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(2010) 01 DEL CK 0015

In the Delhi High Court

Case No : Regular First Appeal (OS) No. 34 of 2008

Bhandari Engineers and Builders Pvt. Ltd. APPELLANT

Vs

Vijaya Bank and Others RESPONDENT

Date of Decision : 20-01-2010

Acts Referred:

Citation : (2010) 2 BC 438 : (2010) 168 DLT 47

Hon'ble Judges : Vikramajit Sen, J;Manmohan Singh, J

Bench : Division Bench

Advocate : Raju Ramachandran, S.S. Jauhar and Prabhjot Jauhar, for the Appellant; Ashwini K. Mata Raja Balal and Manmeet Sethi, for the Respondent

Final Decision : Dismissed

Judgement

Vikramajit Sen, J.—The Appellant, namely, Bhandari Engineers & Builders Pvt. Ltd. (hereinafter compendiously referred as ''BEBP'' or plaintiff/Appellant) assails the Judgment dated 8.5.2008 of the learned Single Judge whereby its Suit for Declaration and Permanent Injunction came to be dismissed. The plaintiff/ Appellant had arrayed Vijaya Bank as Defendant No. 1; Saudi Hollandi Bank as Defendant No. 2 and Civil Works Company Limited, Saudi Arabia (CWC Saudi Arabia) as Defendant No. 3. There has been no representation on behalf of Defendants No. 2 and 3 before the learned Single Judge. It appears that notice has not been issued to Defendants No. 2 and 3 in this Appeal. However, since the matter has been argued at great length, and keeping in perspective the conclusion that we have arrived at, we think it unnecessary to delay the disposal of the Appeal by insisting on service of notice on Defendant Nos. 2 and 3.

2. It is evident from the impugned Judgment that the learned Single Judge was of the opinion that the plaintiff had made serious misrepresentations to the Court. After a detailed discussion on the facts of the case it was found that the plaintiff was not entitled for any interim relief. Secondly, the learned Single Judge has returned the finding that Courts in India do not possess territorial jurisdiction to adjudicate upon the said case. Hence, the Suit was also dismissed as not

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maintainable.

3. We shall first deal with the question whether this Court possesses territorial jurisdiction to adjudicate over the dispute. Order VII Rule 10 of the Code of Civil Procedure, 1908 (''CPC'' for short) immediately becomes relevant. It stipulates that if the Court is of the opinion that it does not possess territorial jurisdiction, it must return the plaint for filing in the appropriate Court. It does not postulate the dismissal of the suit. Since it is clear that the dismissal of the suit was not predicated only on the absence of territorial jurisdiction, we shall desist from making any further observations. This is for the reason that a suit can also be dismissed under Rule 11 of the said Order VII of the CPC which, inter alia, states that a plaint can be rejected where it does not disclose a cause of action or appears, from the statement in the Plaint, to be barred by any law.

4. The Prayers made in the Plaint read thus:

43. (a) pass a decree of Declaration in favour of the plaintiff and against the Defendant No. 1 declaring that the counter guarantee No. FBG/RFC/01/105 in favour of Saudi Hollandi Bank, Riyadh, Saudi Arabia, the Defendant No. 2 is void;

(b) pass a decree of declaration in favour of the plaintiff and against the Defendants declaring that the performance guarantee No. 050119IS721CA dated 19th January, 2005 issued by Saudi Hollandi Bank, Defendant No. 2 herein in favour of Defendant No. 3 for a sum of Rs. SAR 12.50 million valid for a period of 45 months beginning 18th January, 2005 and ending on 18th October, 2008, is void;

(c) a Decree Permanent Injunction in favour of the plaintiff and against the Defendant No. 3 restraining the said Defendant, its representatives, officers, representatives or assigns from encashing the performance bank guarantee No. 050119IS721CA dated 19th January, 2005 issued by Saudi Hollandi Bank, Defendant No. 2 herein in favour of Defendant No. 3 for a sum of Rs. SAR 12.50 million valid for a period of 45 months beginning 18th January, 2005 and ending on 18th October, 2008;

(d) Decree of Permanent injunction in favour of plaintiff and against the Defendant No. 1 and 2 restraining Defendant No. 1, its representatives, officers, representatives or assigns from making any payment against the counter guarantee No. FBG/RFC/01/05 in favour of the Saudi Hollandi Bank, Riyadh, Saudi Arabia and Defendant No. 2 from demanding any sum against the said counter guarantee.;

(e) A decree of permanent injunction restraining the Defendant No. 2 from making any payment to Defendant No. 3 against performance bank guarantee No. 050119IS721CA dated 19th January, 2005 issued by Saudi Hollandi Bank, Defendant No. 2 herein in favour of Defendant No. 3 for a sum of Rs. SAR 12.50 million valid for a period of 45 months beginning 18th January, 2005 and ending on 18th October, 2008;

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(f) Award the costs of the suit in favour of the plaintiff and against the Defendant No. 3;

(g) Pass such other and further orders as this Hon''ble Court may deem fit and proper in the facts and circumstances of the present case.

5. In the present case, so far as relief of injunction is concerned, the plaintiff seeks a restraint order against the Defendant from encashing the subject Performance Bank Guarantee. There can be no gainsaying that in the event that an interim or temporary injunction is declined, the suit, so far as this relief is concerned, would be rendered infructuous. Where the injunction is for interdicting the encashment of a Bank Guarantee as soon as payment against the Bank Guarantee is made the suit ceases to have any relevance or efficacy. Secondly, an injunctory relief is essentially discretionary and equitable in nature. It is trite that if a material misrepresentation has been made by the plaintiff, it disentitles itself from the grant of relief since it has transgressed equity while seeking it; having approached the Court with unclean hands it is not entitled to an injunction. Accordingly, once a Court arrives at the conclusion that a deliberate and significant misrepresentation has occurred, it is within its powers to dismiss the suit itself.

