
(2010) 04 CAL CK 0079

In the Calcutta High Court

Case No : G.A. No's. 2441 and 2724 of 2009, A.P.O.T. No. 341 of 2009, A.P.O. No. 239 of 2009 and W.P. No. 485 of 2009

Central Bank of India and Others

APPELLANT

Vs

Devi Ispat Ltd. and Another

RESPONDENT

Date of Decision : 05-04-2010

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 226, 26
Contract Act, 1872 — Section 171

Citation : (2010) 04 CAL CK 0079

Hon'ble Judges : Prasenjit Mandal, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Samaraditya Pal, R. Deb, D. Sen, R. Medora and A. De, for the Appellant; S.K. Kapoor, K.V. Viswanathan, Sonal Shah, Vipul Kundulia and K. Shah, for the Respondent

Judgement

Bhaskar Bhattacharya, J.—This Mandamus-Appeal is at the instance of a Respondent in a writ- application and is directed against an order dated August 24, 2009 passed by a learned Single Judge of this Court by which His Lordship allowed a writ- application by directing the appellant before us to forthwith return the title-deeds deposited before it by the writ-petitioner as condition of obtaining the loan- facility.

2. Being dissatisfied, the appellant, the Central Bank of India, has come up with this appeal.

3. In the writ-application, the writ-petitioners prayed for the following relief:

a) A writ of and/or writs in the nature of Mandamus be issued commanding the respondent-bank and each one of their men, agents and/or subordinates to forthwith take steps to release the security documents and issue No Objection Certificate and No Due Certificate pertaining to the petitioner-company's account with the Burrabazar Branch of the respondent-bank to the petitioner-company which they have not released acting in a mala fide manner, without any further

delay and after complying with all formalities;

b) A writ of and/or writs in the nature of Certiorari be issued directing the respondent authorities concerned and each one of them, their men, agents and/or subordinates to forthwith transmit the entire records of the instance case forming the basis of non-release of the Security Documents and non issuance of the No Objection Certificate and No Due Certificate pertaining to the petitioner-company's account with the Burrabazar Branch of the respondent-bank to the petitioner-company before the Hon"ble Court and to certify them and/or being so certified to quash the refusal to prove the same;

c) Rule of NISI in terms of prayers (a) and (b) made hereinabove;

d) An order be issued directing the respondent authorities concerned to forthwith set aside the arbitrary reasons of not having received consent from the respondent No. 1 and release the Security Documents and issue the No Objection Certificate and No Due Certificate pertaining to the petitioner upon compliance with all reasonable and required formalities;

e) An order be passed injuncting the respondent Nos. 1 to 3 from creating any ground and realising the security provided by the petitioner-company and/or its Director and release all the Security Documents held by it and issue No Objection Certificate and No Due Certificate pertaining to the petitioner-company's account with the Burrabazar Branch of the respondent-bank to the petitioner upon compliance with all reasonable and required formalities;

f) Ad-interim orders in terms of prayers (d) and (e) hereinabove;

g) Pass such other order or orders and/or direction or directions as Your Lordship would deem fit and proper;

4. The case made out by the writ-petitioner may be epitomized thus:

1. The petitioner is a company incorporated under the provisions of the Companies Act, 1956 having its registered office at 85, Netaji Subahs Road, Kolkata - 700001.

2. The petitioner-company was incorporated on 31st August, 2004 with the name M/s. Devi Ispat Pvt. Ltd. The name of the petitioner-company was thereafter changed to M/s. Devi Ispat Ltd. The present Directors of the petitioner-company are Mr. Nirmal Kumar Mandhani, Mr. Mohit Mandhani and Mr. Baidyanath Paul.

3. The petitioner-company carries on the business of manufacturing and trading in ingots and various other types of steel and for the said purpose requires financial support from the financial institutions like the respondent-bank.

4. The respondent No. 1 is a banking company under the relevant applicable laws in India. The respondent No. 1 being a public bank is discharging public functions and fulfils the criteria of Article 12 of the Constitution of India and is, as such, a "State" under the said provision.

5. Since the very inception of the petitioner-company, it has been banking with the respondent-bank and has been availing various facilities being Term Loan, Working Capital Demand Loan, Cash Credit and Letter of Credit facility.

6. On 16th October, 2006 the petitioner-company wrote to the respondent- bank requesting it to review and enhance its credit facilities. On the basis of such proposal of the petitioner-company, the respondent No. 3 intimated the petitioner-company of its decision of review and the enhanced credit facilities of the petitioner-company's account maintained by the respondent-bank, whereby the petitioner-company was to enjoy two Term Loans being Term Loan I for Rs. 360.00 lakh being Account Number 1103590030, Term Loan II for Rs. 2 15 lakh being Account Number 1103590041, Cash Credit for Rs. 300.00 lakh being Account Number 1103589988. Working Capital Demand Loan (WCDL) for Rs. 1200 lakh being Account Number 3001640109 and Letter of Credit favouring West Bengal State Electricity Distribution Company Limited for Rs. 56.00 lakh. The Collateral Securities given to the respondent-bank against such loan were Equitable Mortgage of land and building at Jalan Industrial Companies in the name of the petitioner-company measuring 105 cottahs (approx). Equitable Mortgage of land and building at Jalan Industrial Complex in the name of the director Nirmal Kumar Mandhani measuring 79 cottahs (approx), along with the Primary Security in the nature of equitable mortgage and hypothecation of fixed assets of the factory unit for Rs. 788.22 lakh (assessed on 31st March, 2006), hypothecation of stocks, raw materials, work-in-process, finished goods, consumables and stores, hypothecation of book debts, fixed deposit of Rs lakh and 25% margin as fixed deposit on the Letter of Credit for Rs. 56.00 lakh.

