
(1986) 02 CAL CK 0031

In the Calcutta High Court

Case No : Appeal No. Nil of 1985 (Suit No. 687 of 1985)

Centax (India) Ltd.

APPELLANT

Vs

Vinmar Impex Inc. and Others

RESPONDENT

Date of Decision : 03-02-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Contract Act, 1872 — Section 124

Citation : AIR 1986 Cal 356

Hon'ble Judges : Sachi Kanta Hazari, J; Bimal Chandra Basak, J

Bench : Division Bench

Advocate : Kappor, for the Respondent

Final Decision : Dismissed

Judgement

Bimal Chandra Basak, J.—This appeal arises out of an order passed on the 3rd Dec. 1985 by the Trial Court in an application for interlocutory order filed by the plaintiff-appellant herein. On or about 19th Nov. 1985 the suit was filed by the plaintiff-appellant against the defendants respondents praying for the following reliefs :--

- (a) Decree for Rs. 9,25,020.80P. against the defendants 1 and 2.
- (b) Interim interest and interest on judgment;
- (c) Alternatively, an enquiry into the loss and damages suffered by the plaintiff and a decree for such sum as may be found due upon such enquiry;
- (d) Perpetual injunction restraining the defendant 3 from invoking and/or receiving any payment under the Letters of Indemnity/Guarantee dated 26th June, 1985 given by the defendant No. 4.
- (e) Perpetual injunction restraining the defendant No. 4 from making any payment and/or disbursing any money to the defendant 3 under the Letters of Indemnity/Guarantee dt. 26th June, 1985;

- (f) Such other injunction as would afford adequate relief to the plaintiff;
- (g) Receiver;
- (h) Attachment;
- (i) Costs;
- (j) Such further or other reliefs.

The defendant 1 is a company carrying on business at Singapore. The defendant 2 is the agent in India of defendant 1. The defendant 3 is the shipping company which brought the goods to the Port of Calcutta. The defendant 4 is Allahabad Bank which executed four documents in favour of the defendant 3 which are the subject matter of dispute in the Appeal. As the said documents have been sometimes describes as Guarantee, sometimes as Indemnity and sometimes as both by the plaintiff-appellant and as there is much dispute between the parties regarding the actual nature of the said documents, we shall hereinafter refer to the same as the said instruments. We shall refer to the relevant facts of this case so far as they are relevant for the purpose of disposal of this Appeal and in the light of the ultimate order sought to be passed by us.

2. According to the plaint, in April 1985 there was an agreement by and between the plaintiff-appellant and the defendant 1 through the defendant 2 for sale to the plaintiff of 100 M.T. of High Density Polyethylene Powder (hereinafter referred to as HDPE) on certain terms and conditions. We should point out that though in the plaint and the petition it is stated by the plaintiff that it was agreed that the goods shall be of Grade 5202, this is disputed by the defendants-respondents according to whom 5202 was merely the marking but it was not a part of the agreement . that the goods were to be of Grade 5202. The plaintiff states that accordingly the plaintiff opened a Letter of Credit in favour of the defendant 1 which was duly communicated to the defendant 1. The defendant 1 shipped from Singapore on board "Ganges Pioneer" 100 M.T. HDPE granules in four containers of 25 M.T. each covered by four Bills of Lading all dt. 30th May, 1985 and issued on behalf of the owners of the said vessel. According to the plaintiff the said vessel arrived at the Port of Calcutta on the 5th June, 1985 and discharged the goods covered by the said Bills of Lading. The complaint of the plaintiff is that for negotiating the said letter of credit, the defendant 1 was to send to the defendant 4, that is, the Allahabad Bank the original documents which included Bills of Lading etc. so that upon retirement of the documents the plaintiff could take delivery of the goods but that the defendant 1 did not send the same. It is alleged that the plaintiff could not take delivery of the goods because of non-furnishing of such original documents. It is alleged that the plaintiff had sold the goods on high seas basis to its customer and that it had agreed to hand over the documents to its customer by 12th June, 1985 for taking delivery of the goods but because of default on the part of the defendant 1, the plaintiff was unable to hand over the original documents and the plaintiffs customer cancelled the said order. It is alleged that on or about 21st June, 1985 the plaintiff received the

advanced set of non-negotiable bills of Lading etc. from the defendant 1. It is stated that for the purpose of obtaining delivery orders it was necessary to surrender the original Bills of Lading to the defendant 3, i.e. the shipping company but that on or about 25 June, 1985 the defendant 1 instructed the defendant 3 the shipping company to release the said cargo by giving necessary delivery order to the plaintiff upon the plaintiffs furnishing bank guarantee in favour of the defendant 3 for release of the goods in lieu of the original negotiable Bills of Lading. It is stated that accordingly the plaintiff executed four several letters of indemnity in favour of the defendant 3 and that the defendant No. 4 (Bank) guaranteed the same in writing. In view of the nature of the arguments made before us, the actual language of the said instruments is very relevant and we shall set out hereunder one of such instruments : --

Bank's Agreement For The Release Of Goods In Lieu Of Original Negotiable Bills Of Lading United States Lines Agency (A Division of ISA Pvt. Ltd.) "Azimganj House", 7, Camac St., Calcutta-700017. Gentlemen :

Re : S/S Ganges Pioneer Voyage No. 4 Port Of Loading Singapore Port Of Discharge/ Destination Calcutta Bill Of Lading No. 675-4992 Di. .10-5-85 Description Of Goods High Density Polythylene Powder (Granule) (HOPE 5202 MARLEX) Container No. USLU-421S578.

