

(1995) 08 DEL CK 0054

In the Delhi High Court

Case No : Interim Application No's. 14490 of 1992 and 7179 of 1994 and Suit No. 4666 of 1992

Biba-chem Private Ltd.

APPELLANT

Vs

Hi-tech Carbon and Another

RESPONDENT

Date of Decision : 01-08-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1

Citation : (1995) 3 AD 1047 : (1995) 34 DRJ 520

Hon'ble Judges : S.K. Mahajan, J

Bench : Single Bench

Advocate : A.K. Singhia, Mukul Rohatagi and Bina Gupta, for the Appellant;

Judgement

S.K. Mahajan, J.

(1) This order will dispose of the application under Order 39 Rule I and 2 filed by the plaintiff for an injunction restraining defendant No.1 from enforcing bank guarantee No.4/90 and No.1/91 for Rs. 10,00,000.00 and Rs.5,00,000.00 respectively and defendant No.2 bank from acting thereupon as also the application of defendant No.1 under Order 39 rule 4 for vacating the ex-parte stay granted in favor of the plaintiff on 4th January, 1993, whereby defendant No.1 was restrained from enforcing the aforesaid two guarantees.

(2) In short, the facts of this case are that vide letter dated 29th June, 1988, the plaintiff was appointed the sales agent of defendant No.1 on the terms and conditions as contained in the said agreement. The designation as mentioned in the said letter for the plaintiff was "Consignment Agent". Under the terms of the agreement, the plaintiff was to sell the products of defendant No. I and it was to be paid commission at the rates agreed between the parties. In terms of the agreement, the plaintiff was to let defendant No. I know the estimated monthly quantity that the plaintiff was expected to sell in the succeeding month and defendant No. I was to consign its products to the plaintiff in such quantities as might be available with them at the relevant time. The plaintiff was to promptly

and quickly take delivery of the products consigned and dispatched by defendant No.1. Defendant No.1 had also reserved its rights to sell its products, during the continuance of the agreement, to any other party and to appoint any other distributor, stockists, etc. and such appointment would not have given any right to the plaintiff to claim any commission or consideration whatsoever. The plaintiff was also required to furnish guarantee in terms of the said agreement. It will be useful to quote clause 12 of the said agreement which requires the furnishing of guarantee as the entire case is based upon the said guarantees which were furnished under clause 12: -

"YOU shall furnish us a confirmed and irrevocable guarantee in a form acceptable to us for a sum of Rs.15 lakhs only from a scheduled Bank to be approved by us or deposit with us Rs.15 lakhs only as and by way of security for the due performance of the several conditions/obligations/stipulations and terms herein contained on your part to be complied with, observed and performed. It shall be a condition of such Bank guarantee or deposit, that in the event of any breach or non compliances, nonobservance and nonperformance of any or all the conditions, obligations, stipulations under the agreement the said guarantee or deposit shall forthwith become enforceable by us and the Bank shall forthwith upon demand by us unconditionally pay to us the amount of the Bank Guarantee without any recourse or reference to you whatsoever and without any abatement, hindrance and/or objection whatsoever. The security deposit will carry interest @ 14%."

(3) In the first instance, the agency agreement was for a period of one year and was to continue up to 30th June, 1989 after which it could have been extended by mutual agreement between the parties.

(4) In terms of .Clause 12 mentioned above, the plaintiff submitted to defendant No.1 a bank guarantee No.4/90 dated 4th January, 1990 for Rs.10,00,000.00 and another guarantee No.1/91 for Rs.5,00,000.00 was given in January, 1991. Both these guarantees had been given by Canara Bank - defendant No.2 for and on behalf of defendant No.1.