7. By and under various letters dated 15th September, 2008, 23rd October, 2008, 24th March, 2009 and 24th April, 2009 the respondent-bank, upon the instructions of the respondent No. 1 had, advised the petitioner to shift its loan account to some other bank without stating any reason whatsoever. Upon receipt of such advice, the petitioner-company started negotiating with various banks to takeover its account at that juncture of market recession and economic slowdown. Nevertheless, the petitioner- company was at last successful in finding a Banker and as such, The State Bank of India, Chowringhee Branch, Kolkata, was willing to takeover the account of the petitioner-company.

8. The petitioner-company after finding a new banker cleared all the dues of the respondent-bank and had made provisions for 100% margin of remaining Letter of Credit that the petitioner-company had taken favouring West Bengal State Electricity Distribution Company Limited.

9. The petitioner-company had by its letter dated 6th May, 2009 authorised the respondent-bank to handover the original title deeds of its factory premises and all the collateral securities held by it as against the petitioner-company as well as from Mr. Nirmal Kumar Mandhani, a director of the petitioner-company, to the State Bank of India, Chowringhee Branch, Kolkata, along with the "No-Due" Certificate, and "No-Objection" Certificate. This apart, the petitioner-company

had also requested the respondent-bank to charge up to date interest upon all cash credit account, term loan accounts, Working Capital Demand Loan account and handover the remaining balance in the form of a Banker's cheque. The respondent-bank was also instructed to hold on the liquid security being MMDC and Cash Margins so as to provide cover to the Letter of Credit issue in favour of the West Bengal State Electricity Distribution Company Limited and create further case margins in respect of the same. It was clarified to the respondent-bank that pending return of the Letter of Credit by the West Bengal State Electricity Distribution Company Limited the petitioner-company would not discharge the MMDC's of the petitioner-company held by the respondent-bank.

10. The petitioner-company's banker, The State Bank of India, Chowringhee Branch, Kolkata, had after taking over the account written to the respondent-bank to handover to it the title deeds and release all securities for the new banker to takeover the account immediately but such requests of the petitioner-company as well as the petitioner-company's banker were all falling on deaf-ears.

11. Upon taking over of the account, the State Bank of India had given a Banker's Cheque of Rs. 15 crore which the respondent-bank had encashed and appropriated in lieu of the outstanding balances lying against the petitioner-company along with all amount of interest charged upon the same, as on 9th May, 2009 which would be reflected from the statement of accounts of the petitioner-company issued by the respondent-bank. This apart, the State Bank of India has also opened a Letter of Credit for an enhanced value, favouring the West Bengal State Electricity Distribution Company Limited. Since the substitution of the Letter of Credit with the West Bengal State Electricity Distribution Company Limited is a matter of procedure and would take its own course, provision has been made by the petitioner-company to duly secure the respondent-bank against the same.

12. Even as on 12th May, 2009 the petitioner had written to the respondent Nos. 2 and 3 that in spite of adjusting the balance outstanding in the account maintained by the petitioner-company the respondent-bank had not released the security documents and the "No-Objection" Certificate and "No-Due" Certificate which were required because the new banker of the petitioner-company would smoothly takeover the account of the petitioner and the petitioner-company would carry on its business without being subjected to severe financial difficulty which it had till then suffered.

13. The petitioner-company had further on 16th May, 2009 written to the respondent Nos. 2 and 3 once again asking it to release the Security Documents and the "No-Objection" Certificate and "No-Due" Certificate withheld by the respondent-bank which the respondent-bank has till date not handed over by taking refuge in frivolous ground being that the respondent-bank is yet to receive consent from the Central Office, Mumbai.

14. At the time of advising closure of all accounts and shifting of loan, the

respondent-bank had got instructions from its higher authorities and from the Central Office, Mumbai and pursuant to the same, the petitioner- company was to look for another banker and shift its source of loan. Strangely enough, after finding a new bank to takeover the accounts and after having cleared all its dues, the respondent-bank were at that juncture, when they were to release all securities documents and give "No- Due" certificate and a "No-Objection" certificate, taking pleas of not having received consent from the Central Office for such release. Such attitude of the respondent-bank was mala fide and detrimental to the smooth running of the petitioner-company's business which was being affected because of financial difficulties.

15. The State Bank of India, Chowringhee Branch, the present banker of the petitioner-company had also written to the respondent-bank asking them for the release of all the securities including title deeds of the immovable properties as they had, upon advise of the respondent-bank and upon the petitioner-company approaching them for taking over of the account, taken over the advance as per the Statement of Accounts provided by the respondent-bank.

16. The petitioner-company had thereafter instructed its advocate to issue a notice dated 22nd May, 2009 demanding the respondent Nos. 2 and 3 to release the Security Documents, "No-Objection" Certificate and "No-Due" Certificate withheld by them immediately but the same had till date not been acted upon leaving the petitioner-company with no other alternative but to move before this Hon'ble Court. The respondent had not complied with such demand. Hence, the writ-application was filed.

5. The writ-application was contested by the appellant by filing affidavit-in-opposition and its defences may be summarized thus:

a. The relief which the petitioners claimed in this writ-petition arose out of contract between the petitioner No. 1 and the respondents and as such, the writ-petition was not maintainable.

b. With reference to the statements made in paragraph 9 of the petition it is true that the petitioner-company has cleared all its dues that was shown due and payable in their account maintained with the Burrabazar Branch of the Central Bank of India other than the Letter of Credit. The Letter of Credit for Rs. 56 lakh was opened by the Burrabazar Branch of the Central Bank of India, in favour of West Bengal State Electricity Distribution Company Limited which is revolving in nature and is valid up to 7.3.2010. As such, the 100% margin given by the petitioner would not completely secure the bank. As the said Letter of Credit is revolving in nature, the liability created on such Letter of Credit also revolves and in this process, so long such Letter of Credit remains valid, the liability may continue to incur by the bank till the expiry of such Letter of Credit. The amount of actual liability may go higher than the amount mentioned in the Letter of Credit as it is a revolving one.