As The Original Bill Of Lading Is Unavailable, Upon Payment Of All Freight And Charges, Please Deliver The Above Mentioned Goods To : M/s. Centax (India) Limited 3, Esplanade Mansion, Calcutta 700 069.

In Consideration Of Your Releasing The Aforementioned Goods To The Above We undertake To Indemnify And Hold Harmless You And/Or The Above Carriers Its Owners Charterers, Masters And Agents With Respect To Any Claims, Damages, Costs And Expenses Of Any Nature Whatsoever And To Reimburse You For Cargo Value And Any Additional Claims, Damages, Costs and Expenses In Connection Therewith. We Further Undertake To Deliver To You Or To Arrange For Our Customer To Deliver To You, Upon Receipt, The Original Bill Of Lading Properly Endorsed And, Upon Delivery To You, This Undertaking Shall Have No Further Effect.

Bank's name

Company's name

Allahabad Bank

Centax (India)

Limited

Stephen House Branch,

3. Esplanade

Calcutta

Mansion,

By & For Allahabad

Calcutta 700 069

Bank

By : Durgadas Banerjee

Signature of Banker

Signature

Manager

Director

Official title

Official Title

3. It is alleged by the plaintiff appellant that pursuant thereto the defendant No. 3 sent delivery orders. It is stated that the plaintiff had to pay and incur in respect of the said cargo, demurrage and port charges, detention charges and other incidental expenses amounting to Rs. 1,98,294.80 paise. It is further stated that apart from the said the plaintiff had to pay Rs. 51,726.00 to Loknath Shipping and Clearing Agency, the clearing agent of the plaintiff, towards clearing, handling, port charges and local deliveries etc. It is alleged that the plaintiff obtained delivery of cargo on or about 1st July, 1985 at Kidderpore Docks whereupon on inspection it was found that the defendant 1, in gross violation of the agreement, has sent HOPE grade 5502 which was of much inferior quality of HOPE 5202 which the plaintiff had contracted for. Accordingly it was alleged that the defendant No. 1 committed a clear breach of contract by shipping inferior quality of cargo which was discovered by the plaintiff for the first time on or about 1st July, 1985. It is further alleged that the plaintiff had the said goods surveyed by Messrs Gillanders Arbuthnot & Co. Ltd and on inspection it was found that the goods delivered are HDPE grade 5502 and the said cargo was not in accordance with the invoice specification or specification mentioned in the advanced set of Bill of Lading. It is alleged that ultimately the said goods were sold in the months of September and October at a total price of Rs. 17,50,000.00. It is further alleged that the goods contracted for were not easily available in the market and the plaintiff was unable to purchase similar goods for its customers who had cancelled the order and thereby the plaintiff had suffered loss to the extent of Rs. 6,75,000.00 being the balance between the sum of Rs. 24,25,000/- which is claimed to be the sale price of the said 100 M.T. HDPE of 5202 specification the plaintiff would have realised on the basis of such high seas contract and the total sale price of Rs. 17,50,000.00 at which price it is alleged that the goods of 5502 specification have actually been sold. Accordingly the plaintiff was claiming a total sum of Rs. 9,25,020.80 paise as alleged loss and

damages referred by it being the sum total of Rs. 1,98,294.80, Rs. 51,726.00 and Rs. 6,75,000.00 referred to above.

4. It is further alleged by the plaintiff that the defendant 1 has deliberately acted fraudulently for reasons whereof the plaintiff has suffered loss and damages the particulars of such alleged fraud being given in para 29 of the plaint, the sum and substance of which is that the original documents were withheld because goods contracted for were not shipped. In this connection, the plaintiff has further alleged that the defendants 1 and 2 are wrongfully demanding from the defendant 3 payment of the value of the cargo covered by the Bills of Lading and invoices of the defendant 1 amounting to a sum of USD 56500 equivalent to Rs. 6,90,000.00 approximately. It is further alleged that the defendant 3 is wrongfully and illegally threatening to invoke the said guarantee given by the defendant No. 4 and realise the price of the cargo covered by the said Bills of Lading in spite of the fraud committed. It is further alleged that the defendants 1, 2 and 3 are wrongfully and illegally threatening to invade the plaintiffs right to the enjoyment of the Bank guarantee. Accordingly such suit was filed making such prayers.

5. We have given in details the claim made by the plaintiff in its plaint to show what was the original claim of the plaintiff in the plaint inasmuch as it is alleged that subsequently in application and affidavits and in their submissions made before us, a different case is sought to be made out by the plaintiff-appellant.

6. After filing of the suit on 25th Nov. 1985 the plaintiff-appellant made an interlocutory application for following orders :

(a) Injunction restraining the respondents 1 and 2 from demanding payment of the value of the goods or making any other claim in respect of the goods covered by the Bills of Lading Nos. 765-4989, 675-4990, 675-4991 and 675-4992 all dt. 30th May, 1985;

(b) Injunction restraining the respondent 3 from invoking and/or demanding any payment under the guarantees dt. 26th June, 1985 given by the respondent 4;

(c) Injunction restraining the respondent 4 from making any payment or disbursing any money to the respondent 3 under the said guarantee dt. 26th June, 1985.

(d) Direction upon the respondents 1 and 2 to submit and/or to surrender the Original Negotiable Bills of Lading Nos. 675-4989, 675-4990, 675-4991 and 675-4992 all dt. 30th May, 1985 to the respondent 3.

(e) Ad interim order in terms of prayers above;

(f) Costs of and incidental to this application be paid by the respondents 1 and 2.