6. In fairness to Mr. Mata, learned Senior Counsel for Vijaya Bank, he does not support the finding that this Court does not possess territorial jurisdiction. In A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, the Supreme Court has clarified that exclusion of jurisdiction should never be lightly inferred. It should be manifestly and unequivocally clear that the parties had excluded the jurisdiction of a particular Court, and only then should that Court decline to exercise jurisdiction. At the instance and request of the Appellant made in New Delhi to Vijaya Bank, Saudi Hollandi Bank had furnished a Performance Guarantee to CWC, one of the terms of which is that ''any dispute with respect to this Guarantee shall be resolved by the competent authorities in the Kingdom of Saudi Arabia and according to the Regulations, Decisions and Instructions''. Keeping in perspective the ratio of ABC Laminart, we are unable to subscribe to the view that this Clause categorically stipulates that disputes between the parties must only be adjudicated in Saudi Arabia, to the exclusion of all other Courts which, by virtue of the CPC, have been empowered to decide disputes. A reference to the recent case of Laxman Prasad Vs. Prodigy Electronics Ltd. and Another, , which relied on ABC Laminart will be apposite for our discussion on this issue of Jurisdiction. In this case, there was a similar Clause in the Agreement between the parties which stipulated interpretation of the terms and conditions of the Contract in accordance to the laws of the Hong Kong Special Administrative Region. The Hon''ble Court after considering this Clause held thus:

29. According to the appellant, since the terms and conditions in the agreement have to be interpreted in accordance with the laws of Hong Kong, no court in any country other than a court in Hong Kong shall have jurisdiction to entertain a suit, petition, application or any other proceeding. The submission of the

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respondent Company, on the other hand, is that what was agreed upon was not territorial jurisdiction of a court but applicability of laws. Clause 18 deals with the second eventuality and declares that terms and conditions of the agreement would be interpreted in accordance with the laws of Hong Kong.

30. We find considerable force in the submission of the learned Counsel for the respondent Company. In our view, ''cause of action'' and ''applicability of law'' are two distinct, different and independent things and one cannot be confused with the other. The expression ''cause of action'' has not been defined in the Code. It is, however, settled law that every suit presupposes the existence of a cause of action. If there is no cause of action, the plaint has to be rejected [Rule 11(a) of Order 7]. Stated simply, ''cause of action'' means a right to sue. It consists of material facts which are imperative for the plaintiff to allege and prove to succeed in the suit. The classic definition of the expression (''cause of action'') is found in the observations of Lord Brett in Cooke v. Gill. His Lordship stated:

Cause of action means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court.

31. In A.B.C. Laminart (P) Ltd. v. A.P. Agencies this Court said: (SCC p. 170, para 12)

12. A cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff.

32. Now, Sections 16-20 of the Code deal with territorial jurisdiction of a court (place of suing). Whereas Sections 16-18 relate to immovable property, suits for compensation for wrongs to persons or movables have been dealt with u/s 19. Section 20 of the Code is a residuary provision and covers all cases not falling under Sections 16-19.

33. The relevant part of Section 20 reads thus:

20. Other suits to be instituted where defendants reside or cause of action arises.-Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction-

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(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

34. Bare reading of Clause (c) leaves no room for doubt that a suit would lie in a court within the local limits of whose jurisdiction the cause of action has arisen, wholly or partly.

35. Section 20 has been designed to secure that justice might be brought as near as possible to every man''s hearthstone and that the defendant should not be put to the trouble and expense of travelling long distances in order to defend himself.

36. According to the plaintiff Company, a suit instituted on the Original Side of the High Court of Delhi is maintainable since a part of cause of action had accrued within the territorial jurisdiction of the Delhi court (breach of agreement by the defendant).

37. The argument of the defendant that the agreement was executed in Hong Kong and hence suit could have been instituted only in that country is, in our opinion, not well founded. It is no doubt true that the suit could have been instituted in Hong Kong as well. That, however, does not take away the jurisdiction of the Delhi court where a part of cause of action has arisen. In the plaint, it was specifically alleged by the plaintiff Company that the defendant committed breach of terms and conditions of agreement during the trade fair in February 2005 held in Pragati Maidan, Delhi. It was, therefore, open to the plaintiff Company to institute a suit in a competent court within the jurisdiction of Delhi and that is how the suit is filed in the High Court on its Original Side.

38. In our considered opinion, therefore, the contention of the appellant-defendant that the agreement was executed in a foreign country or the defendant was a resident of Ghaziabad (Uttar Pradesh) cannot take away, exclude or oust the jurisdiction of the Delhi court in view of the averment made in the plaint that a part of cause of action had arisen within the local limits of Delhi.

7. The compact with regard to the Bank Guarantee originated at New Delhi. Consequent upon the plaintiff approaching Vijaya Bank in their Branch Office at New Delhi, and on the request of the plaintiff, Vijaya Bank furnished the subject Bank Guarantee. The cause of action, therefore, had squarely and indubitably

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arisen in New Delhi. We are mindful of the fact that Defendant Nos. 2 and 3 do not actually and voluntarily reside or carry on business in Delhi. Since the cause of action has arisen in Delhi and since the exclusion Clause in the Bank Guarantee (reproduced above) does not completely oust the jurisdiction of Courts at Delhi, we are unable to sustain this finding of the learned Single Judge. As we have recorded, Mr. Mata has not supported this aspect of the Judgment. We may observe that it causes avoidable confusion where the Court opines that it does not have jurisdiction and yet enters on the merits of the case.

