertained where claim is made for only refund of money consequent upon declaration of law that levy and collection of tax/cess is unconstitutional or without the authority of law. It is one thing to say that the High Court has no power under Article 226 of the Constitution to issue a writ of mandamus for making refund of the money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each case. For instance, in the cases on hand where facts are not in dispute, collection of money as cess was itself without the authority of law; no case of undue enrichment was made out and the amount of cess was paid under protest; the writ petitions were filed within a reasonable time from the date of the declaration that the law under which tax/cess was collected was unconstitutional. There is no good reason to deny a relief of refund to the citizens in such cases on the principles of public interest and equity in the light of the cases cited above. However, it must not be understood that in all cases where collection of cess, levy or tax is held to be unconstitutional or invalid, the refund should necessarily follow. We wish to add that even in cases where collection of cess, levy or tax is held to be unconstitutional or invalid, refund is not an automatic consequence but may be refused on several grounds depending on facts and circumstances of a given case.

26. Therefore, this objection must also fail because in a given case it is open to the writ court to give such monetary relief also.

27. From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See *National Thermal Power Corporation Ltd. Vs. M/s. Flowmore Private Ltd.* and another, And this plenary right of the High Court to issue a prerogative writ will not normally

be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction.

53. From the above, it is clear that when an instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution. Thus if we apply the above principle of applicability of Article 14 to the facts of this case, then we notice that the first respondent being an instrumentality of the State and a monopoly body had to be approached by the appellants by compulsion to cover its export risk. The policy of insurance covering the risk of the appellants was issued by the first respondent after seeking all required information and after receiving huge sums of money as premium exceeding Rs. 16 lakhs. On facts we have found that the terms of the policy do not give room to any ambiguity as to the risk covered by the first respondent. We are also of the considered opinion that the liability of the first respondent under the policy arose when the default of the exporter occurred and thereafter when the Kazakhstan Government failed to fulfil its guarantee. There is no allegation that the contracts in question were obtained either by fraud or by misrepresentation. In such factual situation, we are of the opinion, the facts of this case do not and should not inhibit the High Court or this Court from granting the relief sought for by the petitioner.

(5) In Hyderabad Urban Development Authority, reconstituted as Hyderabad Metropolitan Development Authority, Secunderabad v. M/s. IBC Knowledge Park Pvt. Ltd., rep. by its Managing Director Yunus Zia (5 supra), the Division Bench of this Court at paragraphs 48, 50 and 53, held as under:

48. On an analysis of the above decisions of the Supreme Court, it is clear that contractual obligations may fall under judicial review if there is some public law element involved therein. Where the dispute lies within the contractual field pure and simple in the realm of private law a writ petition is not maintainable. In such cases, the relations between the parties are governed by the contract which determines the rights and obligations of the parties Inter se. However, where there is an element of arbitrariness or unreasonableness, illegality, irrationality or procedural impropriety in the action of state authorities offending Article 14 of the Constitution of India, even in respect of a dispute arising out of a private contract, the Court, in exercise of its power of judicial review under Article 226, can entertain the matter and grant relief as per law.

Thus, though judicial review in matters of contractual obligations is permissible, but such review must be within the permissible limits and in public interest and in accordance with the principles laid down by the Supreme Court. It must be intended to prevent arbitrariness or favoritism and it must be exercised in the

larger public interest. It depends upon the facts and circumstances of each case. In cases where there is an element of arbitrariness, illegality or irrationality in the action of the State or its instrumentality the Court can interfere and grant relief. Here we are concerned with the contractual obligations of the parties pure and simple and violation of the same by the parties. Therefore, the Tata Cellular case relied upon by the learned single Judge has no application as the said case deals with award of contract. In Bareilly Development Authority case, the Supreme Court categorically held when the State or its instrumentality enters into ordinary contract with private persons, parties are governed by terms of the contract and aggrieved party is not entitled to seek redress under Article 226 for breach of the contract. In State of Gujarat and Others Vs. Meghji Pethraj Shah Charitable Trust and Others, also it was held if the matter is governed by a contract or agreement between the parties, writ petition is not maintainable since it is a public law remedy and is not available for any private law filed. Since the parties herein are governed by the terms of the contract pure and simple the aggrieved party has to seek the relief in appropriate forum but not by way of judicial review under Article 226 of the Constitution of India.

50. It is true that an action of state instrumentality even in contractual matters of private nature is amenable to writ jurisdiction if it acts unfairly, unjustly and unreasonably as held by the Supreme Court in ABL International Ltd. case and Tata Cellular case. In the instant case there is no material to show that the state authorities had acted unfairly, unjustly or unreasonably. The only contention is that it had not disclosed about the dispute as to the title of the State to the property. As already stated, according to the state instrumentality it has unimpeachable title to the property; therefore, question of non-disclosure of any material defect does not arise. Even after the expiry of the time limit, the respondents had enlarged time for payment of balance sale consideration on two occasions but the petitioners have not availed of it and even when the respondents have agreed to refund the amounts paid, the petitioners have not chosen to furnish the bank guarantee as requested. Clause (b) of Confirmation-cum-provisional allotment of terms of and conditions of agreement provide that final allotment letter will be issued on payment of full sale price. Clause (c) of Initial Deposit provides that in case of cancellation of allotment for nonpayment of balance sale price as stipulated or for any other reason, the entire ID amount in full stands forfeited. Clause (e) provides that any part payments made towards ID and failed pay the balance sale price within the prescribed time, both EMD and whatever amount of ID paid is liable for forfeiture. As already stated, the contract between the parties is a concluded one. Therefore, the petitioners having failed to fulfil the conditions of the contract cannot complain arbitrariness or illegality in the action of the respondents declining to refund the amounts paid and claim refund in a writ proceeding.