(g) Such further orders be made and/or directions be given as this Hon''ble Court may deem fit and proper;

7. Upon such application being moved upon notice to the respondents 1, 2 and 4 upon hearing the submissions of the parties the learned trial Judge declined to pass any ad interim order as prayed for and in particular any order restraining the respondent 4 from making any payment under the said instruments. It is stated on behalf of the appellant that being aggrieved by the same the Appellant preferred an Appeal and that the Appeal Court on 29th Nov. 1985 after giving leave to file Memorandum of Appeal without certified copy of the order, directed that status quo be maintained till 3rd Dec. 1985. It is further stated that the Appeal Court however, made it clear while passing the interim order that the Appeal Court did not go into the merits of the case but for protection of interest of all the parties, passed an order of status quo and directed the matter to appear as a new motion before the learned Judge taking interlocutory matter on 2nd Dec. 1985, who will consider the matter and decide what order to be passed. It is further stated that the application did not appear as a new motion before the learned Judge taking interlocutory matter on 2nd Dec. 1985 as directed by the Appeal Court but it appeared on 3rd Dec. 1985 as a new motion. It is stated that upon hearing the submission of the parties the Trial Court declined to pass any ad interim order as prayed for in the petition but his Lordship did not deliver any judgment or give any reason for declining to pass ad interim order.

8. Being aggrieved by the same this appeal is sought to be preferred wherein apart from making the usual prayer for filing Memorandum of Appeal without certified copy of the order appealed from, the following orders were prayed for :

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(b) Injunction restraining the respondents No. 1 and 2 from demanding payment of the value of the goods or making any other claim in respect of the goods covered by the Bills of Lading Nos. 675-4989, 675-4990, 675-4991 and 675-4992 all dt. 30th May, 1985.

(c) Injunction restraining the respondent 3 from invoking and/or demanding any payment under the indemnities dt. 26th June, 1985 given by the respondent No. 4.

(d) Injunction restraining the respondent No. 4 from making any payment or disbursing any money to the respondent 3 under the said Indemnities dt. 26th June, 1985.

(e) Direction upon the respondents 1 and 2 to submit and/or surrender the Original Negotiable Bills of Lading Nos. 675-4989, 675-4990, 675-4991 and 675-4992 all dt. 30th May, 1985.

(f) Ad interim order in terms of prayers above.

(g) Costs of and incidental to this application be paid by the respondents 1 and 2.

(h) Such further orders be made and/or directions be given as this Hon''ble Court may deem fit and proper.

Upon such application being, moved upon notice, after hearing the parties we passed the following order on 15th Jan., 1986.

The Court: By consent of the parties the appeal is treated as on day's list. It is further recorded that the appeal would be heard along with this application and the disposal of this application will also amount to disposal of the appeal. Any document and/or record relied on in the trial Court shall form part of the records of this case and the parties shall be entitled to rely upon the same. Undertaking is dispensed with. Let it not be heard today.

Thereafter we passed the following order on 16th Jan., 1986:-

The Court: -- By consent of the parties hearing of the application and the appeal before the Appeal Court will also dispose of the application made in the lower Court and the said lower Court application will not be proceeded with.

Pursuant to direction learned Advocate for the Bank has stated that the equivalent amount in Indian Currency to the amount concerned has been kept in a separate account subject to further order of this Court.

Appeal is adjourned till 27-1-86. This course of action was taken by us in view of the following. If we had followed the usual procedure of the Appeal Court, then there would have been hearings at three different stages. The first stage would have been the hearing of the application for stay and interim order before filing of affidavits. The second stage would have been the hearing of such application upon completion of the affidavits and the final and third stage would be the hearing of the appeal itself. This is apart from the separate hearing of the application for interim order before the Trial Court and the resulting appeal therefrom and the repetition of the same procedure. This will take much time and cause unnecessary delay. In each and every stage there would be practically the same exhaustive and lengthy arguments on behalf of all the parties. Accordingly it is better that this is confined to only one stage alone, i.e. hearing of the appeal itself along with the application before this Court and dispensing with the separate and independent hearing of the application for interim order before the trial Court. This would expedite the whole thing. Accordingly this has now come up before us for final hearing.

9. We ought to point out that before us Mr. Mitra the learned Advocate for the plaintiff-appellant has confined his submissions only so far as prayers (c) and (d) of the petition before us and prayers (b) and (c) of the application for interim order before the Trial Court are concerned i.e. the enforcement of the four instruments executed by the Bank. In this connection he has referred to Section 124 of the Contract Act which provides as follows :

"24. Contract of indemnity defined -- A Contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "Contract of Indemnity"."

In the plaint and various petitions and affidavits filed on behalf of his clients,

these instruments have been described sometimes as bank guarantees, sometimes as indemnities and sometimes as both. Mr. Mitra has submitted that these are not bank guarantees at all. These are merely instruments to reimburse. It is not even a contract of indemnity. He has submitted that irrespective of the expressions "guarantee" or "indemnity" used from time to time on behalf of the appellant-petitioner, it is the substance and not the form which is to be looked into. The instruments provide for reimbursement. As in this particular case, there is no claim by the Shipping Company and in any event as the Bank has not incurred any loss or made any expenditure, the question of reimbursement does not and cannot arise. In this connection he has made reference to para 11 of the petition before us which is set out hereinbelow.