(5) Some of the customers to whom the goods have been supplied by defendant No.1 through the plaintiff have stated to have delayed making of payments or defaulted in making payments of the goods supplied to them. The value of unpaid in- voices, according to the plaintiff, has been debited to the account of the plaintiff. According to the plaintiff, though it was the duty of defendant No.1 to make recoveries from the customers, however, the said defendant required the plaintiff to make such recovery and pay the same to the defendant. The agency is stated to have been renewed from time to time and was valid up to July, 1993. Defendant No.1, according to the plaintiff, did not supply any material to the plaintiff after July 1992 and even earlier to that the supply was irregular and had been drastically cut and reduced after March 1989. It is alleged that the plaintiffs working was made impossible by defendant No. I, yet the plaintiff had to keep its establishment intact in expectation of resumption of supply of

material. Attention of defendant No. 1 is stated to have been drawn to the terms of the agency vide letter dated 15th December, 1992. The said defendant in spite of taking note of and appreciate the position explained had informed the plaintiff that it would be invoking the bank guarantees given by the plaintiff. Vide letter dated 16th December, 1992 defendant No.2 informed the plaintiff that the letters of invocation dated 1st December, 1992 have been received from defendant No. 1 on 16th December, 1992. The case of the plaintiff, Therefore, is that the said letters of invocation invoking the bank guarantees, which were valid up to July 1993, is a glaring breach of the terms on the part of defendant No. 1 and the conduct and action of defendant No.1 has occasioned in the plaintiff suffering losses. As per calculations of the plaintiff, a sum of Rs.18,94,924.90 paise was the amount of loss suffered by the plaintiff on account of defendant No.1 committing breach of the terms of the agreement. It is also the case of the plaintiff that its duty-under the agency terms was limited to collection and deposits of sales tax and other taxes/duties and imposing delcreder risk or affixing responsibilities upon the plaintiff to pay the amount allegedly due from the customers was of no avail as the said clauses are not enforceable being barred u/s 230 of the Indian Contract Act. The plaintiff is alleged to have not committed any breach of the terms, conditions and stipulations and instructions under the agreement and as such, according to the plaintiff, the defendants did not have any right to invoke the bank guarantees given by defendant No.2 for and on behalf of the plaintiff.

(6) Along with the suit, an application for an ad-interim injunction has been filed for restraining defendant No.1 from enforcing bank guarantee Nos-4/90 and 1/91 for Rs.10,00,000.00 and Rs.5,00,000.00 respectively and defendant No.2 from acting upon the letters of invocation issued by defendant No.1.

(7) Written statement and reply to the application has been Filed by defendant No.1. Besides challenging the territorial jurisdiction of this Court to decide the case, the defendant has stated that suit for injunction is not maintainable; that both the guarantees were unconditional wherein the banker had assumed unconditional obligation to pay the amount on demand without demur to defendant No.1; the plaintiff could not maintain the suit nor defendant No.2 could refuse to pay the amount once a demand had been made by defendant No.1. On merits, the allegations made by the plaintiff in the suit were stated to be false and it was denied that any loss had been suffered by the plaintiff because of any act of defendant No.1. It was submitted that defendant No.1 was lawfully entitled to invoke the bank guarantees and to receive the payments thereunder. It is stated that there was no cause of action for the plaintiff to file suit for injunction and the plaintiff was not entitled to a stay restraining the bank to make payment of the amount under the guarantee in terms of the letter of invocation given by defendant No.1. Replication "and rejoinder to the application has been filed by the plaintiff.

(8) I have heard Mr.A.K.Singla learned counsel for the plaintiff and Mr. Mukul

Rohtagi, Sr. Advocate for the defendant.

(9) The plaintiff has in support of his case raised three arguments as under : -

1. There was no demand in accordance with the terms of the bank guarantee and consequently the bank should not make payment of amount under the guarantee to defendant No.1;

2. Even if the letter of invocation can be said to be a demand, it may not be enforced as the same was illegal and void;

3. The bank guarantees could not be encashed as the demand made by defendant No.1 was clearly fraudulent and in case the same were invoked, it would disturb special equities and would subject the plaintiff to suffer irretrievable loss and injury.