8. Coming to the issue of grant of injunction against invocation of Bank Guarantee, the Hon''ble Supreme Court has crystalized the law regarding invocation/encashment of Letter of Credit and Bank Guarantee in its pronouncements such that it admits of no debate or doubt. As far back as in 1970, the Court had in Tarapore and Co. Vs. V/O Tractoroexport and Another, elaborately and perspicuously explained the scope and ambit of judicial interference in matters concerning Letters of Credit and Bank Guarantees in these words-

The scope of an irrevocable letter of credit is explained thus in Halsbury''s Laws of England (Vol. 34, Paragraph 319 at page 185):

It is often made a condition of a mercantile contract that the buyer shall pay for the goods by means of a confirmed credit, and it is then the duty of the buyer to procure his bank, known as the issuing or originating bank, to issue an irrevocable credit in favour of the seller by which the bank undertakes to the seller, either directly or through another bank in the seller''s country known as the correspondent or negotiating bank, to accept drafts drawn upon it for the price of the goods, against tender by the seller of the shipping documents. The contractual relationship between the issuing bank and the buyer is defined by the terms of the agreement between them under which the letter opening the credit is issued; and as between the seller and the bank, the issue of the credit duly notified to the seller creates a new contractual nexus and renders the bank directly liable to the seller to pay the purchase price or to accept the bill of exchange upon tender of the documents. The contract thus created between the seller and the bank is separate from, although ancillary to, the original contract between the buyer and the seller, by reason of the bank''s undertaking to the seller, which is absolute. Thus the bank is not entitled to rely upon terms of the contract between the buyer and the seller which might permit the buyer to reject the goods and to refuse payment therefor; and, conversely, the buyer is not entitled to an injunction restraining the seller from dealing with the letter of credit if the goods are defective.

Chalmers on ''Bills of Exchange'' explains the legal position in these words

The modern commercial credit serves to interpose between a buyer and seller a third person of un-questioned solvency, almost invariably a banker of international repute; the banker on the instructions of the buyer issues the letter

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of credit and thereby undertakes to act as paymaster upon the seller performing the conditions set out in it. A letter of credit may be in any one of a number of specialised forms and contains the undertaking of the banker to honour all bills of exchange drawn thereunder. It can hardly be over-emphasised that the banker is not bound or entitled to honour such bills of exchange unless they, and such accompanying documents as may be required thereunder, are in exact compliance with the terms of the credit. Such documents must be scrutanised with meticulous care, the maxim de minimis non curat lex cannot be invoked where payment is made by the letter of credit. If the seller has complied with the terms of the letter of credit, however, there is an absolute obligation upon the banker to pay irrespective of any disputes there may be between the buyer and the seller as to whether the goods are up to contract or not.

Similar are the views expressed in `Practice and Law of Banking'' by H.B. Sheldon, ''the Law of Bankers Commercial Credits'' by H.C. Gutteridge, ''the Law relating to Commercial Letters of Credit'' by A.G. Devis'' ''the Law Relating to Bankers'' Letters of Credit'' by B.C. Mitra and in several other text books read to us by Mr. Mohan Kumaramangalam, learned Counsel for the Russian Firm. The legal position as set out above was not controverted by Mr. M.C. Satalvad, learned Counsel for the Indian Firm. So far as the Bank of India is concerned it admitted its liability to honour the letter of credit and expressed its willingness to abide by its terms. It took the same position before the High Court.

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10. A case somewhat similar to the one before us came up for consideration before the Queens Bench Division in England in Hamzeh Walas and Sons v. British Imex Industries Ltd. 1958 2 QB 127. Therein the plaintiffs, a Jordanian firm contracted to purchase from the defendants, a British firm, a large quantity of reinforced steel rods, to be delivered in two instalments. Payment was to be effected by opening in favour of the defendants of two confirmed letters of credit with the Midland Bank Ltd., in London, one in respect of each instalment. The letters of credit were duly opened and the first was realised by the defendants on the delivery of the first instalment. The plaintiffs complained that that instalment was defective and sought an injunction to bar the defendants from realizing the second letter of credit. Donovan, J., the Trial Judge refused the application. In appeal Jenkins, Sellers and Pearce L., JJ. Confirmed the decision of the Trial Judge. In the course of his judgment Jenkins, L.J., who spoke for the Court observed thus:

We have been referred to a number of authorities, and it seems to be plain enough that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes upon the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties as to whether the goods are up to contract or not. An elaborate commercial system has been built up on the footing that bankers'' confirmed credits are of that character, and, in my judgment, it would be wrong

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for this Court in the present case to interfere with that established practice.

There is this to be remembered, too. A vendor of goods selling against a confirmed letter of credit is selling under the assurance that nothing will prevent him from receiving the price. That is of no mean advantage when goods manufactured in one country are being sold in another. It is, furthermore, to be observed that vendors are often reselling goods bought from third parties. When they are doing that, and when they are being paid by a confirmed letter of credit, their practice is - and I think it was followed by the defendants in this case--to finance the payments necessary to be made to their suppliers against the letter of credit. That system of financing these operations, as I see it, would break down completely if a dispute as between the vendor and the purchaser was to have the effect of .freezing. if I may use that expression the sum in respect of which the letter of credit was opened.