c. It is true that the petitioner by letter of 6th May 2009 authorised the

respondent to handover the original title deeds and other securities to Mr. Nirmal Kumar Mandhani and also to issue a "No-Due" certificate. But as stated above, the liability of the bank for the revolving Letter of Credit being still alive at that point of time which was not for a certain amount, the question of releasing the security at that stage as requested did not arise.

d. The Central Bank of India, Burrabazar Branch extended certain banking facilities to one Rajco Steel Enterprises (hereinafter called "Rajco Steel"), which is a partnership firm. By perpetrating fraud in such account of Rajco Steel, a huge amount was siphoned out to the accounts of other constituents of the Bank maintained at various branches of Central Bank of India. After such fraud came to the notice of the bank, an investigation was conducted to find out the amount that was siphoned out from the account of Rajco Steel to the account of other borrowers/sister concerns and/or associates of Rajco Steel when it transpired that huge amount was siphoned out from the account of the Rajco Steel to the account of petitioner No. 1. After such fraud was detected and investigated, the respondent No. 2 lodged a complaint with the Superintendent of Police, Central Bureau of Investigation by its letter of 14th March 2009. Based on such complaint, an FIR was recorded.

e. A special audit was also conducted to ascertain the extent of fraud. It transpired from the record dated 2nd April 2009 of such special audit that the petitioner No. 1 was also involved in fraudulent transaction of Rajco Steel.

f. The Respondents were in process of initiating recovery proceeding against the Rajco Steel Enterprises and its associates/sister concern in whose account the money had been transferred by siphoning it out from the amount of Rajco Steel and in this process, the respondents were working out whether the legal proceeding could also be initiated in whose account such money has been transferred including the petitioner No. 1.

g. At this juncture, if the respondents are required to release all its securities created by the petitioner No. 1, in that event, the respondents will lose its valuable securities. Apprehending that the respondents might decide to take appropriate action for recovery of its due against the petitioner No. 1, in whose account the money has been transferred by siphoning out from the account of Rajco Steel Enterprises, the petitioner being well aware of their misdeed and being parties to the fraud in the account of Rajco Steel Enterprises, as conspirator, is now desperately trying to takeaway all the securities from the respondents so that those securities cannot be invoked for recovery of the amount transferred in the account of the petitioner No. 1 by siphoning it out from the account Rajco Steel Enterprises.

h. All the liabilities, actual or contingent of the petitioner, have not been liquidated, more particularly, the Letter of Credit issued by the Central Bank of India, Burrabazar Branch, in favour of the West Bengal State Electricity Distribution Company Limited has not been returned after due discharge thereof,

and as such, the question of releasing the security and/or issue the certificates did not arise at all. Merely because the State Bank of India has opened a Letter of Credit favouring West Bengal State Electricity Distribution Company Limited will not discharge the obligation of the petitioners" towards the respondents.

i. When the entire liability of the petitioner No. 1 has not been fully discharged there was no question of handing over the security documents and issue of "No-Objection" and "No-Due" certificates.

j. It was denied that at the time of advising closure of accounts and shifting of the source of loan, the respondent-bank had got instruction from its higher authorities and from the central office, Mumbai and pursuant to the same, the petitioner-company was to look after another banker and shift its account. As stated above, the entire liability of the petitioner No. 1 whether actual or contingent being not fully liquidated, the question of releasing the securities and issue of "No-Due" certificate and "No-Objection" certificate did not arise at all, more particularly, when the petitioner No. 1 has been found to be party to the fraud perpetrated on the Central Bank of India, Burrabazar Branch in the account of Rajco Steel Enterprises as stated earlier. It is denied that the attitude of the respondent-bank is mala fide and detrimental to the smooth running of the petitioner-company's business which is getting affected because of financial difficulties.

k. As the petitioner No. 1 has not fully discharged its liability, there is no question of State Bank of India or the petitioners requesting to the respondent-bank to release all the securities including the title deeds and issue of the "No-Objection" and "No-Due" certificate of immovable properties as alleged.

l. Since the petitioners have not been fully discharged of their liability, actual and contingent, there is no question of releasing the securities and issue the certificates asked for by the petitioners particularly when they were involved in defrauding the bank by siphoning out the fund from the account of Rajco Steel Enterprises and to transfer the same to its account to reduce its liability and investigation on such fraud is continuing and the bank is in process of working out the involvement of the petitioner No. 1 in such fraud which may require initiating proceeding against the petitioner No. 1 also.

6. The writ-petitioners filed affidavit-in-reply thereby denying the allegation of fraud taken by the appellant in its affidavit-in-opposition and their reply to those allegations were as follows:

i) The respondent No. 3 all along advised the petitioner to shift its accounts to some other bank and the petitioner No. 1 finally managed to switch over from Central Bank of India to State Bank of India. The petitioner and the State Bank of India altered their position by handing over a Banker's cheque for Rs. 15,00,00,000/- to the respondent-bank. If the respondent No. 3 had indicated that even after payment of Rs. 15,00,00,000/-, the respondent-bank would not issue a "No-Due" certificate and not release the securities held by the respondent-

bank, the State Bank of India would not have taken over the accounts of the petitioner No. 1 and made the payment of Rs. 15,00,00,000/- and altered its position.

ii) The respondent authorities held out that if payment of Rs. 15,00,00,000/- was made to the respondent-bank, which was the outstanding balance on the basis of the calculations made by the respondent No. 3, the accounts of the petitioner-company could be shifted and all securities held therein would also be returned. After such action, the respondents are estopped from claiming or contending otherwise, and all action otherwise by the respondents would be barred by the application of principles of promissory estoppel against the respondent authorities.

iii) It is recklessly alleged in the affidavit that the Burrabazar branch of the respondent No. 1 is not made party to the petition and the petition is bad for non-joinder of necessary parties. The deponent of the affidavit-in-opposition had himself stated that he is an Assistant General Manager, Central Bank of India, posted at the Burrabazar branch and as such, the respondent No. 3 having stated so in a sworn affidavit, it should not lie in the mouth of the deponent to allege that Burrabazar branch of the respondent No. 1 is not made party to the petition. This speaks volumes about the mala fides of the respondents.