(10) The contention is that there are serious questions which require decision in the case which cannot be decided otherwise by way of evidence and as such the plaintiff has, prima facie, case. It is also stated that in case the bank guarantees are invoked an irretrievable loss would be caused to the plaintiff and the balance of convenience also demanded that till decision of the suit bank guarantee should not be invoked. It is contended that the plaintiff has made a claim for compensation for non-performance of the obligation by the defendant which claim amount, to more than Rs.19,00,000.00 . It is the submission of the plaintiff that a claim of defendant No.1 is totally false as is apparent from the fact that it was trying to recover from the plaintiff the price of the " . goods which had been directly supplied to third parties. The amount not paid by such customers has been debited to the account of the plaintiff. According to the plaintiff in terms of the agency agreement dated 29th June, 1988 title of the goods always remained with defendant No.1 and the plaintiff was only acting as its agent. plaintiff could not treat the goods as his own goods and, Therefore, it was not possible for the plaintiff to recover the price of goods from the customers to whom the supplies had been made by defendant No.1. According to the plaintiff, he has no locus to recover the amount from the customers and as such debit entries made by defendant No".1 were not warranted by the terms of the agreement and consequently no amount being due from the plaintiff, the said defendant could not invoke the bank guarantees. Reliance has been placed upon judgments reported as K.V. Periyamianna Marakkayar and Sons Vs. Banians and Co., and Champa Ram and Another Vs. Firm Tulshi Ram-Jai Lal, .

(11) The judgments have been cited in support of the contention that to hold the plaintiff, who was only an agent, liable as a principal debtor was not warranted by the agreement. The further contention is that assuming the plaintiff to be liable under clauses 13 and 14 of the agreement, then the said clauses- were void and unenforceable. It is also contended that plaintiff could not be made to accept liability as a delcredere agent because to incur the liability of delcredere agent, such an agent must be paid some additional remuneration. According to the plaintiff, admittedly no additional remuneration had been paid to the plaintiff

and consequently the delcreder risk which is sought to be imposed was totally illegal. Reliance has been placed upon statement of account filed by the defendant to show that the amount due from the third party has been debited to the account of plaintiff. Mr. Singla, Therefore, submits that there arc serious questions which are required to be decided in the suit and without leading evidence thereupon, it will not be just to allow defendant No. I to invoke the bank guarantees.

(12) To my mind, the question as to whether defendant No. I is trying to recover from the plaintiff the price of the goods which had been directly supplied to third parties and as to whether the amount allegedly not paid by such customers- had been debited to the account of the plaintiff does not arise for consideration in the present case. Whether the plaintiff is made liable as a principal debtor or whether the liability of a delcreder agent can be fastened upon the plaintiff is also wholly irrelevant for the purposes of deciding the present application. At this stage, the Court is only to see the terms of the deed of guarantee and no other document to decide as to whether defendant No. I was entitled to invoke the bank guarantee. In case, under the terms of the bank guarantee defendant No. I was within its rights to invoke the same, other questions now sought to be raised will become wholly irrelevant. I am, Therefore, not going into this question as to whether any amount was allegedly due from the plaintiff to defendant No. I and as to whether bank guarantees are being invoked for purposes of recovery of that amount or not.

(13) It is next contended by Mr. Singla that the demand is not in accordance with the terms of the agreement. The submission is that it was only in cases of non-performance or breach of obligations mentioned in clause 12 of the agreement that the bank guarantee can be invoked. The contention, Therefore, is that defendant No. I must disclose as to what were the breaches committed by the plaintiff which have given rise to invocation of the bank guarantee. As the letter of invocation does not at all mention as to what were the acts of non-performance and what were the breaches of the obligations, defendant No. I was not entitled to invoke bank guarantees. Said letter, according to the plaintiff, cannot be said to be a demand and unless there is a demand, the bank cannot pay the amount to the defendant.