"11. It was also contended on behalf of the petitioner that the Letters of Indemnity would only be invoked by the respondent 3 provided any claim or damages have been made against the respondent and any payment has been made by the respondent 3 to the respondent 1. Since no such claim has been made upon and no payment has been made by the respondent 3 there cannot be any question of reimbursement in favour of the respondent 3. The question of the indemnity can only arise provided the respondent 3 suffered any damages or made any payment."

10. He has further submitted that he is not challenging the validity of the instrument. It is valid but not enforceable as at present. Accordingly no prayer for cancellation of or declaration regarding the validity of the same has been made in the plaint.

11. Mr. Kapoor appearing on behalf of the respondent 3 i.e. the shipping company in whose favour the instruments were executed, has submitted that in this case his clients are not concerned with the original contract between the buyer and seller and the alleged rights of the parties thereto. His clients have delivered the goods without the original documents on the basis of the instruments executed by the Bank in favour of the shipping company which was also counter-signed by the plaintiff buyers. His clients have made claims, to the Bank and the Bank is liable to make payment of the same. The right to contest the claim of the shipping company is not vested in the plaintiff-Appellant. The shipping company has made claim and Bank must pay the same. The shipping company is not interested in respect of the dispute between the shipper and the plaintiff-buyer. He has further submitted that the suit is mainly for damages for alleged breach of contract entered into by and between the seller and the purchaser on account of alleged delay and default in furnishing the original shipping documents by the seller. This is a money claim for damages. Therefore the question of securing such claim does not arise. In any event, in such a suit, the rights of his clients cannot be interfered with.

12. Mr. Sen appearing for the sellers-respondents Nos. 1 and 2 has submitted that the claim of the plaintiff-appellant is false and fabricated. He has drawn our attention to paras 24, 26, and Schedule B of the plaint wherein the alleged loss

arising out of alleged diminution of price is determined as Rs. 6.75,000.00 whereas in the letter dt. 27th July, 1985 the amount claimed on that account is stated to be Rs. 5,00,000.00. He has also drawn our attention to para 19 of the plaint and paragraph 19 of the petition before the trial Court and submitted that the allegation that the goods delivered are different from the goods contracted for is completely fictitious and purely an afterthought. So far as para 11 of this petition before the Appeal Court is concerned, that is, the contention that the instruments executed by the Bank have not become enforceable, he has submitted that this is a completely new case which is sought to be raised before the Appeal Court for the first time and no such case was made out in the plaint or petition filed before the Trial Court. He has submitted that the prayers against the respondent 1 are not being pressed in this appeal. He has submitted that it is not being so pressed because no such interim order can be obtained against the respondents 1 and 2 having regard to the nature of the suit. They are now seeking to restrain the Bank so far as enforcement of the said instruments in favour of the shipping company are concerned.

Accordingly they are trying to get a relief indirectly what they cannot get directly. He has further submitted that in paragraph 46 of the petition before the trial Court it is sought to be contended that the said indemnities or guarantees were void and not binding upon the petitioners. No such case has been made out in the plaint. Further there is no prayer for declaration or cancellation so far as the said instruments are concerned. Without such prayer, no relief for perpetual injunction regarding such instruments can be obtained. He has pointed out that on the other hand, during the course of submission before this Court, Mr. Mitra has submitted that he is not challenging the validity of the instruments and accordingly no prayer for declaration or cancellation regarding the same has been made. On the, interpretation of the instruments, Mr. Sen has drawn our attention to the language of the same and has submitted that the language is disjunctive. The first part provides for payment arising out of any claim and the second part deals with the question of reimbursement for cargo value. Admittedly the sellers were claiming the amount from the shipping company and the shipping company has in its turn made such claim before the Bank as beneficiary of such instrument. This position is admitted in the plaint and petition. Mr. Sen has further submitted that the underlying contract between the seller and the purchaser and whether there has been a breach of the same is totally irrelevant so far as the instruments executed by the Bank in favour of the shipping company are concerned. If the terms of the same are complied with, then the Bank is bound to make payment. He has further submitted that the petitioners have no locus standi to challenge such claim made by the shipping company pursuant to such instruments. Though in para 24 it is stated that the respondents 1, 2 and 3 are threatening to invade the petitioner's right of enjoyment of the bank guarantee, the same is totally misconceived. The beneficiary is the shipping company and not the plaintiff-appellant. In this connection he has also drawn my attention to the letter dt. 18th Nov. 1985

written by the Bank addressed to the petitioner-appellant. He has submitted that this letter makes it clear that even according to the Bank upon such claim being made by the shipping company on them, they were bound to make payment to the shipping company under the said instruments. He has submitted that in spite of the same it is unfortunate that a nationalised bank would delay the matter to enable the plaintiff to come before this Court so that the Bank may be prevented from making such payment. Dealing with the case sought to be made out in the plaint and petition that the grade contracted for the goods was 5202 whereas the grade delivered was 5502, Mr. Sen has drawn our attention to the Indent placing such order wherein there is nothing-mentioned about any particular grade in the description of the goods but it was merely written at the bottom that the shipping mark would be 5202. In this connection Mr. Sen has drawn our attention to the alleged letter of the plaintiff-appellant dt. 29th April 1985 wherein the plaintiff has purported to confirm the order for the goods which was described as High Density Polyethylene powder grade 5202. Mr. Sen has pointed out that his clients have denied and disputed in their affidavit that any such letter was sent to or received by them. Against that, in the reply filed by the appellants, no material has been brought forward to show that any such letter was sent. Accordingly the story of contract to supply 5202 grade is not to be accepted. So far as the alleged inspection by appellants' surveyor is concerned, he has submitted that though the alleged inspection was sought to have been held on 12th July but in the subsequent letter of 13th Sept. 1985 written by the clearing agents of the Appellants to the defendants 1 and 2, there is no reference to any such inspection. On the other hand, the clearing agents confirmed that the goods viz. 4000 bags of HOPE 5202 were cleared in sound condition. He has submitted that no joint inspection or survey was called for and the alleged survey held on 12th July was not upon notice to his clients. Accordingly no reliance is to be placed in respect of the purported survey report. In this connection he has also drawn our attention to the Test Memo, in the reverse of which it is stated that the sample was in the form of white granules and that it had the characteristic of High Density Polyethylene granules. There is no reference to the grade. He has also referred to the copies of Bills of entry produced by the appellant, which also do not refer to any grade in the description of the goods. He has further submitted that the petitioners have not come with clean hands. They have concealed material facts. Further, they have pleaded facts which are not correct. They have also sought to make out a new case which would not be borne out from the plaint filed in the suit.