53. Karnataka State Forest Industries Corporation Vs. Indian Rocks, is a case where the Corporation was engaged in sale of seized and confiscated granite blocks to persons who intended to purchase in the tender-cum-allotment sale on

"as is where is basis". The successful tenderers deposited the requisite portion of the bid amount and taxes. However, requisite permits were not issued to them and they could get only part of the granite sold to them. There arose a dispute as to the quantum of the balance amount payable by the respondent tenders. Though the Government suggested to the Corporation for refund of the excess amounts paid, the amounts were not paid to the respondents. On challenge before the Karnataka High Court, a learned single Judge directed refund of the amount which was upheld by the Division Bench. It was contended before the Supreme Court that the High Court could not have exercised its jurisdiction under Article 226 to enforce a contract qua contract, particularly when the same involved disputed questions of fact and the respondents being bound by the terms and conditions of tender could not have been given any relief in derogation thereof. Upholding the decision of the High Court, the Supreme Court held that although the writ court would not enforce the terms of a contract qua contract, but where an action of State is arbitrary or discriminatory and violative of Article 14, a writ petition would be nonetheless be maintainable. It was also held that a writ of mandamus can be issued only when there exist a legal right in the writ petition and corresponding legal duty on the part of the State, but then if any action on the part of the State is wholly unfair or arbitrary; the superior courts are not powerless. In our view, the facts of this case are distinguishable and have no application to the case on hand. Here non-fulfillment of the terms and conditions of the contract was on the part of the petitioners and not on the part of the respondents. There is no dispute that the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. As already held there is no arbitrariness or illegality in the action of the respondents declining to refund the amounts. Respondents afforded fair opportunity to the petitioners to take steps in respect of the contract by extending time to deposit the amounts, but the petitioners did not deposit the amounts. Therefore, the petitioners cannot complain violation of the provisions of Article 14.

(6) In *Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.* (6 supra), the Hon'ble Apex Court, at paragraphs 10, 11, 13, 14 & 15, held as under:

10. The law relating to grant or refusal to grant injunction in the matter of invocation of a bank guarantee or a letter of credit is now well settled by a plethora of decisions not only of this Court but also of the different High Courts in India. In *U.P. State Sugar Corpn. v. Sumac International Ltd.* 1989(2) APLJ 384 this Court considered its various earlier decisions. In this decision, the principle that has been laid down clearly on the enforcement of a bank guarantee or a letter of credit is that in respect of a bank guarantee or a letter of credit which is sought to be encashed by a beneficiary, the bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. Accordingly this Court held that the courts should be slow in granting an order of injunction to restrain the realisation of such a bank guarantee. It has also been held by this Court in that decision that the existence of any dispute

between the parties to the contract is not a ground to restrain the enforcement of bank guarantees or letters of credit. However, this Court made two exceptions for grant of an order of injunction to restrain the enforcement of a bank guarantee or a letter of credit: (i) fraud committed in the notice of the bank which would vitiate the very foundation of guarantee; and (ii) injustice of the kind which would make it impossible for the guarantor to reimburse himself.

11. Except under these circumstances, the courts should not readily issue injunction to restrain the realisation of a bank guarantee or a letter of credit. So far as the first exception is concerned i.e. of fraud, one has to satisfy the court that the fraud in connection with the bank guarantee or letter of credit would vitiate the very foundation of such a bank guarantee or letter of credit. So far as the second exception is concerned, this Court has held in that decision that it relates to cases where allowing encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. While dealing with the case of fraud, this Court in *Bank of India Vs. Nangia Constructions (I) Pvt. Ltd. and Others*, held as follows: (SCC p. 197, para 53)

The fraud must be of an egregious nature such as to vitiate the entire underlying transaction.

(emphasis supplied)

While coming to a conclusion as to what constitutes fraud, this Court in the above case quoted (at SCC p. 197, para 54) with approval the observations of Sir John Donaldson, M.R. in *Babubhai Muljibhai Patel Vs. Nandlal Khodidas Barot and Others*, which is as follows:

The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the banks knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a banks credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged.

(emphasis supplied)

13. So far as the second exception is concerned, this Court in *U.P. State Sugar Corpn. v. Sumac International Ltd.* 1989 (2) APLJ 384 as considered herein earlier, at SCC para 14 on pp. 575-76 observed as follows:

14. On the question of irretrievable injury which is the second exception to the rule against granting of injunctions when unconditional bank guarantees are sought to be realised the Court said in the above case that the irretrievable injury must be of the kind which was the subject-matter of the decision in *Hyderabad Urban Development Authority and The Vice Chairman and Managing Director, Hyderabad Urban Development Authority and Others Vs. M/s. IBC*

Knowledge Park Pvt. Ltd. and The State of A.P. and Others, . In that case an exporter in USA entered into an agreement with the Imperial Government of Iran and sought an order terminating its liability on stand by letters of credit issued by an American bank in favour of an Iranian bank as part of the contract. The relief was sought on account of the situation created after the Iranian revolution when the American Government cancelled the export licences in relation to Iran and the Iranian Government had forcibly taken 52 American citizens as hostages. The US Government had blocked all Iranian assets under the jurisdiction of United States and had cancelled the export contract. The Court upheld the contention of the exporter that any claim for damages against the purchaser if decreed by the American courts would not be executable in Iran under these circumstances and realisation of the bank guarantee/letters of credit would cause irreparable harm to the plaintiff. This contention was upheld. To avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if he ultimately succeeds, will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. In Hyderabad Urban Development Authority and The Vice Chairman and Managing Director, Hyderabad Urban Development Authority and Others Vs. M/s. IBC Knowledge Park Pvt. Ltd. and The State of A.P. and Others, there was a certainty on this issue. Secondly, there was good reason, in that case for the Court to be prima facie satisfied that the guarantors i.e. the bank and its customer would be found entitled to receive the amount paid under the guarantee.

(emphasis supplied)

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, 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 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."

15. Keeping these principles in mind and applying the same on the facts of this case, we can only draw this conclusion that no good ground has been made out by the appellant to interfere with the impugned order. As noted hereinabove, there are two exceptions when courts can grant an order of injunction in favour of an aggrieved party in the matter of encashment of a bank guarantee or a letter of credit. Conditions (v) and (vi), as noted hereinabove, are two such exceptions. For this reason, let us first deal with the case of fraud pleaded by the appellant in their application for injunction. The particulars of fraud have been pleaded in para 45 of the application for injunction filed by the appellant in the High Court.