(14) The terms of the bank guarantee have been referred to support his argument that it was incumbent upon defendant No. I to mention about its claims against the plaintiff which had arisen under the consignment agency agreement. The contention, Therefore, is that as defendant No. I having not mentioned its claims in the letters of invocation, the bank was not obliged to make payment under the bank guarantee to the said defendant. Relevant contents of the bank guarantee, reliance upon which has been placed, are that "the guarantee shall be irrevocable for all claims of Hi-Tech Carbon in liabilities of M/s.Biba Chem Pvt. Ltd., 208, Hernkunt, Rajendra Place, New Delhi, arising under the consignment agency agreement until discharged by Hi-Tech Carbon in

writing". The submission, Therefore, is that the mention of the words "All claims" in the guarantee means that defendant NO. I must indicate as to what were the claims and how a breach had been committed by the plaintiff of the terms and conditions of consignment agency agreement, which had given rise to the said claims. In the absence of any such claims mentioned in the letters of invocation, defendant No. I could not, as contended by the plaintiff, invoke the guarantee. It is submitted that the bank guarantee cannot be read in isolation of the consignment agency agreement as the said agreement has been made a part of the bank guarantee.

(15) I am afraid, the contention raised by the plaintiff is devoid of any merits. To appreciate the contention of learned counsel for the plaintiff, it will be useful to quote the letter of invocation which is said to be not in accordance with the terms of the agreement: -

DECEMBER1,1992

Manager,

CA?AR Bank ,

OKHLA Kalka ji, Plot No.8,

NEW Delhi .

REF.: Bank guarantee No.4/90 dt,24.1.90 issued in favor of us on behalf of M/s.Biba Chem Pvt. Limited, New Delhi for Rs.10 lacs & your extension letter dt.6.01.92

DEAR Sir ,

THE above referred Bank Guarantee having validity date till 20.1.93 has been issued by you in our favor to guarantee the payment of Rs.10 lacs towards performance of terms and conditions contained in the Consignment Agent's Agreement of M/s.Biba Chem Pvt. Ltd., New Delhi. We are sorry to inform you that Biba Chem P.Ltd. has not performed it's obligation as per our agreement with them and we hereby take recourse to the said guarantee of Rs. 10 lacs.

PLEASE treat this letter as "Notice of Demand" and as per clause 4 of the Bank guarantee issued by you, we request you to kindly remit us Rs.10 lacs urgently against the said Bank guarantee. We are enclosing photocopy of Bank Guarantee No.4/90 dated 24.1.90 and extension letter dated 12.1.91 and 6.1.92 for your doing the needful.

THANKING you,

YOURS faithfully ,

FORHI-TECH Carbon

SD/-

(SS Rathi)

VICE President (Finance)

(16) After the suit had been filed by the plaintiff, defendant No. I had written a letter dated 15th January, 1993 to the bank informing them as under : - "This is further to our letter dated 1st December, 1992 received by you on 16th December, 1992 wherein we had invoked the above mentioned Bank Guarantee for Rs.10 lacs (Rupees Ten Lac only). As already intimated to you, M/s.Biba Chem (P) Ltd. have not performed their obligations as per Agreement dated 29th June, 1988. M/s.Biba Chem (P) Ltd. is liable to pay to us an amount of Rs-27,25,411.06 (Rupees twenty seven lacs twenty five thousand four hundred eleven & paise six only) as per statement annexed hereto. In terms of the said Bank guarantee you are Therefore, liable to pay to us the amount of RS.10 lacs (Rupees ten lac only) as per the Notice of Demand already issued to you by our letter dated 1st December, 1992.

WE may inform you that M/s.Biba Chem (P) Ltd., has filed a Suit in Delhi High Court and by an Order dated 4th January, 1993 the Hon''ble Delhi High Court has restrained us from enforcing the above Bank Guarantee. We have already filed a Written Statement in the said Suit and you may Therefore, credit our account or pay to us the aforesaid amount of Rs.10 lacs (Rupees Ten Lac only) as soon as the aforesaid injunction order is dies charged and/or modified by the High Court."

(17) To my mind, there is a clear demand made by defendant No. I with the bank to pay to the said defendant, the amount as mentioned in the aforesaid letters and the contention of learned counsel for the plaintiff that the said letter cannot be said to be a demand as envisaged by the bank guarantee is devoid of any merits. In my opinion, nothing more was required to be mentioned in the said letters.