13. The Bank has not filed any affidavit and its Advocate has submitted before the Court that he has no submission to make and that the Bank shall abide by any order as the Court may pass. However, they have produced all the relevant documents in their custody and possession in connection with this transaction, inspection of which was given to the parties and copies supplied.

14. In his reply Mr. Mitra has submitted that it is correct that no material has been produced in support of his client's contention regarding "high seas

contract" at a much higher price excepting that the same was referred to in the Telex dt. 30th June, 1985 sent by appellants to the sellers. He has further admitted that there is no document on record to show the terms and conditions of the alleged sale ultimately effected at a lower price which is the basis of his claim. Mr. Mitra has submitted that it is true that his clients have ultimately sold the goods for Rs. 17,50,000/- but his clients had to incur expenditure amounting to Rs. 13,57,130,00 and accordingly if his clients are made liable to make payment of Rs. 6,90,000/- which is the amount involved in the instruments, then they would be out of pocket to the extent of Rs. 3,00,000,00/-. So far as the contract for grade 5202 is concerned he has referred to the brochure and submitted that the same refers to different types of grades. So far as the claim of the shipping company is concerned, he has repeated that mere claim does not make the said instruments enforceable.

15. We have set out in details the arguments made before us. In our opinion it is neither necessary nor proper at this stage to come to a final decision regarding the merits of the case. We are not hearing the suit. We are not finally deciding the rights of the parties. Further, in view of the fact that prayer of interim order has been confined only in respect of prayers (c) and (d) we are only to decide whether any interim order pending final decision in the suit should be passed restraining the Bank from making any payment to the beneficiary i.e. the respondent 3 under the said instruments and whether the beneficiary should be restrained from demanding any payment under the said instruments. We are merely to hold at this stage whether a prima facie case for such an interim order has been made out or not and it is not for as to finally decide the rights of the parties at this stage. We are also to consider the question of balance of convenience, that is, whether Order 39 of the C.P.C. should be invoked in this case in favour of the plaintiff or not. On the question of bank guarantee and Letters of Credit, there have now been various decisions of this Court as well as the Supreme Court. We have referred to the same in detail in our judgment delivered on 19th of Dec. 1985 in the case of Allied Resins and Chemicals Ltd. Vs. Minerals and Metals Trading Corporation of India Ltd. and Another, inspection of which was given to the learned Advocate appearing before us. In that judgment we have considered the following judgments amongst others : United Commercial Bank Vs. Bank of India and Others, , Bird and Co. Vs. Tripura Jute Mills and Another, Texmaco Ltd. Vs. State Bank of India and Others, National Project Construction Corporation Ltd. Vs. G. Ranjan, , United Commercial Bank Vs. Hanuman Synthetics Ltd. and Others, . From the said judgments the following becomes clear. We make it clear that it is not our intention to summarise the principles laid down therein or set out the same exhaustively but we merely point out some of the salient features of the same. Bank guarantees and Letters of Credit practically stand on the same footing. In our opinion an Indemnity given by a Bank also stands on the same footing. This is also made clear in the Supreme Court judgment in the case of United Commercial Bank v. Bank of India (supra). In our opinion whether it is a bank guarantee or a Letter

of Credit or contract of indemnity, the enforceability of such an instrument against the Bank depends on the terms and conditions of the same. The question before the Court in such a case is whether the terms of the same have been fulfilled to enable the beneficiary to enforce the same against the Bank executing the same. If it has been so fulfilled, then, the beneficiary is entitled to enforce the same against the Bank and, it is not fit and proper on the part of the Court as a matter of fact and law, it is not open to the Court to pass an interlocutory order, whereby the beneficiary will be deprived of the benefit of the same and he is prevented from enforcing the same against the Bank. There should be a sanctity in respect of any such instrument executed by a Bank assuring payment to a beneficiary; otherwise all the commercial transactions will be in jeopardy and the Foreign Trade will be seriously affected. The foreign sellers or buyers will not have any faith in the Indian Banks. In respect of such instruments executed by a Bank, the Bank is not and should not be concerned with the outlying (underlying?) contract between the buyer and seller. Duties of a Bank under any such instrument are created by the document itself but in any case it has the powers and is subject to the limitations which are given or imposed by it. Whether in respect of the underlying contract between the seller and purchaser, any of the parties have committed default or not, whether the seller is entitled to the prices under the underlying contract or not, is not and cannot be the subject matter of controversy if otherwise under the instrument the beneficiary is entitled to the amount assured by the Bank having fulfilled the terms and conditions of the instrument executed by the Bank. The dispute as to the sufficiency of the performance between the buyer and the seller or between the seller and the buyer cannot be the reason for withholding the payment claimed under such instrument. In such a case the Bank has only to see whether the event has happened on which its obligation to pay has arisen. In such a case the Courts should not pass any interim injunction; otherwise the whole banking system would fail and the trade will collapse.