From a close scrutiny of the facts pleaded in the said paragraph of the application for injunction, in our view, it cannot be held that such facts have constituted fraud for which an order of injunction in the matter of encashment of letter of credit could be passed by the courts. The facts pleaded in para 45 of the application for injunction would only show that although the respondent had agreed to remove the defects in the goods by saying that it shall take steps to reduce the ash content of the goods to 0.3% before the payment date of the letter of credit as extended, but they deliberately and with ulterior motive had not fulfilled their intention to do so. It is not in dispute that the particulars of the fraud prima facie were restricted to 10,000 metric tons of the goods supplied by the respondent in respect of which documents were not negotiated by the appellant. The entire consignment which was admittedly shipped by MV Iran Takhti was 12,503 metric tons out of which 2503 metric tons were negotiated and payments released by Central Bank of India. Admittedly, as noted hereinabove, a case of fraud was alleged only in respect of a part of the consignment of the second shipment.

It has been rightly held by the High Court that this could not constitute fraud as fraud must be in respect of the whole consignment and not in respect of a part of the same. In this view of the matter, we are, therefore, in agreement with the High Court that the pleadings made relating to fraud in para 45 of the application for injunction were not sufficient nor could any strong prima facie case of fraud be made out in the petition which would warrant a continuance of the order of status quo. That apart, as noted hereinabove, in the matter of invocation of a bank guarantee or a letter of credit, it is not open for the bank to rely upon the terms of the underlying contract between the parties.

(7) In *R.P. Kapur v. Union of India* (7 supra), the Hon'ble Supreme Court at paragraphs 8 and 9, held as under:

"8. The appellant, therefore, contends that when the subsistence allowance is 75% of pay instead of adopting the 75% of the average of 10 months pay i.e. average of Rs. 2650 p.m. for 10 months (or Rs. 3300 as stated in the counter) being the amount per month paid in the last 10 months before the compulsory retirement on 25-11-1992, the respondents have wrongly computed the pension and all other retiral benefits illegally on the basis of Rs. 1250 p.m., the pay during the 10 months preceding the order of suspension dated 21-1-1982.

9. We shall now refer to the response of the respondents in their initial counter-affidavit filed before the Tribunal which, on its face, appears to be self-contradictory. It is stated there (p. 47 of the paper-book) that the Railway Board in consultation with the Department of Pension and Pensioners Welfare have taken the view that since the petitioner was paid only subsistence allowance during the period of suspension, the relevant period of 10 months for calculation of average emoluments for the pension should be the one relating to 10 months period preceding 21-1-1982 i.e. the date on which the petitioner had been kept under suspension.

The above contention in the counter is obviously based on the order dated 28-5-1993 referred to earlier. It is then stated in the counter rather curiously that even if the average emoluments are fixed as per the pay revision w.e.f. 1-1-1986, the pension will not increase.

This peculiar logic in the counter is worth quoting:

It is pertinent to mention here that even though the pension was calculated on the basis of pre-revised scale as on 1-1-1986, the pension of the petitioner has been fixed at Rs. 1178.00 which is equivalent to the revised pay scale as on 1-1-1986 plus normal relief as admissible from time to time to the pensioners. Therefore, it is implied that the petitioner has been paid his due pension equivalent to the revised pay scale as admissible in such case. If his revised pay of Rs. 3200 were taken into consideration for the purpose of calculation of pension, he would be getting the same pension i.e. Rs. 1178.00. Therefore, the prayer of the pensioner has got no merit and deserves to be dismissed.

(8) In *M/s. Deluxe Wines, Kachiguda, Hyderabad v. The State of Andhra Pradesh*, rep. by its Secretary, Revenue Department, Hyderabad (8 supra), the Division Bench of this Court at paragraph 37, held as under:

The contention put forward by the learned Government Pleader that the writ petitions cannot be entertained as there is an alternative remedy is absolutely without substance. It is settled law now that the Writ Petitions cannot be rejected on the ground of availability of alternative remedy when the Writ Petitions had already been admitted and Rule Nisi was issued and the Writ Petitions have been pending for quite some time in the High court. Apart from this the question of vires of a provision cannot be raised before the statutory authorities like the assessing authority and the appellate authority because they are creatures under the Act.

(9) In *Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.* (9 supra), it was held as under:

All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice.

Such has been the course of decision in all the cases there have been this year in our courts here in England. First of all, there was *R D Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd.* (1977) 2 All ER 862 at 870 before Kerr J. The learned judge considered the position in principle. I would like to adopt a passage from his judgment:

It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The courts are not concerned with their difficulties to enforce such claims; these are risks which the merchants take. In this case the plaintiffs took the risk of the unconditional wording of the guarantees. The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged.

Since that time there has been before Donaldson J and afterwards in this court the case of *Howe Richardson Scale Co Ltd. v Polimex Cekop* (1977) Court of Appeal Transcript 270. In that case Roskill LJ spoke to the same effect. He said:

Whether the obligation arises under a letter of credit or under a guarantee, the obligation of the bank is to perform by that particular contract, and that obligation does not in the ordinary way depend on the correct resolution of a dispute as to the sufficiency of performance by the seller to the buyer or by the buyer to the seller as the case may be under the sale and purchase contract; the bank here is simply concerned to see whether the event has happened on which its obligation to pay has arisen.

(10) In *United Commercial Bank v. Bank of India* (10 supra), the Hon''ble Supreme Court at paragraphs 38, 40 and 41 held as under:

38. In the light of these principles, the rule is well established that a bank issuing or confirming a letter of credit is not concerned with the underlying contract between the buyer and seller. Duties of a bank under a letter of credit are created by the document itself, but in any case it has the power and is subject to the limitations which are given or imposed by it, in the absence of the appropriate provisions in the letter of credit.

40. In view of the banker's obligation under an irrevocable letter of credit to pay, his buyer-customer cannot instruct him not to pay. In *Hamzeh Malas v. British Tmex Industries Ltd.* [1958] 2 Q.B. 127 the plaintiffs, the buyers, applied for an injunction restraining the sellers, the defendants, from drawing under the credit established by the buyer's bankers. This was refused, Jenkins, L.J. stating, at p. 129, that...the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods which imposes on the banker an absolute obligation to pay.... and that "this was not a case in which the Court ought to exercise its discretion and grant the injunction". The same considerations apply to a bank guarantee.