(18) The question for consideration is whether this Court at the time of deciding the issue of Bank guarantee is required to go into the terms and conditions of the principal contract to find out whether there has been a breach of the terms of the principal contract which would entitle the party to invoke the bank guarantee.

(19) Consistent view of the Courts has been that in order to restrain the invocation of bank guarantee there should be a serious dispute and a 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 guarantee would be negated and the fabric of trading operation would be jeopardised.

(20) In the present case, I find that the plaintiff has not even pleaded that there were special equities in its favor which could entitle him to the grant of an injunction. Issue of bank guarantees, to my mind, has to be decided only on the basis of the terms of the guarantee itself making it completely divorced from the main contract. It would not be proper to go through the terms of the main

contract to find out as to whether there was any breach of the contract, if so, who committed such breach and as to whether any loss has been suffered by the plaintiff in the performance of its obligations by the plaintiff. To find out as to whether a case has been made out for injunction to restrain the bank to make payment under the bank guarantee, one has to look only to the guarantee itself. I do not find that any act of fraud has been made out in the facts and circumstances of the present case. All that has been argued by the plaintiff is that the plaintiff was not liable to pay any amount under the agency agreement to defendant No. 1 nor has he committed any breach thereof and consequently the bank guarantee could not be invoked. What were the acts of fraud committed by defendant No. 1 and what were the special equities in favor of the plaintiff have not been elaborated.

(21) It will be useful to refer to some of the judgments which had taken the consistent view that unless an act of fraud and irretrievable injustice has been made out, there was no case for grant of injunction to restrain the bank from making payment under the bank guarantee.

(22) In *U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd.*, the facts were : -

"THE appellant, a State Government enterprise, on or about May 17, 1983, entered into a contract with the respondent a private limited company, for the supply and installation of a VanaSpati manufacturing plant at a place in the district of Nainital. The contract bond contemplated guaranteed performance of the work at various stages in accordance with the time schedule prescribed and provided for completion and commissioning of the plant after trial run by May 15, 1984. According to the appellant, the time was essentially and indisputably the essence of the contract.

(23) As per the terms and conditions of the contract bond, according to the appellant, the respondent was to furnish a performance bank guarantee for Rs. 16.5 lakhs and yet another bank guarantee for Rs. 33 lakhs as security for the monies advanced by the appellant to the respondent for undertaking the work. Both these guarantees as also the contract bond entitled the appellant to invoke them and call for their realisation and encashment on the failure of the respondent to perform the obligations for which the appellant was made the sole judge .

(24) It was alleged that the respondent defaulted at various stages and finally failed to complete the work within the stipulated time. The appellant invoked the two guarantees one after the other, and thereafter proceeded to have the plant completed, etc. According to the appellant, the plant could actually be commissioned for commercial production in July/August, 1985.

(25) The respondent on August 4, 1986 filed an application u/s 41 of the Arbitration Act, 1940 (The Act) in the Court of the Civil Judge, praying for an injunction restraining the appellant from Realizing and encashing the bank

garnets. The civil judge dismissed the application. The respondent filed a revision petition before the High Court, which allowed the same, holding that the invocation of the performance guarantees was illegal, and the contentions of the appellant that the performance guarantees constituted independent and separate contracts between the guarantor bank and the beneficiary and created independent rights, liabilities and obligations under the guarantee bond themselves, as being "technical pleas ". The High Court , directed, the respondent to keep alive the bank guarantee during the tendency of the arbitration proceedings.