iv) The purported grounds made out by the deponent revolves around two pretentious issues, namely, (1) alleged siphoning of huge amount from the account of one Rajco Steel to the account of the petitioner No. 1 and (2) prospect of the respondent-bank being foisted with liability in excess of Rs. 56,00,000/- under the revolving Letter of Credit. Both the aforesaid grounds are specious, imaginary and speculative.

v) It is alleged that after detection and investigation of alleged fraud, the respondent No. 2 lodged a complaint with the Superintendent of Police, Central Bureau of Investigation on March 14, 2009 and based on the complaint, an FIR was recorded. It is indeed curious to note that in none of the letters written by the respondent No. 3 to the petitioner No. 1, there has been any mention of the alleged siphoning of funds by Rajco Steel and/or any money being transferred to the account of the petitioner and/or of the filing of complaint.

vi) It is indeed significant to note that in spite of receiving several letters from the petitioner No. 1, the respondent authorities failed and neglected to reply to any of the letters sent by the petitioner No. 1. If there is any element of truth in the allegations made by the deponent in the affidavit, the respondent authorities ought to have stated about the complaint being lodged with the Superintendent of Police, Central Bureau of Investigation on March 14, 2009 and recording of the FIR and/or of the alleged siphoning of funds by Rajco Steel and/or any money being transferred to the amount of the petitioner and/or of the filing of complaint. Nowhere in the affidavit under reply have the respondents given any details or particulars of any purported or alleged claims that the respondents

might have had against the petitioner No. 1.

vii) It is indeed curious to note that after having alleged that the respondent No. 2 filed a complaint with the Superintendent of Police, Central Bureau of Investigation on March 14, 2009 on the basis of which an FIR was recorded, the deponent is alleging that a purported special audit was also conducted and from the report dated April 2, 2009, it transpired that the petitioner No. 1 was also involved in transaction of Rajco Steel.

viii) It is alleged that the respondents are working out whether legal proceedings could also be initiated in whose account such amount has been transferred, including the petitioner No. 1. This allegation really exposes the incongruent approach and stand adopted by the respondent authorities.

ix) The respondents have specifically admitted that the petitioner-company has cleared all its dues. It is also admitted that 100% margin has been deposited by the petitioner No. 1 and is available with the respondent-bank which covers the entire Letter of Credit limit.

x) The respondent-bank can in no circumstances be allowed to take any objection in excess of the amount undertaken by the bank under the Letter of Credit. The Letter of Credit gets replenished and revolves again only after the bills negotiated there under are returned by the petitioner No. 1. Therefore, the respondent is estopped from alleging that the amount of actual liability may go higher than the amount mentioned in the Letter of Credit as it is a revolving Letter of Credit.

xi) The petitioner further states that the system of the working of the revolving Letter of Credit is such that each month the West Bengal State Electricity Distribution Company Limited raises a bill upon the petitioner and the petitioner pays the said bill promptly and as such, the Letter of Credit as issued by the respondent is made good by such payment. It has never been the case that at any point of time the West Bengal State Electricity Distribution Company Limited has raised a bill which the petitioner has not paid and as such, the Letter of Credit has been exposed. Further to meet the exigency, if any, the petitioner has provided for 100% margin against the Letter of Credit and has by all means secured the bank. In the premises that such security in the form of 100% margin has been given and that admittedly all dues as reflected in the various accounts of the petitioner-company has been cleared there arises no reason why the security documents of the petitioner-company would be held back by the respondent-bank. At no points of time can the actual liability of the respondent-bank go beyond the amount mentioned in the Letter of Credit.

7. As pointed out earlier, the learned Single Judge has allowed the writ-application. While allowing the application, the learned Single Judge overruled the defence of the appellant sought to be taken by relying upon Section 171 of the Contract Act and as regards fraud, the learned Single Judge observed as follows:

At the time that the respondent-bank last wrote to the petitioner-company for it to remove its borrowal accounts from the bank, it was aware of the alleged fraud having been perpetrated by Rajco. By the time that the company caused the cheque for Rs. 15 crore to be deposited with the respondent-bank by State Bank, the bank had the report of the special audit that it had commissioned. It is also not the bank's case that it was not aware by then that one of its officers had certified the creditworthiness of the petitioner-company on behalf of the bank in a letter issued to State Bank. Yet, it does not appear from the contemporaneous correspondence or the bank's affidavits that the bank recalled its letter issued to State Bank or otherwise made State Bank aware of the bank's suspicion that the petitioner-company was a party to the alleged fraud perpetrated on it by Rajco. The bank did not inform the petitioners of the bank's suspicion. The bank permitted its certificate issued by an alleged tainted officer to be relied upon by another nationalised bank, it received the payment on behalf of the petitioner-company from State Bank and, prior to the institution of the proceedings, did not assert the lien that it now claims.

In the bank inducing the petitioner-company to remove its borrowable accounts without alleging any wrongdoing on the company's part and in the bank receiving the payment and obtaining the benefit of having all its accounts in respect of the petitioner-company squared up without so much as a whisper of its suspicion of the company's complicity in the alleged fraud, it forfeited, by its conduct, any right to exercise the lien on the documents of title that the petitioner-company had deposited for obtaining the credit facilities.

The admitted position is that immediately upon the receipt of the cheque for Rs. 15 crore from State Bank, the bank's statements of accounts furnished to the petitioner-company revealed that no further amounts remained outstanding therein. With the bank's liability in respect of the revolving letter of credit also having been taken over subsequently by State Bank, there was no amount due from the petitioner-company to the bank in the general balance of account for the bank to exercise any lien in respect of title deeds. It is not necessary to give the bank's conduct any name once it is found that the bank had acted arbitrarily and unreasonably in retaining the title deeds despite there being no immediate debt due from the company.