41. A letter of credit sometimes resembles and is analogous to a contract of guarantee. In *Elian and Anr. v. Matsas and Ors.* [1966] 2 Ll. Rep. 495 Lord Denning, M.R., while refusing to grant an injunction stated:

...a bank guarantee is very much like a letter of credit. The courts will do their utmost to enforce it according to its terms. They will not in the ordinary course of things, interfere by way of injunction to prevent its due implementation. Thus they refused in *Malas v. British Imex Industries Ltd.* But that is not an absolute rule. Circumstances may arise such as to warrant interference by injunction.

48. A Bank which gives a performance guarantee must honour that guarantee according to its terms. In *R.D. Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd.* [1977] 3 W.L.R. 752 Kerr, J. considered the position in principle. We would like to adopt a passage from his judgment at p. 761:

It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The courts are not concerned with their difficulties to enforce such claims; these are risks which these merchants take. In this case the plaintiffs took the risk of the unconditional wording of the guarantees. The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged.

(Emphasis supplied.)

(11) In *U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.* (11 supra), the Hon"ble Apex Court at paragraphs 21, 28, 30, 34, 43, 53, 54 & 55, held as under:

21. In the instant case, the learned Judge has proceeded on the basis that this was not an injunction sought against the bank but this was the injunction sought against the appellant. But the net effect of the injunction is to restrain the bank from performing the bank guarantee. That cannot be done. One cannot do indirectly what one is not free to do directly. But a maltreated man in such circumstances is not remediless. The respondent was not to suffer any injustice which was irretrievable. The respondent can sue the appellant for damages. In this case, there cannot be any basis for apprehension that irretrievable damages would be caused if any. I am of the opinion that this is not a case in which injunction should be granted. An irrevocable commitment either in the form of confirmed bank guarantee or irrevocable letter of credit cannot be interfered with except in case of fraud or in case of question of apprehension of irretrievable injustice has been made out. This is the well settled principle of the law in England. This is also a well settled principle of law in India, as I shall presently notice from some of the decisions of the High Court and decisions of this Court.

28. I am, however, of the opinion that these observations must be strictly considered in the light of the principle enunciated. It is not the decision that there should be a *prima facie* case. In order to restrain the operation either of irrevocable letter of credit or of confirmed letter of credit or of bank guarantee, there should be serious dispute and there should be good *prima facie* case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Otherwise the very purpose of bank guarantees would be negated and the fabric of trading operation will get jeopardised.

30. These observations *a fortiori* apply to a bank guarantee because upon bank guarantee revolves many of the internal trade and transactions in a country. In *Syndicate Bank Vs. Vijay Kumar and others*, this Court was dealing with injunction restraining the bank in respect of letter of credit. This Court observed that the High Court was wrong in granting the temporary injunction restraining the appellant bank from recalling the amount paid to the respondent bank. The Court reiterated that courts usually refrain from granting injunction to restrain the performance of the contractual obligations arising out of a letter of credit, or a bank guarantee between one bank and another. If such temporary injunction were to be granted in a transaction between a banker and a banker, restraining a bank from recalling the amount due when payment was made under reserve to another bank or in terms of the letter of guarantee or credit executed by it, the whole banking system in the country would fail.

34. On the basis of these principles I reiterate that commitments of banks must be honoured free from interference by the courts. Otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice be done,

the court should interfere.

43. The argument for the respondent is attractive but it seems to overlook the basic nature of the case. The basic nature of the case relates to the obligations assumed by the bank under the guarantees given to UPCOF Ltd. If under law, the bank cannot be prevented by SCE(P) Ltd. from honouring the credit guarantees, the UPCOF Ltd. also cannot be restrained from invoking the guarantees. What applies to the bank must equally apply to UPCOF Ltd. Therefore, the frame of the suit by not impleading the bank cannot make any difference in the position of law. Equally, it would be futile to contend that the court was justified in granting the injunction since it has found a *prima facie* case in favour of the SCE(P) Ltd. The question of examining the *prima facie* case or balance of convenience does not arise if the court cannot interfere with the unconditional commitment made by the bank in the guarantees in question.

53. Whether it is a traditional letter of credit or a new device like performance bond or performance guarantee, the obligation of banks appears to be the same. If the documentary credits are irrevocable and independent, the banks must pay when demand is made. Since the bank pledges its own credit involving its reputation, it has no defence except in the case of fraud. The banks obligations of course should not be extended to protect the unscrupulous seller, that is, the seller who is responsible for the fraud. But, the banker must be sure of his ground before declining to pay. The nature of the fraud that the courts talk about is fraud of an egregious nature as to vitiate the entire underlying transaction. It is fraud of the beneficiary, not the fraud of somebody else. If the bank detects with a minimal investigation the fraudulent action of the seller, the payment could be refused. The bank cannot be compelled to honour the credit in such cases. But it may be very difficult for the bank to take a decision on the alleged fraudulent action. In such cases, it would be proper for the bank to ask the buyer to approach the court for an injunction.

54. The court, however, should not lightly interfere with the operation of irrevocable documentary credit. I agree with my learned brother that in order to restrain the operation of the irrevocable letter of credit, performance bond or guarantee, there should be serious dispute to be tried and there should be a good *prima facie* acts of fraud. As Sir John Donaldson, M.R. said in *Bolivinter Oil SA v. Chase Manhattan Bank*:

The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the banks knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a banks credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged.

55. From the above discussion, what appears to me is this: The sound banking system may, however require more caution in the issuance of irrevocable documentary credits. It would be for the banks to safeguard themselves by other means and generally not for the court to come to their rescue with injunctions unless there is established fraud. In the result, this appeal must be allowed. The judgment and order of the Allahabad High Court dated 20-2-1987 must be set aside and the order of learned Civil Judge, Lucknow dated 8-8-1986 restored.