16. Incidentally it must be pointed out that in this particular case such instruments have been executed in favour of the shipping company not only by the Bank itself but they have been countersigned by the plaintiff-appellant also.

17. In the present case we are prima facie of the opinion that the contention of Mr. Mitra in so far as interpretation of the instruments is concerned cannot be accepted. On the other hand, the contentions of the respondents are prima facie sound. The admitted position is that without production of the original Bill of Lading the delivery of the goods has been taken by the plaintiff-appellant solely on the basis of the said instruments -- call it guarantee, call it indemnity or implied indemnity or in any other name. The only question is whether the terms and conditions of the said instruments have been fulfilled to enable the beneficiary to the amount assured thereby. In this case the language of the said instruments is quite clear. It was recorded that the original Bills of Lading were not available. The Shipping Company (Respondent No. 3) was requested to deliver the goods upon payment of all freights and charges. In consideration of

such release the Bank undertook to indemnify and hold harmless the beneficiary and others mentioned therein with respect to any claims of damages, costs and expenses of any nature whatsoever. In addition to that they undertook to indemnify and hold harmless the beneficiary for cargo value and any additional claims, damages etc. In our opinion, the said instruments can be enforced not merely for the purpose of reimbursement only after payments have been made and expenses incurred by the Bank but also in respect of any claim of any nature whatsoever made in connection with such release made without any original document. We have to keep in mind that the goods have been taken delivery of by the plaintiff without production of original Bills of Lading solely on the basis of such assurance. The admitted position is that claim has been made by the shipping company with the Bank. It is something more than that. From Bank's letters themselves it is quite clear that the Bank has also accepted the position that its liability to make such payment under the said instruments has arisen and the said instruments have become enforceable at the instance of the beneficiary. That is why it called upon its constituents, i.e. the plaintiff-appellant to pay the money. In this context particular reference may be made to the letter of respondent 3 dt. 18th Sept. 31st Oct. and 18th Nov. 1985 and the Bank's letters dt. 18th and 23rd of Nov. 1985 which are set out hereinbelow : --

"UNITED STATES LINES AGENCY

(A Division of ISA Pvt. Ltd.)

AZIMGANJ HOUSE

7, Camac Street, Calcutta-700 017.

September 18, 1985.

USLA : RNT : 1406

Chief Manager, Allahabad Bank, Stephen House Branch, Calcutta-700001.

Dear Sir,

Re : M. V. Ganges Pioneer Voy-4 P/L Singapore P/D Calcutta B/LS Nos. 675-4989, 4990, 4991 & 4992 dt. 30th May, 1985 -- High Density Polyethylene Powder (Granule) (HOPE 5202 Marlex).

We would refer to your four undertakings all dated 26-6-85 and have to advise you that we have not been delivered the original Bills of Lading endorsed, consequently your obligation under the undertakings still subsists. We have also to advise you that despite delivery obtained by your constituent Centax (India) Ltd., of 3, Esplanade Mansions, Calcutta on the strength of your undertakings your constituent has neither delivered the original B/L duly endorsed nor has your constituent provided otherwise" for payment of the value of consignment so delivered. Consequently the shipper Vinmar Impex Inc. of Singapore has preferred claims for payment against us.

We are accordingly giving you notice hereby requiring you to pay up the value of the consignment covered by four B/LS being USD 56,500 (Fifty six Thousand Five Hundred US Dollars only). In case of your default we shall be obliged to take legal recourses for recovery. Yours faithfully,

For United States Lines Agency (A Division of I.S.A. Pvt. Ltd.) As Agents of Foreign Principals USA Inc.

Sd/- R. N. Iyer

Deputy Manager (O & D)".

""(b). United States Lines Agency (A Division of ISA Pvt. Ltd) "Azimganj House" 7, Camac Street, Calcutta-700 017.

October 31, 1985. Registered with Ack/ Due.

USLA: RNT 1612 Chief Manager, Allahabad Bank, Stephen House Branch, Calcutta-700017.

Dear Sir,

Re : M.V. Ganges Pioneer Voy-4 P/L - Singapore P/D Calcutta B/LS Nos. 675-4989, 4990, 4991 and 4992 dt. 30th May, 1985, High Density Polyethylene Powder (Granule) (HOPE 5202 Marlex).

We refer to your letter Ref. : No. BR/Adv/ 33/193 dt. 30th Sept. 1985, received by us only on 15th October, 1985. We do not understand why payment against your above four undertakings is being delayed by you. We have released the above mentioned consignment to Centax (India) Ltd. on the basis of your undertakings only.

Please note that we are not concerned with the correspondence you have had with your higher authorities nor with Centax (India) Ltd.

You are requested to kindly arrange for immediate payment and oblige.

Yours faithfully,

For : United States Lines Agency (A Division of ISA Pvt. Ltd.) As Agents of Foreign Principals U.S.L. Inc.,

Sd/O R. N. Iyer.

Deputy Manager (O & D)."

"Allahabad Bank Stephen House 4, B. B. D. Bagh (East) Calcutta-1.

BR/Adv/33/252 M/s. Centax (India) Ltd., 41, Chowringhee Road, Calcutta-700071.

Dear Sir,

Letter of Credit No. 32/Stephen House/13 dt. 17-5-85 for USD 56,500/- FVG.