It is made clear that the allegations levelled by the bank that the petitioner-company and its officers were party to the alleged fraud perpetrated by Rajco and the petitioners' denial thereof have not been gone into.

8. Mr. Pal, the learned Senior Advocate appearing on behalf of the appellant has laboriously criticized the order impugned in this appeal by pointing out that in one hand, the learned Single Judge kept the question of fraud alleged by his client open and on the other hand, passed direction upon his client to handover the title-deeds with the finding that there was no due payable by the writ-petitioner to the appellant. According to Mr. Pal, the allegation of fraud is now being investigated by the CBI, there is no scope of adjudication of this type of

allegations levelled against the writ-petitioners within the narrow scope of an application under Article 226 of the Constitution of India and thus, the direction of the learned Single Judge for return of the title-deed was on the face of the order an erroneous one.

9. Mr. Pal by relying upon the auditor's report tried to impress upon us that in this case, the writ-petitioner is involved in the fraud against his client with the connivance of some of the employees of the Bank and one Rajco Steel, another borrower of the appellant holding account in the selfsame branch, and thus, it is fit case of setting aside the order passed by the learned Single Judge and for permitting his client to hold those deeds till the adjudication of the question of fraud by the competent authority. Mr. Pal further submits that after the disposal of the writ-application, his client has already instituted a proceeding before the Debt Recovery Tribunal for recovery of the balance amount of about Rs. 8 crore allegedly payable by the writ-petitioner to his client. Mr. Pal, therefore, prays for setting aside the order impugned.

10. Apart from the aforesaid submissions, Mr. Pal further contended that a writ-application is not maintainable for enforcing a contractual right against a nationalized bank and according to him, the writ-application is also liable to be rejected on that ground.

11. Mr. Kapur, the learned Senior Advocate appearing on behalf of the respondent, has, on the other hand, opposed the aforesaid contentions of Mr. Pal and has contended that the learned Single Judge has in the facts of the present case rightly passed the direction for handing over the deeds of his client when the bank by its conduct has led his client to believe that there is no due by permitting his client to shift the account and in the process, receiving a sum of Rs. 15 crore paid by his client through its new banker viz. State Bank of India. Mr. Kapur submits that it will appear from the conduct of the appellant that the allegation of fraud is a device only to harass the writ-petitioner. Mr. Kapur points out that till the disposal of the writ-application, the appellant even did not initiate any proceedings for recovery of the alleged due from the writ-petitioner and it is only after the disposal of the writ-application that the appellant has initiated the proceedings before the Debt Recovery Tribunal for recovery of the alleged due. Mr. Kapur contends that the account last furnished by the appellant itself would show that no amount was due and payable by his client after the adjustment of the sum of Rs. 15 crore paid through the State Bank of India. Mr. Kapur further contends that the appellant in reply to the various letters written by his client never alleged fraud against his client and that his client is not at all involved with any fraud allegedly practised by Rajco and there is no common director of his client and the said Rajco Steel. Mr. Kapur, therefore, prays for dismissal of this appeal.

12. Therefore, the question that falls for determination in this appeal is whether the learned Single Judge was justified in passing a direction for return of the title-deeds of the writ-petitioner which was mortgaged with the bank as a security of

the loan agreed to be accepted from the Bank when undisputedly the Bank on accepting a sum of Rs. 15 crore from the writ-petitioner through the State Bank of India, the new Banker of the writ-petitioner had permitted the writ-petitioner to shift its account after indicating credit balance in the account.

13. After hearing the learned Counsel for the parties and after going through the materials on record placed before the learned Single Judge, we find that in spite of the letters dated 6th May, 2009 (Pg.369, PB-II), 12th May, 2009 (Pg.378, PB-II), 16th May, 2009 (Pg.380, PB-II) written by the writ-petitioner and the subsequent letter dated 19th May, 2009 written by the SBI at the request of the writ-petitioner, (Pg.566, PB-II) and the earlier notice of the learned Advocate of the writ-petitioner dated 2nd May, 2009 (Pg.382, PB-II), the bank did not allege any fraud. Nor did the appellant complain that any amount was still payable by the writ-petitioner and even those letters were not replied to by the appellant.

14. In the affidavit-in-opposition, the bank for the first time pleaded that the writ-petitioner was an active participant in a fraud committed on the bank and referred to a copy of the complaint lodged by the bank to CBI by its letter dated 14th March, 2009 and that CBI was investigating into the matter. [Bank's AO, Para 12, Pg.391, PB-II]

15. The bank further pleaded that it also conducted a special audit by the internal auditors of the Delhi Zonal Audit Team which had filed a report dated 2nd April, 2009 which reported that the writ-petitioner was involved in fraudulent scheme originated by one Rajco Steel. [Bank's AO, Para 13, Pg. 391, PB-II]. The bank asserted in the affidavit-in-opposition that the liability of the writ-petitioner had not been discharged. [Bank's AO, Para 16 & 17, Pg.393, PB-II]

16. The bank further stated that it was in the process of initiating recovery proceedings against all those who had conspired with or assisted each other in perpetrating the fraud.

17. From the aforesaid defence, it is clear that in spite of the fact that the appellant smelt fraud at least from the month of March 2009, never communicated anything to the appellant in that regard and rather insisted on shifting the account and co-operated with the appellant in closing down the existing account and also conveyed to the State Bank of India that it had no grievance against the writ-petitioner and had no objection in shifting the existing account by giving "creditworthy" certificate and in the process, also accepted a sum of Rs. 15 crore from the writ-petitioner through its new banker viz. State Bank of India. When the State Bank of India demanded the title-deeds lying with the appellant, even then the appellant did not feel the necessity of telling the State Bank of India that the writ-petitioner was involved in alleged fraud or that it was unable to return the title-deeds. No material was placed before the Court to indicate that in course of investigation for the last one year, any of the directors of the writ-petitioner has been indicted in any criminal case at the instance of the appellant. Even till the disposal of the proceedings before the

learned Single Judge, the appellant had not initiated any civil proceedings for recovery of any amount due and payable by the writ-petitioner and at the same time, the account maintained and disclosed to the writ-petitioner at the relevant time, indicated that after adjustment of the sum of Rs. 15 crore mentioned above nothing was due and payable whereas excess amount was lying in the credit of the writ-petitioner.