In Urquhart Lindsay and Co. Ltd. v. Eastern Bank Ltd. 1922 1 KB 318 the King''s Bench held that the refusal of the defendants bank to take and pay for the particular bills on presentation of the proper documents constituted a repudiation of the contract as a whole and that the plaintiffs were entitled to damages arising from such a breach. It may be noted that in that case the price quoted in the invoices was objected to by the buyer and he had notified his objection to the bank. But under the terms of the letter of credit the bank was required to make payments on the basis of the invoices tendered by the seller. The court held that if the buyers had an enforceable claim that adjustment must be made by way of refund by the seller and not by the way of retention by the buyer.

11. Similar opinions have been expressed by the American Courts. The leading American case on the subject is Dulien Steel Products Inc., of Washington v. Bankers Trust Co., Federal Reporter 2nd Series, 298 p. 836. The facts of that case are as follows:

The plaintiffs, Dulien Steel Products Inc., of Washington, contracted to sell steel scrap to the European Iron and Steel Company. The transaction was put through M/s. Marco Polo Group Project, Ltd. who were entitled to commission for arranging the transaction. For the payment of the the commission to Marco Polo, plaintiffs procured an irrevocable letter of credit from Seattle First National Bank. As desired by Marco Polo this letter of credit was opened in favour of one Sica. The defendant-bankers confirmed that letter of credit. The credit stipulated for payment against (1) a receipt of Sica for the amount of the credit and (2) a notification of Seattle Bank to the defendants that the plaintiffs had negotiated documents evidencing the shipment of the goods. Sica tendered the stipulated receipt and Seattle Bank informed the defendants that the Dulien had negotiated documentary drafts. Meanwhile after further negotiations between the plaintiffs and the vendees the price of the goods sold was reduced and consequently the commission payable to Marco Polo stood reduced but the defendants were not informed of this fact. Only after notifying the defendants about the negotiation of the drafts drawn under the contract of sale, the Seattle Bank informed the

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defendants about the changes underlying the transaction and asked them not to pay Sica the full amount of the credit. The defendants were also informed that Sica was merely a nominee of Marco Polo and has no rights of his own to the sum of the credit. Sica, however, claimed payment of the full amount of the credit. The defendants asked further instructions from Seattle Bank but despite Seattle Bank''s instructions decided to comply with Sica''s request. After informing Seattle Bank of their intention, they paid Sica the full amount of the credit. plaintiffs thereupon brought an action in the District Court of New York for the recovery of the moneys paid to Sica. The action was dismissed by the trial Court and that decision was affirmed by the Court of Appeals. That decision establishes the well known principle that the letter of credit is independent of and unqualified by the contract of sale or underlying transaction. The autonomy of an irrevocable letter of credit is entitled to protection. As a rule Courts refrain from interfering with that autonomy.

9. In United Commercial Bank Vs. Bank of India and Others, the Apex Court has reiterated that Courts ought not to grant injunctions restraining the performance of the contractual obligations flowing out of a Letter of Credit or a Bank Guarantee between one Bank and another. It observed 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. A banker issuing or confirming an irrevocable credit usually undertakes to honour drafts negotiated, or to reimburse in respect of drafts paid, by the paying or negotiating intermediate banker and the credit is thus in the hands of the beneficiary binding against the banker. A letter of credit constitute the sole contract with the banker and a bank issuing or confirming a letter of credit is not concerned with the underlying contract between the buyer an 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. The banker owes a duty to the buyer to ensure that the documents tendered by the sellers under a credit are complied with those for which the credit calls and which are embodied in terms of paying or negotiating bank The description of the goods in the relative bill of exchange must be the same description in the letter of credit, that it, the goods themselves must in each be described in identical terms, even though the goods differently described in the two documents are, in fact, the same. It is the description of the goods that is all important and if the description is not identical it is the paying bank''s duty to refuse payment.

10. A study of U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., is extremely instructive. The Hon''ble Supreme Court again spoke in these words-

45. The letter of credit has been developed over hundreds of years of international trade. It was most commonly used in conjunction with the sale of goods between geographically distant parties. It was intended to facilitate the

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transfer of goods between distant and unfamiliar buyer and seller. It was found difficult for the seller to rely upon the credit of an unknown customer. It was also found difficult for a buyer to pay for goods prior to their delivery. The Bank''s letter of credit came into existence to bridge this gap. In such transactions, the seller (beneficiary) received payment from issuing bank when he presents a demand as per terms of the documents. The bank must pay if the documents are in order and the terms of credit are satisfied. The bank, however, was not allowed to determine whether the seller had actually shipped the goods or whether the goods conformed to the requirements of the contract. Any dispute between the buyer and the seller must be settled between themselves. The courts, however, carved out an exception to this rule of absolute independence. The courts held that if there has been fraud in the transaction the bank could dishonour beneficiary''s demand for payment. The courts have generally permitted dishonour only on the fraud of the beneficiary, not the fraud of somebody else.

46. It was perhaps for the first time the said exception of fraud to the rule of absolute independence of the letter of credit has been applied by Shientag, J. in the American case of Sztejn v. J. Henry Schroder Banking Corporation 31 NYS 2d 631. Mr. Sztejn wanted to buy some bristles from India and so he entered into a deal with an Indian seller to sell him a quantity. The issuing Bank issued a letter of credit to the Indian seller that provided that, upon receipt of appropriate documents, the bank would pay for the shipment. Somehow, Mr. Sztejn discovered that the shipment made was not crates of bristles, but creates of worthless material and rubbish. He went to his bank which probably informed him that the letter of credit was an independent undertaking of the bank and it must pay.

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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 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 bank''s 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.