(12) In *Syndicate Bank v. Vijay Kumar* (12 supra), the Hon''ble Apex Court at paragraph 10, held as under:

10. It is in common parlance that the issuance of guarantee is what that a guarantor creates to discharge liability when the principal debtor fails in his duty and guarantee is in the nature of collateral agreement to answer for the debt. It is well-settled that the Bank guarantee is an autonomous contract and imposes an absolute obligation on the Bank to fulfill the terms and the payment in the Bank guarantee becomes due on the happening of a contingency on the occurrence of which the guarantee becomes enforceable.

(13) In *The State Trading Corporation of India Ltd. v. Jainsons Clothing Corporation* (13 supra), the Hon''ble Supreme Court at paragraphs 5, 6, 9 & 10 held as under:

5. None of the conditions are satisfied or applicable to the facts in this case. It is not the case that there is any fraud committed by the appellant in entering into contract with the respondent in particular with reference to Clause 17 of the Contract dated April 20, 1985. Nor is there any fraud into formation or execution of bank guarantee. From the contention of the appellant it would appear that on account of negotiations between the appellant the principal foreign buyer-Abu Dhabi Municipality, the supply of 7000 M.T. of B-Grade basmati rice was not made in terms of the principal contract entered into by the appellant with the foreign buyer. But there is no clause in the contract dated April 20, 1985 entered between the appellant and the respondents that the contract with the respondents is co-terminus with non-performance or frustration of the contract with the foreign buyer. In the absence of such recital the necessary consequences is that irrespective'' of the frustration of the contract or cancellation of the contract between the principal supplier, namely, the appellant and the foreign buyer, namely, Abu Dhabi Municipality, the respondent was under the contract obligated to make supply of 3000 M.T. of B-Grade basmati rice in terms thereof. The certificate issued by the officer clearly shows that there was a failure or default committed by the respondent in supplying the rice as contracted for. Under those circumstances, it is not a case of any fraud, but at best, it is a case of cancellation of the contract by the appellant-principal supplier to the foreign buyer. But that does not have the effect of frustrating or cancelling the contract which the respondent had entered into with the appellant.

Therefore, even from the affidavit evidence given in support of the application for

injunction, not only no plea of fraud was made but also there was no plea of irretrievable injustice that the respondent was likely to suffer on account of the enforcement of the bank guarantee - an exception carved out by this Court in U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., . Therein this Court after elaborate consideration of all the decisions, held in para 34 that on the basis of these principles the commitments of bank guarantee must be honoured free from interference by the courts. Otherwise, trust in commerce internal and international would be irreparably damaged.

It is only in exceptional cases, that is to say, in case of fraud or in case of irretrievable injustice, the court would interfere.

6. While elaborating the plea of fraud, in the concurrent judgment, Jagannatha Shetty, J. had elaborately dealt with and stated that:

The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged.

Under those circumstances, it was also held that the plea of fraud must be in the nature of an egregious nature as to vitiate the entire underlying transaction of the bank guarantee. It is fraud of that beneficiary and not the fraud of somebody else that would make the Court to grant the Order of injunction as asked for. If the bank detects with the minimal investigation the fraudulent action of the seller, the payment could be refused is not a fraud as contemplated under the guarantee. We respectfully agree with the above ratio.

This view was reiterated in General Electric Technical Services Company Inc. Vs. M/s. Punj Sons (P) Ltd. and another, . This Court has held in paragraph 9 thus:

The question is whether the court was justified in restraining the Bank from paying to GETSCO under the bank guarantee at the instance of respondent 1. The law as to the contractual obligations under the bank guarantee has been well settled in a catena of cases. Almost all such cases have been considered in U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd. Following that ration it was observed that the Bank must honour the bank guarantee free from interference by the courts. Otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice, the court should interfere. In the concurring opinion one of us (K. Jagannatha Shetty, J.) has observed that whether it is a traditional bond or performance guarantee, the obligation of the Bank appears to be the same. If the documentary credits are irrevocable and independent, the Bank must pay when demand is made. Since

the Bank pledges its own credit involving its reputation, it has no defence except in the case of fraud. The Bank's obligations of course should not be extended to protect the unscrupulous party, that is, the party who is responsible for the fraud. But the banker must be sure of his ground before declining to pay. The nature of the fraud that the courts talk about is fraud of an "egregious nature as to vitiate the entire underlying transaction". It is fraud of the beneficiary, not the fraud of somebody else.

9. The grant of injunction is a discretionary power in equity jurisdiction. The contract of guarantee is a trilateral contract which the bank has undertaken to unconditionally and unequivocally abide by the terms of the contract. It is an act of trust with full faith to facilitate free flow of trade and commerce in internal or international trade or business. It creates an irrevocable obligation to perform the contract in terms thereof. On the occurrence of the events mentioned therein the bank guarantee becomes enforceable. The subsequent disputes in the performance of the contract does not give rise to a cause nor is the court justified on that basis, to issue an injunction from enforcing the contract, i.e. bank guarantee. The parties are not left with no remedy. In the event of the dispute in the main contract ends in the party's favour, he/it is entitled to damages or other consequential reliefs.

10. It is settled law that the Court, before issuing the injunction under Order 39, Rules 1 and 2, CPC should prime face be satisfied that there is triable issue strong prima facie case of fraud or irretrievable injury and balance of convenience is in favour of issuing injunction to prevent irremediable injury. The court should normally insist upon enforcement of the bank guarantee and the court should not interfere with the enforcement of the contract of guarantee unless there is a specific plea of fraud or special equities in favour of the plaintiff. He must necessarily plead and produce all the necessary evidence in proof of the fraud in execution of the contract of the guarantee, but not the contract either of the original contract or any of the subsequent events that may happen as a ground for fraud.