Vinmar Impex Inc. Singapore Opened by our International Branch on Your Behalf.

Please refer to the series of correspondences , and discussions made between us and you and also with United States Lines Agency on the above matter, the last one being you letter No. CIL/AB/85. dt. 13-11-85 addressed to the Deputy General Manager, Foreign Department. Head Office, under copy to us. On examination of the case and the relative L/C file of our International Branch, Calcutta, it is observed that by countersigning the guarantees in favour of the Shipping Line, followed by obtaining delivery of the goods by you, it is implied that these documents have been finally accepted in lieu of the Shipping documents, and no further recourse may be available for withholding payment. Therefore, you are precluded to raise any question about the quality of goods with the Bank and it is a matter to be sorted out between you and the exporter. Under the above mentioned circumstances, you are advised to arrange payment of the above bill amount to us immediately to enable us to surrender the Shipping documents to the shipping line in return for the Guarantees countersigned by us. Further please note that all the expenses incurred or to be incurred in this connection will be borne by you.

It may also be noted that we have already requested our International Branch to obtain the Original Shipping Documents from the exporter through our correspondents in Singapore.

As the matter has already been considerably delayed, please treat the matter as Most Urgent.

Yours faithfully,

Sd/- Chief Manager.

Khaitan & Co. Advocates & Notaries 1B, Old Post Office St., 2nd Floor, Calcutta-700001. Regd. with A/D.

November 18, 1985

The Chief Manager, Allahabad Bank, Stephen House, Calcutta-700001.

Dear Sir.

Our clients : United States Lines Agency of 7, Camac Street, Calcutta.

Re : 4 Bank Agreements/Guarantees all dated 26th June, 1985 in respect of M. V. Ganges Pioneer Voy-4 B/L Singapore P/D Calcutta. B/.LS Nos. 675-4989, 4990, 4991 & 4992 dated 30th May, 1985 High Density Polyethylene Powder (Granule) (HOPE 5202 Marlex)

Our clients have handed over to us the four Bank Agreements-Guarantees issued by you in favour of our clients in respect of the aforesaid four Bills of Lading and also two letters dt. 18th Sept. 1985 and 31st Oct. 1985 addressed by our clients to you and also your letter dt. 30th Sept. 1985 addressed to our clients with instructions to write to you as follows :--

At the the very outset, we on behalf of our clients repeat and reiterate the contents of our clients' letters dt. 18th Sept. 1985 and 31st Oct., 1985 and call upon you to immediately comply with the same. Our clients deny and dispute the legality, validity and/or the correctness of your letter dt. 30th Sept. 1985 whereunder you have informed our clients that you are referring the matter to the higher authorities for their advice.

In this connection, please note that our clients released the goods to M/s. Centax India Ltd. only against your undertaking to indemnify our clients and to make payment of the value of the Cargo including all claims, damages, costs, and expenses which our clients may incur as specified in the Bank Agreements/Guarantees as aforesaid. Please note that the Bank Agreements/Guarantees issued by you in favour of our clients impose an irrevocable obligation on your part to pay to our clients and constitute a bargain between yourselves and our clients which impose on you an absolute irrevocable obligation to pay for the value of the cargo/goods against the aforesaid Bank Agreements/Guarantees.

We on behalf of our clients hereby call upon you to kindly make the payment for the aforesaid four consignments covered by the Bank Agreements/Guarantees, Total value of which being USD 56,500 forthwith.

Our clients are confident that you being a nationalised bank will not act in an arbitrary and illegal manner and comply with all your obligations which you have undertaken to do in terms of the four Bank Agreements/ Guarantees as aforesaid.

Please further note that our clients have suffered and are suffering heavy losses and damages on account of your delay, negligence and refusal to pay and honour the Bank Agreements/Guarantees as aforesaid and our clients will hold you liable for all losses and expenses suffered/incurred in the matter.

Yours faithfully, For Khaitan & Co. Sd/- N. G. Khaitan.

Ref.No.BR/Adv./33/270

Stephen House Branch Calcutta-700 001 23rd November 1985.

The Deputy General Manager (Foreign Deptt.)

Head Office.

Calcutta.

Dear Sir,

4 Bank Agreements/Guarantees all dated 26th June 1985 in respect of M-V Ganges Pioneer Voy-4 B/L Singapore, P/D Calcutta, B/LS Nos. 675/4989, 4990, 4991 & 4992 dated 30th May. 1985. High Density Polyethylene Powder (Granule) (HDPE 5202 . Marlex).

Further to our letter No. of 20th November last and the discussion we had with the General Manager, the Asstt. General Manager (Law) and your goodself on the

above subject at Head Office on 22nd November last, we have to advise that in terms of the instructions given by the Asstt. General Manager (Law), a brief in the above matter was handed over to M/s. Chowdhury, Chakraborty & Co. -- Notaries & Advocates, Calcutta in order to protect the Bank's interest in connection with the petition to be filed by M/s. Centax India Ltd. before the Hon'ble High Court on the 25th current. We have further to advise that the undersigned along with Shri M. R. Sarbadhikari, Assist. General Manager (Law) also called on the office of the above advocate to appraise the details of the case on the same day.

As regards the payment of the bills amount to \$ 56,500 the matter was further discussed with the representative of M/s. Centax (I) Ltd. on 23rd instant in the presence of the Assist. General Manager (Law) at his chamber in which connection the party has given an undertaking to pay, a photo copy of which is also enclosed for your kind perusal. .