11. In Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and

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another, , the following observations have been made:

We are, therefore, of the opinion that the correct position of law is that commitment of banks must be honoured free from interference by the courts and it is only in exceptional cases, that is to say, in case of fraud or in a case where irretrievable injustice would be done if bank guarantee is allowed to be encashed, the court should interfere. In this case fraud has not been pleaded and the relief for injunction was sought by the contractor/Respondent 1 on the ground that special equities or the special circumstances of the case required it. The special circumstances and/or special equities which have been pleaded in this case are that there is a serious dispute on the question as to who has committed breach of the contract, that the contractor has a counter-claim against the appellant, that the disputes between the parties have been referred to the arbitrators and that no amount can be said to be due and payable by the contractor to the appellant till the arbitrators declare their award. In our opinion, these factors are not sufficient to make this case an exceptional case justifying interference by restraining the appellant from enforcing the bank guarantees. The High Court was, therefore, not right in restraining the appellant from enforcing the bank guarantees.

12. In AIR 1997 1644 (SC) the circumstances in which the invocation of a Bank Guarantee or payments made pursuant thereto could be interdicted, had been Restated. While spelling out the essentials of fraud and/or irretrievable injustice in this context, the Apex Court had recorded the following observations:

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 coexist in some cases.

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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 the Itek Corpn. case, 566 Fed Supp 1210. 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 Itek case (supra) 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.

15. Our attention was invited to a number of decisions on this issue--among them, to Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and others, and Hindustan Steel Workers Construction Ltd. Vs. G.S. Atwal and Co. (Engineers) Pvt. Ltd., as also to National Thermal Power Corporation Ltd. Vs. M/s. Flowmore Private Ltd. and another, . The latest decision is in the case of State of Maharashtra and another Vs. M/s. National Construction Company, Bombay and another, where this Court has summed up the position by stating:

The rule is well established that a bank issuing a guarantee is not concerned with the underlying contract between the parties to the contract. The duty of the bank under a performance guarantee is created by the document itself. Once the documents are in order the bank giving the guarantee must honour the same and make payment ordinarily unless there is an allegation of fraud or the like. The courts will not interfere directly or indirectly to withhold payment, otherwise trust in commerce internal and international would be irreparably damaged. But that does not mean that the parties to the underlying contract cannot settle the disputes with respect to allegations of breach by resorting to litigation or arbitration as stipulated in the contract. The remedy arising ex contractu is not barred and the cause of action for the same is independent of enforcement of the guarantee.

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13. Reference may also be made to the observations of B.N. Kirpal, J. (as his Lordship then was) in Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, , and the terse deprecation contained therein to the Courts'' interdicting the normal operation of Bank Guarantees and Letters of Credit. 21. Numerous decisions of this Court rendered over a span of nearly two decades have laid down and reiterated the principles which the courts must apply while considering the question whether to grant an injunction which has the effect of restraining the encashment of a bank guarantee. We do not think it necessary to burden this judgment by referring to all of them. Some of the more recent pronouncements on this point where the earlier decisions have been considered and reiterated are Svenska Handelsbanken v. Indian Charge Chrome, Larsen & Toubro Ltd. v. Maharashtra SEB, Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd. and U.P. State Sugar Corpn. v. Sumac International Ltd. The general principle which has been laid down by this Court has been summarised in the case of U.P. State Sugar Corpn. As follows: (SCC p. 574, para 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 the 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.

Dealing with the question of fraud it has been held that fraud has to be an established fraud. The following observations of Sir John Donaldson, M.R. In Bolivinter Oil SA v. Chase Manhattan Bank are apposite:

...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

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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."

The aforesaid passage was approved and followed by this Court in U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.

22. The second exception to the rule of granting injunction, i.e., the resulting of irretrievable injury, has to be such a circumstance which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds. This will have to be decisively established and it must be proved to the satisfaction of the court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary, by way of restitution.

14. It will be apposite to make a reference of Federal Bank Limited v. V.M. Jog Engineering Limited (2001) 1 SCC 663 the Apex Court had recorded the following enunciation of law-

In several judgments of this Court, it has been held that courts ought not to grant injunction to restrain encashment of bank guarantees or letters of credit. Two exceptions have been mentioned - (i) fraud, and (ii) irretrievable damage. If the plaintiff is prima facie able to establish that the case comes within these two exceptions, temporary injunction under Order 39 Rule 1 CPC can be issued. It has also been held that the contract of the bank guarantee or the letter of credit is independent of the main contract between the seller and the buyer. This is also clear from Articles 3 and 4 of UCP (1983 Revision). In case of an irrevocable bank guarantee or letter of credit the buyer cannot obtain injunction against the banker on the ground that there was a breach of the contract by the seller. The bank is to honour the demand for encashment if the seller prima facie complies with the terms of bank guarantee or the letter of credit, namely, if the seller produces the documents enumerated in the bank guarantee or the letter of credit. If the bank is satisfied on the face of the documents that they are in conformity with the list of documents mentioned in the bank guarantee or the letter of credit and there is no discrepancy, it is bound to honour the demand of the seller for encashment. While doing so it must take reasonable care. It is not permissible for the bank to refuse payment on the ground that the buyer is claiming that there is a breach of contract. Nor can the bank try to decide this question of breach at that stage and refuse payment to the seller. Its obligation under the document having nothing to do with any dispute as to breach of contract between the seller and the buyer.