18. In our opinion, a party can reasonably contend that his statements earlier reflected from the account to the effect that no amount was payable to him by the other party was incorrect because at the time of making such earlier statement of account, he was unaware of the fraud committed by the other party upon him in collusion with some of his employees and other borrower and for that reason, he was not bound by the earlier statements reflected in the accounts disclosed by him and consequently, he had a right not to return the security given by the other party which is still lying with him.

19. However, in order to resist an action for return of the security filed by the other party by relying upon the account furnished by the first party, such party must establish that he had no knowledge of such fraud at the time of admitting "no due" as reflected in the account and that for settlement of the said account by consenting to close down the relation of borrower and lender, he had not received any amount from the other side with the knowledge of such fraud of that party. In other words, if I know that my borrower by practising fraud upon me is trying to shift the account on payment of Rs. 15 crore through his new banker with the understanding that all the securities would be returned to the new banker although the actual due is Rs. 23 crore and if I agree to accept the said sum of Rs. 15 crore by disclosing the account of "no due" on adjustment of that amount, I shall be precluded from setting up the plea of fraud as a defence in an action for return of the securities.

20. However, if I decide to return the amount of Rs. 15 crore that I took for closing down the transaction being unaware of the existence of the alleged fraud, I shall be able to successfully resist the action of return of securities on the ground that my earlier statement of account was the outcome of fraud perpetrated upon me. It is settled law that a person alleging fraud for avoiding a settlement must return the benefit he himself has gained out of that settlement.

21. For the above reason, we, at the outset, enquired from Mr. Pal, the learned Senior Advocate appearing on behalf of the appellant, whether his client was ready to return the sum of Rs. 15 crore received from the writ-petitioner through its new banker as a part of settlement of their existing account by shifting the same from the appellant. Mr. Pal after taking instruction expressed his client's specific instruction not to return the said amount as a condition of resisting the claim of return of the securities withheld by the appellant by taking the plea of alleged fraud.

22. In such a background, we propose to decide the appeal.

23. First of all, we proceed to consider whether the appellant had any knowledge of the alleged fraud committed by the writ-petitioner at the time of shifting the account in extracting, in essence, an admission of "no due" from the appellant in the account between the parties.

24. We have already pointed out that according to the appellant, in the month of March, 2009 they lodged complained of fraud against Rajco Steel and in the month of April, 2009 they had their special audit report discovering the alleged fraud of Rajco Steel and the writ-petitioner was permitted to shift his account in the month of May, 2009 on accepting a sum of Rs. 15 crore through the new banker. Even before shifting of the account to the State Bank of India, no complaint was made either to the new banker or to the writ-petitioner complaining any fraud. Even when the letters were written to return the securities in the month of May 2009, the appellant did not allege fraud against the writ-petitioner. Till today, it is not the case of the appellant that any criminal case has been initiated against any of the directors of the writ-petitioner and till the disposal of the writ-application, no proceedings for recovery of any amount was initiated against the writ-petitioner in the Debts Recovery Tribunal.

25. From the aforesaid facts any of the following three alternative views can be inferred:

1) The appellant till the shifting of the account of the writ-petitioner and acceptance of Rs. 15 crore from the writ-petitioner through its new banker did not at all know the involvement of the writ-petitioner in the alleged fraud and that is why permitted the writ-petitioner to shift its account and render all possible help to assist the writ-petitioner in finding out a new banker by giving "worthy of credence" certificate.

2) The appellant had genuine apprehension about the involvement of the writ-petitioner in the alleged fraud and for that reason, from the last part of the year 2008, the appellant was insisting on shifting the account of the writ-petitioner as would appear from various letters placed in these proceedings and pretended to be unaware of such fraud with the intention of getting a lump sum amount from the new banker as a consequence of shifting the account with a further motive not to refund the security and to utilize the security for the adjustment of the balance dues that will be found really payable on detection of the extent of fraud.

3) The writ-petitioner is not at all involved in the alleged fraud of Rajco Steel and it was false that in the month of April, 2009 the appellant through its special audit detected the involvement of the writ- petitioner as would appear from the fact that knowing well that a particular account holder has practised fraud upon it, a nationalized bank will never permit such account holder to shift its account to another Bank by giving a certificate of "credit worthiness" and at least, will, in no case, show excess credit amount in its favour in the account after receiving a sum of Rs. 15 crore, when according to the appellant, in the month of March, 2009 already a criminal case has been started and in the month of April, 2009

special audit of the appellant allegedly detected involvement of the writ-petitioner in the fraud.

26. Unless the question of fraud is investigated fully and tried on evidence, no final conclusion can be drawn in the matter and the learned Single Judge rightly decided not to enter into such question within the narrow scope of the writ-application.

27. Therefore, the next question is whether a nationalized bank can in the above circumstances by merely raising a plea of fraud refuse to handover security when its last account shows no dues of its account holder.

28. It is now settled law that if a party to a contract decides to rescind the same on the ground of fraud perpetrated by the other party, the party rescinding the contract must be prepared to refund the benefit obtained by it out of such agreement. The above principle of equity is also applicable to such party if it wants to avoid enforcement of such contract by taking the plea of fraud.