(14) In *U.P. State Sugar Corporation v. M/s. Sumac International Ltd.* (14 supra), the Hon'ble Apex Court at paragraph 12, held as under:

12. The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The Courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The Courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be

restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may co-exist in some cases. In the case of *U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd.*, which was the case of a works contract where the performance guarantee given under the contract was sought to be invoked, this Court, after referring extensively to English and Indian cases on the subject, said that the guarantee must be honoured in accordance with its terms. The bank which gives the guarantee is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not. The bank must pay according to the tenor of its guarantee on demand without proof or condition. There are only two exceptions to this rule. The first exception is a case when there is a clear fraud of which the bank has notice. The fraud must be of an egregious nature such as to vitiate the entire underlying transaction. Explaining the kind of fraud that may absolve a bank from honouring its guarantee, this Court in the above case quoted with approval the observations of Sir John Donaldson, M.R. in *Bolivinter Oil SA v. Chase Manhattan Bank NA* (1984) 1 All ER 351 at 352. "The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it charged". This Court set aside an injunction granted by the High Court to restrain the realisation of the bank guarantee.

(15) In *National Thermal Power Corporation Ltd. v. Flowmore Pvt. Ltd.* (15 supra), the Hon'ble Apex Court, at paragraphs 8 and 10, held as under:

8. The present appeals are filed from these judgments and orders of the Delhi High Court. The question of jurisdiction of the Division Bench of the Delhi High Court to entertain an appeal from an order of a Single Judge of the High Court granting an injunction under Section 41 of the Arbitration Act, need not detain us when we are examining the order of the learned Single Judge under Article 136 of the Constitution of India, an appeal from that order having been dismissed. On merit, the order of injunction issued by a learned Single Judge of the Delhi High Court cannot be sustained. In the case of *Svenska Handelsbanken v. Indian*

Charge Chrome 1989(2) APLJ 384 a Bench of three Judges of this Court has, while dealing with performance guarantees and guarantees against advances, observed that looking to the obligation assumed by the bank under such guarantees or letters of credit, the bank cannot be prevented by the party at whose instance the guarantee or letter of credit, was issued, from honouring the credit guaranteed. Since the bank pledges its own credit involving its reputation, it has no defence except in the case of fraud or irretrievable injustice. Fraud must be of an egregious nature so as to vitiate the entire underlying transaction. While irretrievable injustice should be of the kind arising in an irretrievable situation which was referred to in the US case of Bank of India Vs. Nangia Constructions (I) Pvt. Ltd. and Others, the irreparable harm should not be speculative. It should be genuine and immediate as well as irreversible a kind of situation which existed in the case of Bank of India Vs. Nangia Constructions (I) Pvt. Ltd. and Others, where, on account of the revolution in Iran the American Government had cancelled all export contracts to Iran and had blocked all Iranian assets within the jurisdiction of the United States. Fifty-two Americans had been taken hostages in Iran. In this situation the Court felt that the plaintiff had no remedy at all and the harm to him would be irreparable. This kind of a situation is not a likely situation. This Court in the case of Svenska Handelsbanken has cited with approval the observations of this Court in the case of U.P. Coop. Federation Ltd. v. Singh Consultants & Engineers (P) Ltd. to the effect that the Babubhai Muljibhai Patel Vs. Nandlal Khodidas Barot and Others, to the effect that the Court should not lightly interfere with a performance bond or guarantee unless there is fraud of the beneficiary and not somebody else.

10. Both these submissions cannot be accepted. It is true that the bank guarantee of Rs. 85,000 contains an express term to the effect that any demand made by the owner shall be conclusive and binding on the bank notwithstanding any difference between the owner and the contractor or any dispute pending before any court, tribunal, arbitrator or any other authority. Nevertheless, this express term merely reiterates the nature of a bank guarantee which is payable on demand being made by the beneficiary of the bank guarantee. A bank guarantee which is payable on demand implies that the bank is liable to pay as and when a demand is made upon the bank by the beneficiary. The Bank is not concerned with any inter se disputes between the beneficiary and the person at whose instance the bank had issued the bank guarantee. All the three bank guarantees which have been invoked are payable on demand. There is, therefore, no merit in the submission that the bank guarantees have not been properly invoked.

16. Coming to the judgments cited by the learned counsel for Respondents.

(1) In Canara Bank, Secunderabad v. Power Grid Corporation of India Ltd., New Delhi (16 supra), this Court at paragraph 9, held as under:

9. The fact that the petitioner-Bank part the amount covered by the bank guarantee on demand by the 1st respondent-Corporation has not been disputed

by the 1st respondent. It is also not in dispute that subsequently by virtue of arbitral award passed in accordance with the terms and conditions of the agreement between the 1st and 4th respondents, the 1st respondent-Corporation agreed to refund the amount covered by the bank guarantee to the 4th respondent. However, the petitioner-Bank, which is neither a party to the said agreement nor the arbitration proceedings, cannot claim any right for release of the said amount in its favour. The claim of the petitioner-Bank against the 4th respondent with regard to the recovery of the amount covered by the bank guarantee is nothing but a money claim for which the petitioner cannot invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India. Absolutely no case is made out by the petitioner to show that the 1st respondent failed to perform any statutory obligation or that the inaction of the 1st respondent resulted in infringement of legal right accrued to the petitioner.

(2) In *Kerala State Electricity Board v. Kurien E. Kalathil* (17 supra), the Hon'ble Apex Court, at paragraphs 10 and 11, held as under:

10. We find that there is a merit in the first contention of Mr. Raval. Learned counsel has rightly questioned the maintainability of the writ petition. The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract. If a term of a contract is violated, ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. We are also unable to agree with the observation of the High Court that since the obligations imposed by the contract on the contracting parties come within the purview of the Contract Act, that would not make the contract statutory. Clearly, the High Court fell into an error in coming to the conclusion that the contract in question was statutory in nature.

11. A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. In the present case, it has not been shown how the contract is statutory. The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and

conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil court or in arbitration if provided for in the contract. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition. The contractor should have relegated to other remedies.

(3) In *Indian Bank v. Godhra Nagrik Cooperative Credit Society Ltd.* (18 supra), the Hon"ble Supreme Court at paragraph 10, held as under:

10. Mr. P.P. Rao, learned Senior Counsel appearing on behalf of Bank of Baroda would submit:

(i) In a writ petition involving private dispute, no direction for payment of money in favour of the writ petitioners should have been issued by the High Court;

(ii) As the writ petitions involved serious disputed questions of fact, the High Court should not have entertained the same;

(iii) Having regard to the fact that the Central Bureau of Investigation has since submitted a charge-sheet wherein not only the officers of the banks but also the commission agents have been found to be guilty of an offence of conspiracy in committing fraud on the bank, the judgment and direction of the High Court should be set aside.