15. It is evident that despite the clarity and consistency in the decisions of the Hon''ble Supreme Court injunctions for the encashment of Bank Guarantees and Letters of Credit are nevertheless granted. Very recently in National Highway Authority of India Vs. Ganga Enterprises and Another, , the Apex Court again adumbrated the law on this subject in the following passage:

It is settled law that a contract of guarantee is a complete and separate contract

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by itself. The law regarding enforcement of an ''on-demand bank guarantee'' is very clear. If the enforcement is in terms of the guarantee, then courts must not interfere with the enforcement of bank guarantee. The court can only interfere if the invocation is against the terms of the guarantee of if there is any fraud. Courts cannot restrain invocation of an ''on-demand guarantee'' in accordance with its terms by looking at terms of the underlying contract. The existence or non- existence of an underlying contract becomes irrelevant when the invocation is in terms of the bank guarantee. The bank guarantee stipulated that if the bid was withdrawn within 120 days or if the performance security was not given or if an agreement was not signed, the guarantee could be enforced. The bank guarantee was enforced because the bid was withdrawn within 120 days. Therefore, it could not be said that the invocation of the bank guarantee was against the terms of the bank guarantee. If it was in terms of the bank guarantee, one fails to understand as to how the High Court could say that the guarantee could not have been invoked. If the guarantee was rightly invoked, there was no question of directing refund as has been done by the High Court.

16. From the above discussion, it is manifestly clear that there is no dispute that a Letter of Credit is an independent contract and the Courts are not to interfere with the encashment of the Letter of Credit unless the case falls within the purview of exceptions laid down by the Apex Court. The first exception which has been carved out by the Courts is that the fraud perpetrated must be of egregious nature meaning that the said fraud must be one of gross nature which shakes the conscience of the Court and the said fraud must be known to the parties including the party representing as well as the bank. Under the said circumstances, if the said fraud is established, the Court can interfere with the bank guarantee. In U.P. Cooperation Federation Ltd. (Supra) also it was held that the fraud pleaded must be of an egregious nature so as to vitiate the entire underlying transaction of the Bank Guarantee. It is fraud of the beneficiary and not the fraud of somebody else that would make the Court to grant the Order of injunction as asked for.

17. So far as the facts of the present case are concerned, Mr. Raju Ramachandran, learned Senior Counsel appearing for the plaintiff, has contended that the plaintiff has responded and reacted to a Letter of Intent (LoI) dated 12.12.2004 received by it from CWC, Saudi Arabia. It is noteworthy that this document does not postulate the furnishing of a Performance Bank Guarantee. Indeed, the contract states that it would become effective only upon the obtainment by the plaintiff of the Final License of Approval from the Saudi Authorities. The main plank of the argument on behalf of the plaintiff is that the subject Bank Guarantee was furnished in anticipation of the award of the contract covered by the LoI dated 12.12.2004 and since this did not transpire, the Bank Guarantee became devoid of consideration. Poignantly, the Plaint makes no mention of the LoI dated 15.12.2004 between the CWC, Saudi Arabia and Bhandari Engineers and Builders, Saudi Arabia (BEBSA) which document, inter alia, stipulates -''The execution of this agreement terms is subject to

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obtaining a 5% Performance Bond of contract value specified in Item ''Third'' above valid for 45 months; delivered to Main Contractor(CWC) as a beneficiary from a local Saudi Bank within 30 days from signing letter of award and shall also depend on and be connected with signing the final contracting between the parties in respect of assigning of the execution of works, subject of agreement, after completion of all official procedures and obtaining the related required approval''. Mr. Ramachandran has informed us, on instructions, that sixty five per cent equity of BEBSA is held by the plaintiff; twenty five per cent by a Saudi National, Mr. Mohammed Al-Ghadi and ten per cent by a non-resident Indian, Mr. Udai Bhanu. The learned Single Judge has noted and has expressed his disapproval on the plaintiff''s failure to mention this LoI dated 15.12.2004 and the Contract that was entered into was predicated thereon. Reacting to this conduct of the plaintiff, the learned Single Judge has found the plaintiff to have made material misrepresentations and willful concealment of relevant facts. LoI dated 12.12.2004 did not fructify into the emergency of any contractual relations between any of the parties before us presumably because of the failure of the plaintiff to secure the requisite Licence. It is the LoI dated 15.12.2004 and the resultant Contract which records the assigning of the execution of works of ''Branch Sewerage Networks in Central District, Jedah'' to CWC which, in turn, has sub contracted forty per cent of the value of this work-order to BEBSA. As clarified by the Annexure to the LoI dated 15.12.2004, the value of the work was SAR 770002029.5, forty per cent thereof is SAR 308000811.8 which is the value of the work sub-contracted by CWC to BEBSA. Of this, BEBSA has further sub-contracted SAR 250 million to the plaintiff which is its sister concern and holding company.

18. Mr. Raju Ramachandran has endeavoured to explain the existence of the two LoIs dated 12.12.2004 and 15.12.2004 by contending that even though they make a mention of the entire works of Branch Sewerage Networks in Central District, Jedah, smaller sub-divisions of the work were in the contemplation of CWC. If this was the position, we find no conceivable reason why the LoI dated 15.12.2004 had not been filed by the plaintiff. It is palpably clear that the LoI dated 15.12.2004 had been deliberately withheld in order to paint a picture that only one LoI had been issued, that too to the plaintiff, which LoI does not lead to the award of any contract. Had the latter LoI dated 15.12.2004 been filed, we are in no manner of doubt that the Court would have sought clarification on which one of the two LoIs had fructified into a contract. It is nobody''s case that the contract with BEBSA did not come into existence. In our opinion, the finding of the learned Single Judge to the effect that there has been misrepresentation or concealment by the plaintiff is fully substantiated by the withholding of these documents. It bears reiteration that the requirement of furnishing a Bank Guarantee does not find articulation in the LoI dated 12.12.2004, which indeed concerned the plaintiff. Significantly, the corresponding 7th Clause speaks of the need for the obtainment of Final License Approval which is topical because the plaintiff/BEBP does not have a Saudi Licence whereas BEBSA does.