29. In the case before us, it has been established from the materials on record that it was the from the side of the appellant that the proposal of shifting of the account to another bank came although no reason has been disclosed by the appellant why it repeatedly asked the writ-petitioner to shift its account. It appears that the writ-petitioner accepted the proposal given by the appellant for shifting the account and consequently, the writ-petitioner negotiated with the State Bank of India for shifting its account. The appellant co-operated with the writ-petitioner for shifting the account by giving the certificate of "worthy of credence" in favour of the writ-petitioner and subsequently, received a sum of Rs. 15 crore from the new banker which, but for such agreement of shifting proposed by the appellant, would not have been paid by the new banker on behalf of the writ-petitioner. Now if the appellant wants to avoid the agreement of shifting of the account proposed by it on the ground of fraud of the writ-petitioner and wants to maintain the earlier position of continuance of the account, it must be prepared to refund the benefit of Rs. 15 crore received by it as a condition of such shifting of account.

30. In our view, the appropriate order that should be passed in the writ-application filed is not to enter into the question of fraud taken by the appellant in defence by directing the parties to approach the ordinary appropriate forum prescribed by law for resolving the dispute as to whether any amount is due and payable by the writ-petitioner provided the appellant returns the amount of Rs. 15 crore received by it through the new banker of the writ-petitioner; however if the appellant is unwilling to return the said amount, it should not be permitted to take the defence of fraud and the Writ-Court on the basis of the account issued by the appellant itself showing credit balance in favour of the writ-petitioner should direct return of the security in view of the conduct of the appellant, i.e. the refusal of return of the benefit received out of the agreement which is a prerequisite condition of rescinding the agreement on the ground of fraud. We

cannot lose sight of the fact that it was the appellant who all along insisted on shifting of the account and its proposal of shifting was accepted by the writ-petitioner and the arrangement of payment of Rs. 15 crore was made as a part of the agreement of shifting. It is not the case of the appellant that the writ-petitioner by committing fraud was running away by shifting the account and in the process, the appellant has detected the fraud. If the proposal of the appellant for shifting was not given, the account would continue in regular course.

31. In other words, the defence of the appellant is that "yes, I gave proposal of shifting the account although I will not disclose the reason for such proposal, I co-operated with the writ-petitioner in accomplishing my proposal of shifting the account by inducing the new banker to accept the account of the writ-petitioner by giving "credit worthy" certificate even in spite of my knowledge of involvement of the writ-petitioner through my internal audit report in the month of April 2009 and in the process, I not only received Rs. 15 crore but also indicated "no due" balance in the account after such adjustment, nevertheless the agreement of shifting of account initiated by me has been vitiated by the fraud of the writ-petitioner and as such, I will neither return the securities held for such account and at the same time, will not return Rs. 15 crore received by me through the new banker of the writ-petitioner pursuant to such agreement of shifting."

32. The question of fraud being one of fact, in our view, in such circumstances, the Writ-Court should ask the banker whether it is willing to return the benefit of fraud and if the answer is in affirmative, the writ-application should be dismissed on condition that the banker should return the benefit directing the writ-petitioner to seek the ordinary remedy. However, if the banker refuses to return the benefit it has admittedly received out of the alleged fraud, the Writ-Court should grant relief to the writ-petitioner on the basis of the admission reflected in the account issued by the banker with the observation that such direction is without prejudice to the right and contention of the parties in the adjudication before the ordinary forum if initiated at the instance of the bank alleging fraud.

33. We, however, do not appreciate the attitude of the appellant, a nationalized bank, and a "State" within the meaning of Article 12 of the Constitution of India that although it is unable to involve the writ-petitioner in a criminal prosecution even within a period of one year after discovery of the alleged fraud, yet it will contend before us that the Writ-Court should not entertain the complaint of the writ-petitioner because the legal right of the writ-petitioner sought to be infringed by the appellant arose out of a business transaction and at the same time, it is not inclined to return the benefit.

34. We now propose to deal with the decisions cited by Mr. Pal.

35. In the case of Basdeo Ram Sarup Vs. Dilsukhrai Sewak Ram, , a Division Bench of the Allahabad High Court held that where a person sent a sum of money on the terms that it was to be taken, if at all, in satisfaction of a larger

claim and if the money was kept, it was a question of fact as to the terms upon which it was so kept. Accord and satisfaction, according to the said decision, imply an agreement to take the money in satisfaction of the claim in respect of which it is sent. If accord is a question of agreement, the decision proceeded, there must be either two minds agreeing or one of the two persons acting in such a way as to induce the other to think that the money is taken in satisfaction of the claim and to cause him to act upon that view. In either case, according to the said decision, it is a question of fact both on authority and principle and therefore, it is clear that the mere fact that the cheque is retained and cashed, cannot be conclusive proof in law that the amount was agreed to be accepted on the condition offered.

36. By relying upon the said decision Mr. Pal tried to impress upon us that mere acceptance of Rs. 15 crore by his client through the State Bank of India does not imply that his client accepted the said amount on condition of full satisfaction of the due and with promise of returning the security.

37. In the case before us, it appears that after accepting the said sum of Rs. 15 crore, the appellant in the latest account had shown credit balance in favour of the writ petitioner implying that there was no further due of the writ- petitioner after adjusting that amount. In such a case, once the appellant has indicated credit balance in favour of the writ petitioner, no question of applying the principle mentioned in the Allahabad decision arises. If the bank had not shown credit balance of the writ-petitioner after such adjustment, and contended that even after the said adjustment, further amount of about Rs. 8 crore was due and payable as sought to be argued now, the position would have been different. Therefore, the said decision cannot have any application to the fact of the present case.

38. In the case of Union of India (UOI) and Another Vs. Elbridge Watson, , a Division Bench of this Court held that the prayers of a writ- petition under Article 226 of the Constitution of India must be specific with exactitude and clarity. We fail to appreciate how the said decision can be of any help to the appellant when in the writ-application we are concerned, specific prayer was made for return of the securities and such prayer has been allowed by the learned Single Judge. We do not find any defect in the prayer of the respondent in the writ-application out of which the present appeal arises which we have quoted above.