We have since received from M/s. Khaitan Co. Notaries & Advocates, Calcutta a letter No. NGK dated 18-11-1985 a photo copy of which is enclosed for your kind information, we have since replied to the above letter to . M/s. Khaitan & Co. as per instruction given by the Asstt. General Manager (Law), a copy of which is also enclosed.

We shall advise you of further developments in the matter from time to time.

The Deputy General Manager (Credit) Head Office, Calcutta for information.

Yours faithfully

Chief Manager.

18. It is true that an allegation of fraud has been made in the plaint and petition by the plaintiff purchaser who has taken delivery of the goods but such allegation is against the seller and not against the Shipping Company who has delivered the goods without the Bills of Lading solely on the basis of such instruments. No such allegation of fraud is also made against the Bank which has executed the instruments in favour of the shipping company. The Bank is not entitled to withhold payment to the shipping company after its obligation to pay to the shipping company has arisen, merely because an allegation of fraud has been made against the seller. Reference may be made in this connection to the Supreme Court judgment in the case of United Commercial Bank Vs. Hanuman Synthetics Ltd. and Others, .

19. We may also point out that the case that the said instruments have not become enforceable was not made out in the plaint or in the petition before the Trial Court. It is sought to be made out for the first time in paragraph 11 of the petition before the Appeal Court which we have set out hereinabove. The case sought to be made out in the plaint is for damages suffered for breach of contract by not delivering the goods contracted for and by not delivering the original shipping documents. It is also alleged that the sellers have acted

fraudulently and accordingly the plaintiff purchaser has suffered loss. For the first time in the petition before the Appeal Court and during the arguments before us a case is sought to be made out that the terms and conditions of the instruments have not been complied with to enable the beneficiary to enforce the said instruments against the Bank. -

20. In our opinion, no prima facie case has been made out by the plaintiff-appellant for issuing such temporary injunction so far as the said instruments executed by the Bank are concerned. On the other hand, the defendants have made out a prima facie case that the said instruments have become enforceable and that no such interim injunction should be ordered. Further apart from the question of the prima facie case, following the decisions referred to above, we are of the opinion that in respect of such instruments executed by the Bank, the balance of convenience is in favour of the beneficiary and the Court should not invoke Order 39 of the C.P.C. and pass any interim order of injunction in favour of the plaintiff-appellant so far as the instruments executed by the Bank are concerned.

21. Strictly speaking, in view of our findings as above and in view of the well settled principle that in the case of such instruments executed by the Bank the underlying contract between the seller and the buyer and the question whether any breach has been committed by the seller or the buyer is not at all relevant, it is not necessary for us to go into the merits of the respective contentions of the parties regarding the allegations and cross-allegations relating to the underlying contract between the buyer and the seller and particularly on the question as to whether there has been a breach of contract by the sellers as sought to be contended in the plaint. We are concerned at this stage only with the instruments executed by the Bank and we are not concerned at this stage with the underlying contract between the seller and the purchaser. The instruments executed by the Bank are independent transactions creating obligations independent of the underlying contract between the buyer and the seller. However, as lengthy arguments have been advanced before us on the question of alleged breach of contract between the seller and the purchaser we shall merely make some observations regarding the same. We make it clear that we are not giving any final decision regarding the same,

22. In the original indent, marking has been specified as 5202 but regarding the description of the goods, so far as the grade is concerned, it is left blank. It has not been stated therein that the same must be of grade 5202. It is true that in the alleged confirmation letter by the appellant dt. 29th April 1985 set up by the plaintiff-appellant, it has been stated that the goods must be of 5202 grade. However, though the existence and despatch of the letter has been disputed by the sellers in their affidavit-in-reply admittedly no material has been brought forward by the appellant to show that any such letter was in fact sent. They may be in a position to establish the same at the time of hearing of the suit but the fact remains that as at present, there is no such material on record, Accordingly

we are unable to accept any such contention.

23. Further no prima facie case has also been made out regarding the alleged defect in respect of the quality of the goods. When inspection has been held has not been stated in the petition but the purported survey report is annexed which shows that it was held on 12th July, 1985. Admitted position is that there was no joint survey. There is no material on record to show that the plaintiff-appellant called for any joint survey. Even so far as such alleged unilateral survey is concerned, there is nothing on record to show that the shipping company or the sellers or their representatives were called upon to be present at the time of such alleged survey.

24. No prima facie case regarding alleged damages has also been made out by the plaintiff appellant Regarding the alleged "high sea contract". No date is given. Name of the party is not given. There is no material on record in support thereof excepting a Telex by the appellant to the seller, but no document in support of the same is before the Court

25. So far as the alleged sale on a lesser price of Rs. 17,50,000/- is concerned, the position, is the same. There is no particular regarding the same. The appellant might be able to prove the same at the time of the hearing of the suit but there is no material on record at this stage in support of the same. Further no prima facie case has been, made out regarding the alleged loss suffered or expenditure incurred.

26. For the aforesaid, reasons, in our opinion no prima facie case has been made out for passing an interim order of injunction restraining the Bank from making payment under the said instruments, or restraining the shipping agency, in whose favour the instruments were executed, from realising the money under the said instruments. Further in our opinion this is not a case where Order 39 of C.P.C can be invoked and an order as prayed for can be passed by this court in favour of the plaintiff-appellant. The balance of convenience does not lie in favour of the plaintiff-appellant.

27. For the aforesaid reasons, we dismiss the appeal with costs. All interim orders are vacated.

28. As already directed, disposal of this appeal would also amount to disposal of the application for interim order made before the Appeal Court and such application made before the Trial Court.

Sachi Kanta Hazari, L

I agree.