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19. The Defendant, Vijaya Bank, has placed on record a photocopy of the letter dated 6.12.2004 addressed by CWC Saudi Arabia to BEBSA, informing the latter that its Tender relating to the said Works for a sum of SAR 380 million is acceptable, subject to the deposit with CWC of a Performance Bond amounting to SAR 15.4 million (that is, approximately five per cent of the value of the sub-contract) in the form of a Bankers Guarantee from an approved local bank. Learned Senior Counsel has drawn attention to the documents preparatory to the execution of the Bank Guarantee by Vijaya Bank in which it has been mentioned that purpose of the Guarantee is ''to secure work''. We do not agree with Mr. Ramachandran that the only deduction possible is that the plaintiff had its sight fastened on securing the contract for itself, keeping in our mind the fact that BEBSA was a subsidiary/sister concern of the plaintiff. The sequence of events is that at the instance of the plaintiff Vijaya Bank requested, on 19.1.2005, Saudi Hollandi Bank to furnish a Performance Guarantee to CWC Saudi Arabia which the latter did on the very same date. These transactions occurred in the wake of the failure of the plaintiff to secure the contract for itself, and the success of its subsidiary BEBSA to obtain the subject sub-contract from CWC. Attention has also been drawn to the notings of Vijay Bank to the following effect:

The new contract work of laying Sewer System in the city of Jeddah, kingdom of Saudi Arabia, is obtained on sub contract basis from Civil Works Co. Ltd. Dammam, Saudi Arabia, Riyadh and the aggregate value is 1250 million Saudi Riyals, out of which 700 million SR is retained by the Principal and 300 million SR is sub contracted to Bhandari Engineers and Builders Saudi Arabia and 250 millions to Messrs Bhandari Engineers and Builders Pvt. Ltd. who are the applicant company. The Company is to furnish BG to CWC Ltd. aggregating to 5% of 250 millions which comes to around Rs. 15.00 crores.

20. It is also uncontroverted that a contract was executed on 15.12.2004 between BEBSA and BEPB, which sub-contracted Works of the value of SAR 250 million to the plaintiff. It has been explained by Mr. Mata, learned Senior Counsel, and not denied by Mr. Raju Ramachandran, learned Senior Counsel for the plaintiff/Appellant, that the remainder portion of the Works of the value of SAR 58 million was placed by BEBSA on Kunal Traders (for the manufacture of manholes). Thus, BEBSA sub-contracted the entire Works placed on it aggregating SAR 308 million. The contract between BEBSA and BEPB obligated BEBP to issue a Performance Bond of a value of five per cent of the total sub-contract which is exactly the sum mentioned in the subject Bank Guarantee. This document has also been filed, not by the plaintiff, but by the Defendant Bank.

21. Learned Senior Counsel for the Appellant/plaintiff/BEPB places emphasis on a letter dated 24.10.2007 written by it to Vijaya Bank mentioning therein that the plaintiff could not get Commercial Registration Certificate from the Ministry of Commerce, Saudi Arabia and that without Commercial Registration no company could operate a bank account in Saudi Arabia or carry out any commercial transaction in Saudi Arabia. This statement is correct and is obviously the reason

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why the plaintiff''s face in Saudi Arabia, viz. BEBSA, secured the contract and then passed it on to BEBP. ''Therefore, no work was done in the name of BEBP in Saudi Arabia''. This was followed by another letter dated 1.10.2007 in which a mention was again made only to the LoI dated 12.12.2004. The plaintiff has maintained in the said letter that under the belief that award of contract to it would follow, the plaintiff had requested Vijaya Bank to issue Counter Bank Guarantee in favour of Saudi Hollandi Bank for the benefit of CWC. ''However, no contract was finalized because no contract was entered into''. This is a willful misstatement and suppression of the factual position. It appears that Vijaya Bank had addressed a letter to Saudi Hollandi Bank attempting to cancel the said Bank Guarantee of SAR 12.5 million on the ground that no contract had been entered into. This was immediately responded to by Saudi Hollandi Bank (which had, in turn, furnished a Bank Guarantee to CWC), stating that the Counter Guarantee by Vijaya Bank was an independent contract for which Vijaya Bank would remain liable.

22. Mr. Mata has explained that the stand taken by Vijaya Bank was an abortive attempt to assist its constituent, BEBP and should not be held against the Bank, as is patently apparent on a reading of the Meeting of the Board of Directors of BEBP held on 6.12.2004 which reads thus:

Bank Guarantee from Vijaya Bank

The Chairman informed the Board that for the Company has been offered a sub contract work by Bhandari Engineers and Builders Saudi Arabia for construction of Branch Sewerage Network in the North Central District, Jeddah. For this it is necessary to provide Non Fund Based Bank Guarantee Facility for performance of the contract from a Bank. He suggested approaching Vijaya Bank for availing banking facilities from them. After discussion following resolution was passed: ''RESOLVED THAT the company do request the Vijaya Bank, for allowing the company the Non Fund Based Foreign Bank Guarantee Facility to the extent of Rs. 12.50 million SAR equivalent to Rs. 15.00 Crores (Rupees Fifteen Crores only) representing 5% of 250 million SAR for performance of Branch Sewerage Network in the North Central District, Jeddah Contract.

FURTHER RESOLVED THAT the S. Amrik Singh Bhandari, Chairman and Managing Director of the company be and is hereby authorized to secure the said facilities and to execute all documents and papers as required by the said Bank and to affix common seal if required and to do all such acts and deeds and things as may be necessary to secure the above facilities.