(26) The appellant then moved Supreme Court and Supreme Court through Sabyasachi Mukharji and Shetty, JJ. allowed the appeal U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., of the report Mukharji, J. observed as under:

"UNDER the terms agreed to between the parties, there is no scope of injunction. The High Court proceeded on the basis that this was not an injunction sought against the bank but 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. The respondent was not to suffer any injustice which was irretrievable. The respondent can sue the appellant for damages. There cannot be any basis in the case for apprehension that irretrievable damage could be caused, if any. His Lordship was of the opinion that this was not a case in which injunction 1995 (34) DRJ should be granted. An irrevocable commitment either in the form of confirm bank guarantee or irrevocable letter of credit cannot be interfered with except if a case of fraud or a case of a question of apprehension of irretrievable injustice has been made out. This is the well settled principle of law in England. This is also the well settled principle of law in India. No fraud and no question of irretrievable injustice was involved in the case.

(27) The learned Judge at pages 114 and 1142 held as under:

"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 a serious dispute and a 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 would be jeopardised. The commitments of the banks must be honored free from interference by the courts; otherwise, trust in commerce internal and international would be irreparable injustice that the court should interfere. This is not a case where irretrievable injustice would be done by enforcement of the bank guarantee. This is also not a case where a strong prima facie case of fraud in entering into a transaction was made out. The High Court should not have interfered with the bank guarantee. The judgment and order of the High Court set aside. The order of the Civil Judge restored."

(28) Shetty, concurring with Mukherji, J. notices the question involved at page 1143 of the report as under :

"WHETHER the obligation is similar to the one arising under a letter of credit? Whether the court could interfere in regard to such obligation, and if so, under what circumstances? These are the questions raised in the appeal."

(29) The learned Judge at pages 1144 to 1145 observed :

"THE primary question for consideration is whether the High Court was justified in bank guarantees. The basic nature of the case relates to the obligations assumed by the bank under the guarantees given to the appellant. If under the law, the bank cannot be prevented by the respondent from honouring the credit guarantees, the appellant also cannot be restrained from invoking the guarantees. What applies to the bank must equally apply to the appellant. 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 favor of the respondent. The question of examining the prima facie case or balance of convenience does not arise if the court interfere with the unconditional commitment made by the bank in the guarantees in question".

(30) The learned Judge further at pages 1145 and 121146 observed:

"THE modern documentary credit had its origin from letters of credit. The letter of credit has developed over hundreds of years of international trade. It was intended to facilitate the transfer of goods between distant and unfamiliar buyer and seller. It was found difficult for a buyer to pay for goods prior to their delivery. The bank's letter of credit came to bridge this gap. In such transactions, the seller (beneficiary) receives payment from the issuing bank when he presents a demand as per the 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 seller and the buyer must be settled between themselves. The Courts, however, in carving out an exception to this rule of absolute independence, held that if there has been a "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."

"IN modern commercial transactions, various devices are used to ensure performance by the contracting parties. The traditional letter of credit has taken a new meaning. Stand by letters of credit are also used in business circles. Performance bond and guarantee bond are also devices increasingly adopted in transactions. The courts have treated such documents as analogous to letter of credit."

(31) Learned Judge at pages 1149 and 1150 again observed as under :

"WHETHER it is a traditional letter of credit or a new device, like performance bond or performance guarantee, the obligation of the bank appears to be the same. Since the bank pledges its own credit, involving its reputation, it has no defense except in the case of fraud. The nature of the fraud that the courts talk-about is the fraud of an "egregious nature as to vitiate the entire underlying transaction". It is the fraud of the beneficiary, not fraud of some- body else .The bank cannot be compelled to honour the credit in such cases. In such cases, it would be proper for the bank to ask the buyer to approach the court for an injunction. The court, however, should not lightly interfere with the operation of irrevocable documentary credit. In order to restrain the operation of irrevocable letter of credit, performance bond or guarantee, there should be a serious dispute to be tried and there should be a good prima facie act of fraud."

(32) Learned Judge at page 1150 observed:

"THE sound banking system may, however require more caution in the issuance of irrevocable documentary credit. It would be for the banks to safeguard themselves by other means, and, generally, nor for the courts to come to their rescue with injunctions unless there is established fraud. The appeal must be allowed, and the order of the civil Judge, restored."