Mr. Sundaram, learned Senior Counsel, appearing on behalf of the respondents, on the other hand, would contend:

(a) Although the writ petitions were filed for enforcement of a contract, as the same involved public law character, the writ petitions were maintainable.

(b) Appellants being "State" within the meaning of Article 12 of the Constitution of India, they were amenable to writ jurisdiction of the High Court.

(c) The writ petitions having not been dismissed in limine, the High Court was entitled to go into the merit of the matter for the purpose of arriving at a finding as to whether any case has been made out for issuance of any writ, direction or order.

(d) In a case of this nature the High Court is entitled to convert a private dispute into a public interest litigation, the same having a public ramification by appointing a Committee and act thereupon, as a consequence whereof, relief in favour of the writ petitioners/respondents could be granted.

The propositions of law which are undisputed are:

i) Writ Petitions against the banks being "State" within the meaning of Article 12 of the Constitution of India were maintainable;

ii) Writ Petitions involving serious disputed questions of fact, ordinarily should not be entertained although the High Court in some cases may enter into disputed

questions of fact.

The question, however, is as to whether the learned Single Judge, despite holding that the writ petitions were not maintainable, could have issued direction for constitution of the Committee.

The powers and functions delegated to the Committee were wide, by reason whereof for all intent and purport, even judicial power were delegated.

Let us now consider the question as to whether direction to constitute such a Committee was legally permissible. Indisputably, the authorities of the Reserve Bank of India in exercise of their statutory powers conferred upon them under Section 35A of the Banking Regulation Act could issue directions for initiating an enquiry into the affairs of the Banks. The Banks being public sector undertakings could themselves do so and have in fact done so. It is one thing to say that the Public Sector Banks having regard to the provisions of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 should discharge their functions keeping in mind the larger public interest but ordinarily in the matter of enforcement of contract, they are to be governed by the terms thereof, which would not be amenable to writ jurisdiction of the High Court unless the actions of the banks are found to be wholly arbitrary and unreasonable.

The core question which arises for consideration in the writ petitions was as to whether, keeping in view the apprehension in the mind of the Bank that it has been subjected to fraud by its own officers as also the apprehension in their mind that the writ petitioners or their agents might have conspired with the offices of the Banks, was it unfair and unreasonable in its decision to refuse to make payment? The answer to that question *prima facie* must be rendered in the negative. If, however, it is found as of fact that the writ petitioners-respondents were not parties to the fraud, whether even in a *lis* involving private law domain, namely, contract *qua* contract, as a trustee of the investors' money, they may be held to be liable to refund the amount, is the question?.

Indisputably, whether as a public sector undertakings or otherwise the banks cannot refuse to accede to the just demand of the investors to pay any amount lawfully due to them *inter alia* on the premise that their officers are guilty of commission of any fraud. It is one thing to say that fraud has been committed by their officers to cause wrongful loss to the bank but it is another thing to say that the banks are constructively liable for the acts of their officers. In given cases, the employers are constructively liable for acts of negligence on the part of their employees.

The Alter Ego approach adopted in the theory of Corporate liability which has been applied by the House of Lords in *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co Ltd.* [1915] AC 705 HL is one such instance. The facts of the case concerned a cargo claim which Lennards sought to defend by contending that Section 502 of the Merchant Shipping Act 1894 exonerated the owner from losses arising without his actual fault. The House of Lords held that they could

not rely on that defence since the fault of the appropriate organ such as the Board of Directors or managing Director could be attributed to the company.

In Farrar's Company Law, 4th Edn. Page 147, it is stated: An employee who acts for the company in the course of his or her employment will usually bind the company and his or her knowledge will be attributed to the company because he or she is the company for the purpose of the transaction in question.

This is so even if the employee is acting dishonestly or against the interests of the company or contrary to orders but it is not so where the company is the victim. This is to avoid an obvious contradiction. Another instance of the application of the theory of Corporate Liability is the "Attribution Approach" as adopted by the Judicial Committee of the Privy Council in *Meridian Global Funds Management Asia Ltd. v. Securities Commission* [1995] 2 AC 500 : [1995] 3 All ER 918.

In that case, two employees of Meridian, had improperly used their authority to purchase in the name of the company a substantial interest in Euro-National Corp. Ltd., a New Zealand listed company. Under the New Zealand Securities Amendment Act 1988, Meridian was required to give notice of its acquisition to ENC and the Stock exchange. The two employees knew this but the Board and the managing Director of Meridian did not. No notice was given. The Privy Council upheld the New Zealand Court's decision holding that Meridian had contravened the law, on the premise that the knowledge of the employee would be attributed to Meridian. We will, thus, assume for the purpose of this case that the Banks are constructively liable for acts of their employees. We will also assume that the Banks are liable to pay the amount under the contract for which the FDRs were issued.

(4) In *Rajasthan State Industrial Development and Investment Corporation v. Diamond & Gem Development Corporation Limited* (19 supra), the Hon"ble Supreme Court at paragraphs 19 to 22, held as under:

III. Contractual disputes and Writ Jurisdiction

19. There can be no dispute to the settled legal proposition that matters/disputes relating to contract cannot be agitated nor terms of the contract can be enforced through writ jurisdiction under Article 226 of the Constitution. Thus, the writ court cannot be a forum to seek any relief based on terms and conditions incorporated in the agreement by the parties. [Vide *Syndicate Bank Vs. Vijay Kumar and others*, and *The State Trading Corporation of India Ltd. Vs. Jainsons Clothing Corporation and another*,

20. In *U.P. State Sugar Corporation Vs. M/s. Sumac International Ltd.*, this Court held that a writ cannot lie to resolve a disputed question of fact, particularly to interpret the disputed terms of a contract observing as under: (SCC pp. 298-99, paras 10-11)

10. The interpretation and implementation of a clause in a contract cannot be the

subject-matter of a writ petition. If a term of a contract is violated, ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract..

11. The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil court or in arbitration if provided for in the contract. The contractor should have relegated to other remedies.