23. The position that emerges is crystal clear. The plaintiff had, no doubt, received a LoI dated 12.12.2004. Meanwhile, BEBSA, its subsidiary, came to receive an LoI dated 15.12.2004 in respect of the very same Works. It will not be sanguine to presume that these events had become necessary because the plaintiff would not have received the contract directly from the Government of Saudi Arabia and, therefore, coming to know of this fact had projected and

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supported its subsidiary for the same work. The subsidiary sub-contracted the entire work, majorly to plaintiff (SAR 250 million) with the remainder 58 million to Kunal Traders. In conformity with the written obligations, the plaintiff had arranged the Bank Guarantee for SAR 12.5 million (five per cent of its sub-contract) through Vijaya Bank, on the strength of which Saudi Hollandi Bank had given a Performance Bank Guarantee to CWC. This completely annihilates the case of the plaintiff to the effect that the Bank Guarantee had been furnished in anticipation of the award of the contract to the plaintiff and that it was totally distinct to the contract awarded to its subsidiary, BEBSA. In these circumstances, there was complete consideration for the furnishing of the subject Bank Guarantee by Vijaya Bank at the instance of the plaintiff. Therefore, we find no fraud whatsoever in the invocation of the Bank Guarantee, leave alone egregious fraud or irretrievable injury which must be evident for a Court to be persuaded to restrain its encashment.

24. In the course of hearings, we had enquired as to whether the contract has been completed. We have been informed that there are some disputes between BEBSA and CWC. This sequence of events explains the delay on the part of the plaintiff in seeking a cancellation of this Bank Guarantee as late as in October, 2007. Obviously, the plaintiff had become wise to the fact that CWC would invoke the Bank Guarantee provided to it by Saudi Hollandi Bank which would have the cascading consequence of Saudi Hollandi Bank invoking the Bank Guarantee provided to it by Vijaya Bank which, in turn, would result in Vijaya Bank effecting recovery of its dues from the plaintiff. This position also emerged from a letter dated 24.9.2005 of the plaintiff to Vijaya Bank mentioning, inter alia, thus:

4.1 The work was sub-contracted by Principal Contractor, Civil Works Company Ltd., Damman to a Registered Saudi Registered Company M/s. BEBSAL with Regd. Office at P.O. Box 57382 Riyadh 11574, Flat No. 03, First Floor, Naghi Center, Near King Faisal International Academy, Iman Saudi Bin Abdul Aziz, Bin Mohammed Road, Riyadh, Kingdom of Saudi Arabia. The Chairman of BEBSAL is Mr. Mohammed Al-Ghadi and Managing Director is S. Ajit Singh Bhandari, a Non Resident Indian and settled abroad. BEBSAL sub-contracted to Bhandari Engineers & Builders Pvt. Ltd., New Delhi. On the basis of our proposal, your bank issued Counter Guarantee in favour of Hollandi Bank, Riyadh who issued an irrevocable guarantee to Principal Contractor M/s. Civil Works Company Ltd.

...

4.3 We would like to add that the principal contractor M/s. Civil Works Company Ltd. with whom the Bank Guarantee was lodged threatened to encash the Bank Guarantee unless the work is commenced immediately. This project is of National Importance to Kingdom of Saudi Arabia and His Royal Highness the King of Saudi Arabia have formed a Special Team for monitoring the Project. The Company would have been black-listed and debarred from taking any work in Saudi Arabia in case the work was not started in BEBSAL. Based on the understanding, BE&BPL commended construction with very limited resources in July/August,

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2005.

25. The present case fails to meet the condition laid out in first exception itself inasmuch as the pleadings do not contain details of the alleged fraud nor it is stated anywhere and/or elucidated that the fraud is of egregious nature. The alleged fraud finds mention in paragraph 34 of the Plaint where it is merely averred that ''The refusal by Defendant No. 3 to return the performance Bank Guarantee and the retention by the Defendant No. 3 of the Bank Guarantee tendered by plaintiff is a complete breach of trust and a fraud practiced by the Defendant No. 3 on the plaintiff''. In the face of absence of necessary pleadings, and substantiated arguments with regard to the commission of fraud, we are not satisfied with the submission of the learned Counsel for the plaintiff in this regard.

26. In these circumstances, we are of the opinion that the Appeal is wholly devoid of merit. The learned Single Judge has rightly concluded that the plaintiff has failed to manifest any egregious fraud in the invoking of the Bank Guarantee furnished by Vijaya Bank. Further, the learned Single Judge is correct in concluding that the plaintiff was guilty of deliberate misrepresentation of the factual position inasmuch as the case of the plaintiff that the subject Bank Guarantee was bereft of consideration was contrary to the facts of the case. While the plaintiff may not have succeeded in obtaining the contract for the execution of the works of Branch Sewerage Networks in Central District, Jedah from CWC, it had actually received the predominant share of the works awarded to BEBSA, that is, SAR 250 million out of the total of SAR 308 million awarded to BEBSA. We are also of the opinion that since the plaintiff had approached the Court with unclean hands, it had disentitled itself from any injunctory relief. Apart from the fact that on the refusal to grant injunctory relief the main relief in the suit had become infructuous, misrepresentation of facts is sufficient reason for the dismissal of the suit itself.

27. The Appeal is dismissed. Since the plaintiff/Appellant has failed altogether in substantiating any of the grounds urged by it, this is a fit case for awarding actual costs. We, however, direct the plaintiff/Appellant to pay costs of Rupees 20,000/- to Vijaya Bank within four weeks from today.

28. Trial Court record be sent back.

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