(33) The party seeking injunction from encashing of bank guarantees has to show, prima facie, case of established fraud, special equity and irretrievable injury. As held in U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., the nature of fraud that the Court talk about is a fraud of "egregious nature as to vitiate the entire underlying transaction". What has been pleaded by the plaintiff in the plaint is that the action of defendant No. 1 in invoking the bank guarantee, is ex-facie, illegal, contrary to agency terms as well the terms of the * bank guarantee. Action of the bank has also been alleged to be fraudulent and against special equities. I am unable to find anywhere in the pleading nor the plaintiff has been able to establish any fraud by way of any document nor any details of alleged fraud have been given, what to speak of the fraud of egregious nature as has been held by Supreme Court. There is also no question of any irretrievable injury because an irretrievable injury is one which is not reversible. In case, the plaintiff is ultimately able to establish in appropriate legal proceedings that no amount was due from it to defendant No.1, the amount paid to the said defendant by the bank under the bank guarantee will be directed to be repaid to the plaintiff.

(34) Reliance has been placed by the plaintiff upon judgment of the Bombay High Court reported as Dai-ichi Karkaria Private Ltd., Bombay Vs. Oil and Natural Gas Commission Bombay and another, . On the facts of that cas.e, it was held by the Bombay High Court that a case had been made out establishing that the defendant had procured the consent of the plaintiff to the stipulation in the bank guarantee for its invocation irrespective of non-receipt of the amount of refund of

customs duty as a result of economic duress and fraud committed by it on the plaintiff and the special equities of the situation also warranted grant of an injunction in favor of the plaintiff, as sought for. The said judgment was given on the facts of that case. In the present case, as has already been held by me above, the plaintiff has not made out any case of fraud or special equities in his favor so as to entitle him to grant of an injunction. Reliance has also been placed upon a judgment of this Court reported as *Dewan Craft Systems Private Limited Vs. Central Bank of India and others* 1992 (4) D L 14 wherein it has been held that a perusal of the letters of invocation show that the defendant had not established as to on what account the bank guarantee was to be encashed and it was in these circumstances that the Court was pleased to grant a stay restraining the bank to pay any amount under the guarantee. In the present case, I have quoted both the letters of invocation - one dated 1st December, 1992 and the other dated 15th January, 1993. A reading of the said letters shows that the plaintiff had failed to perform its obligations as per agreement and as a consequent thereto, defendant No.1 was taking recourse to the guarantee and the bank was "called upon to remit the amount of the guarantee to the said defendant. In the "second letter dated 15th January, 1993, it has clearly been mentioned that not only that the plaintiff had failed to perform their obligations as per agreement but they were also liable to pay an amount of Rs-27,25,411.06 paise as per statement annexed with the said letter and the bank was called upon to make payment under the guarantee. In my opinion, defendant No.1 has clearly written that the plaintiff has failed to perform its obligations under the contract and have committed breaches thereof and as a result defendant No.1 had become entitled to invoke the bank guarantee. To my mind, it was sufficient for the bank to make payment under the bank guarantee and not to withhold the same. A bank guarantee which is payable under law implies that the bank is liable to pay as and when the demand is made upon the bank by the beneficiary. The bank is not concerned with any interest disputes between the beneficiary and the person at whose instance the bank had issued the bank guarantee.

(35) It has lastly been contended by learned counsel for the plaintiff that he has already made an application for amendment of the plaint so as to challenge the second letter of invocation dated 15th January, 1993 in respect of both these guarantees. To my mind, filing of this application is of no consequence, as far as the decision on the present application is concerned. I have already held above that there was no case made out by the plaintiff for the grant of an injunction as neither a, prima facie, case of fraud had been made out nor there was special equities in the form of preventing irretrievable injustice between the parties. As held in *Air 1994 Sc 643* "mere irretrievable injustice without prima facie case of established fraud is of no consequence in restraining the encashment of bank guarantee". Even if an application of amendment is allowed, it will not effect the decision on the present application.

(36) I, Therefore, find no merits in the application and the same is, accordingly, dismissed. Nothing observed in this order shall affect the decision of the case on

merits