21. It is evident from the above that generally the Court should not exercise its writ jurisdiction to enforce the contractual obligation. The primary purpose of a writ of mandamus is to protect and establish rights and to impose a corresponding imperative duty existing in law. It is designed to promote justice (*ex debito justitiae*). The grant or refusal of the writ is at the discretion of the court. The writ cannot be granted unless it is established that there is an existing legal right of the applicant, or an existing duty of the respondent. Thus, the writ does not lie to create or to establish a legal right, but to enforce one that is already established. While dealing with a writ petition, the court must exercise discretion, taking into consideration a wide variety of circumstances, *inter alia*, the facts of the case, the exigency that warrants such exercise of discretion, the consequences of grant or refusal of the writ, and the nature and extent of injury that is likely to ensue by such grant or refusal.

22. Hence, discretion must be exercised by the court on grounds of public policy, public interest and public good. The writ is equitable in nature and thus, its issuance is governed by equitable principles. Refusal of relief must be for reasons which would lead to injustice. The prime consideration for the issuance of the said writ is, whether or not substantial justice will be promoted. Furthermore, while granting such a writ, the court must make every effort to ensure from the averments of the writ petition, whether there exist proper pleadings. In order to maintain the writ of mandamus, the first and foremost requirement is that the petition must not be frivolous, and must be filed in good faith. Additionally, the applicant must make a demand which is clear, plain and unambiguous. It must be made to an officer having the requisite authority to perform the act demanded. Furthermore, the authority against whom mandamus is issued, should have rejected the demand earlier. Therefore, a demand and its subsequent refusal, either by words, or by conduct, are necessary to satisfy the court that the opposite party is determined to ignore the demand of the applicant with respect to the enforcement of his legal right. However, a demand may not be necessary when the same is manifest from the facts of the case, that is, when it is an empty formality, or when it is obvious that the opposite party would not consider the demand.

17. The material placed before this Court categorically demonstrates that the

suit, O.S. No. 78 of 2004 filed by the 2nd respondent against the petitioners and the 1st respondent-Bank was decreed on 17.7.2006 to the extent of payment already made by the 1st respondent-Bank and the learned Chief judge was not inclined to go into the aspect of balance of the amount in view of refusal by the 1st respondent Bank to pay the balance amount. The learned Chief Judge also categorically observed in the judgment that the same shall not be construed as finding against 2nd respondent, as such the same does not tantamount to endorsing and agreeing to the claim of the petitioners herein. The learned Chief Judge recorded a categoric finding on the element of fraud in respect of the transaction. Admittedly appeal in C.C.C.A. No. 212 of 2006 is pending before this Court, wherein this Court granted conditional interim order. Therefore the judgments cited by the learned counsel for the petitioners that unless there is an element of fraud the Bank Guarantee cannot be withheld is of no application to the case of the petitioners. So long as the said finding on the element of fraud stares at the petitioners, the contentions based on the principles laid down in the said judgments are not available to the petitioners. Another justification offered by the 1st respondent Bank in its counter that the deponent of the affidavit filed in support of the writ petition clearly stated in the suit as D.W. 2 that the person who opened the LC becomes the beneficiary under the Bank Guarantee and the opener of the second LC, M/s. Warrenby UK, did not invoke the Bank Guarantee.

18. A perusal of the pleadings in the writ affidavit candidly shows that the petitioners are requesting this Court to adjudicate as to whether the interpretation given by the respondents on the terms of the contract i.e., Bank Guarantee is correct or not and for enforcement of the same in accordance with the interpretation of the petitioners. It is also to be noted that virtually the petitioners are asking for the relief of enforcement of contract and for recovery of amount by way of this writ petition. The amenability of the said reliefs for the jurisdiction of this Court under Article 226 of the Constitution of India is required to be examined in the light of the principles and parameters laid down by the Hon'ble Apex Court and this Court. This Court in *Canara Bank, Secunderabad v. Power Grid Corporation of India Ltd., New Delhi* (16 supra) categorically held that for money claim, writ petition is not maintainable under Article 226 of the Constitution of India. In the judgment reported in *Kerala State Electricity Board and another v. Kurien E. Kalathil* (17 supra), the Hon'ble Apex Court dealt with the scope of jurisdiction under Article 226 of the Constitution of India in respect of the matters, touching the implementation and interpretation of the terms of the contract and recovery of amounts and refusal and justification therein and eventually held in favour of non-maintainability of the writ petition. As per the Judgment in *Indian Bank v. Godhra Nagrik Cooperative Credit Society Ltd.* (18 supra), the Apex Court took the view that unless the impugned actions are wholly arbitrary and unreasonable, the writ petition would not lie. In the instant case, the reasons assigned by the respondents herein cannot be said to be either arbitrary or unreasonable nor the same can be construed as against the public policy. In the recent judgment in *Rajasthan State Industrial Development and*

Investment Corporation and another v. Diamond & Gem Development Corporation Limited (20 supra), the Hon"ble Apex Court held against maintainability and further held that only when the element of public policy, public interest and public good are present, the discretion in favour of exercise of jurisdiction is permissible. In the considered opinion of this Court, none of the said contingencies are present and in fact the same are conspicuously absent in the present case.

19. In the judgment in Hyderabad Urban Development Authority, Secunderabad v. M/s. IBC Knowledge Park Pvt. Ltd., (5 supra), this Court relied upon the judgment rendered by the Hon"ble Apex Court in State of Bihar v. Jain Plastics & Chemicals Ltd., and held in favour of non-maintainability of the writ petition.

20. In view of the facts and circumstances of the case and the nature of controversy involved in the writ petition, the judgments cited on behalf of the petitioners would not render any assistance to the petitioners herein. Therefore, this Court is of the view that the petitioners herein have failed in making out a case, warranting interference of this Court under Article 226 of the Constitution of India.

21. For the aforesaid reasons and having regard to the authoritative pronouncements referred to above and having regard to the nature of controversy and keeping in view the pendency of civil litigation between the parties before this Court in C.C.C.A. No. 212 of 2006, this writ petition is dismissed. As a sequel, the miscellaneous petitions, if any, shall stand closed. There shall be no order as to costs.