39. By relying upon paragraph 7 of the judgment in the case of Thansingh Nathmal and Others Vs. A. Mazid, Superintendent of Taxes, Mr. Pal tried to convince us that the High Court should not normally permit a person to bye-pass the machinery created under the statute for granting a relief by entertaining a petition under Article 226 of the Constitution of India. In our opinion, Mr. Pal could successfully apply the said principle to the fact of the present case, provided there was no admission on the part of his client in the account that there is excess payment made by the writ- petitioner after the adjustment of Rs. 15 crore and in such circumstances, a citizen can definitely complain

arbitrariness on the part of a "State" within the meaning of Article 12 of the Constitution in refusing to hand over the security in spite of making admission of full payment of dues.

40. We thus, find that the said decision cannot help Mr. Pal in the facts of the present case.

41. In the case of Shyamnagar Tin Factory Private Ltd. Vs. Snow White Food Product Co. Ltd., , it was pointed out that where a debtor sends a letter to the creditor with a cheque for an amount smaller than what is due stating in the letter that the cheque is sent in full and final settlement of account and the creditor accepts the cheque informing the debtor that he has accepted the cheque in part payment of his dues, he is entitled to claim the balance of the amount of dues.

42. We do not for a moment dispute the aforesaid principles of law but the said principle cannot have any application to a case where the Bank after crediting the amount of Rs. 15 crore shows excess payment in the credit of the writ-petitioner and thus, the said decision does not help the appellant in anyway.

43. In the case of Arya Vyasa Sabha and Others Vs. The Commissioner of Hindu Charitable and Religious Institutions and Endowments, Hyderabad and Others, , it was held that the question involved in the said matter as to whether a particular religious or charitable institutions is or is not a religious denomination or any section thereof within the meaning of Article 26 of the Constitution is a question of fact or in any event, a mixed question of law and fact and cannot be effectively adjudicated in a writ application under Article 226 of the Constitution and thus, Civil Court is the appropriate forum. In the case of National Textile Corpn. Ltd. and Others Vs. Haribox Swalram and Others, , the other decision cited by Mr. Pal the Supreme Court reiterated the same view. By relying upon those decisions, Mr. Pal wanted to contend before us that in this case the dispute as to fraud cannot be adjudicated by the Writ-Court and the learned Single Judge even without deciding that disputed question of fraud erred in law in passing direction for refund of the security, as if, there was not fraud on the part of the writ-petitioner. We fully agree with the contention of Mr. Pal that the question whether any fraud has been perpetrated or not is basically a question of fact and should not be adjudicated in a writ-application but at the same time, when a "State" within the meaning of Article 12 of the Constitution of India, who is supposed to act fairly, after acknowledging "no liability" of a citizen retains the security and does not answer or allege fraud in spite of demand, a Writ-Court is entitled to give relief to a citizen if it appears that the said "State" is a benefactor in the alleged transaction of the fraud who has taken in the defence of fraud before the Writ-Court and is, at the same time, not willing to refund the benefit so obtained which is the pre-requisite for raising the plea of fraud for avoiding an agreement. We, thus, find that the said decision does not help the appellant in anyway.

44. In the case of Krishna Priya Ganguly and Anr. v. University of Lucknow and Ors. reported in 1984 SCC 307, while dealing with a matter arising out of a writ-application where the writ-petitioners prayed for merely consideration of his case for admission, the Supreme Court held that the High Court, in such circumstances, could not go a step further and issue a writ of mandamus directing the college to admit him to the Post Graduate course, thus granting a relief which the petitioner himself never prayed for. By relying upon the said decision, Mr. Pal wanted to submit before us, that this Court cannot pass a direction for refund of Rs. 15 crore when the writ-petitioner did not pray for such relief. We have no intention of passing a direction for returning the said amount to the writ-petitioner which is not even prayed by the writ-petitioner. All that we wanted to convey to Mr. Pal is that in order to raise the plea of fraud for the purpose of avoiding its own admission, the Bank is required to return the said amount, otherwise, such plea is not tenable at the instance of the bank. Once we have got the stance of the bank that it has no intention of refunding the benefit received out of the transaction of fraud alleged to have been practised by the writ-petitioner, we will not permit the appellant to take such defence of fraud for the purpose of wriggling out of the admission made by it as reflected in its own account that excess amount has been paid by the writ-petitioner after adjustment of Rs. 15 crore. We, thus, find that the said decision is of no avail to the appellant.

45. In the case of State of U.P. and Ors. v. Bridge & Roof Company (India) Ltd. reported in (1996) 6 S.C. 22, the Supreme Court held that the provision of Article 226 of the Constitution of India was not meant to supplant the existing remedies at law but only to supplement them in certain well-recognized situations.

46. According to the Supreme Court in the said case, the issue of writ of mandamus was misconceived as the respondent before Supreme Court did not seek to enforce any statutory right of theirs nor was it willing to enforce any statutory obligation cast upon the appellant. Similar was the view of the Supreme Court in the case of State of Bihar and Others Vs. Jain Plastics and Chemicals Ltd., , the other decision cited by Mr. Pal on the similar point. In the said case, the appellant before the Supreme Court invited tender for supply of PVC pipes and fittings and tender of respondent-company was accepted. The respondent-company delayed the supplies and finally appellant terminated contract and purchased fittings at a higher price. Thereafter, while paying the final bill to the respondent, the difference of amount which required to be incurred by the appellants was deducted. The respondent filed a writ-petition challenging the decision taken by the appellants to deduct differential sum for the loss suffered from the bills of respondent-company while making the full and final payment.

47. In such a case, the High Court granted relief to the writ-petitioner. On appeal, the Supreme Court held that the question whether the alleged non-

supply of road permits by the appellants would justify breach of contract by the respondent would depend upon facts and evidence and was not required to be decided or dealt with in a writ-petition. Such seriously disputed questions or rival claims of the parties with regard to breach of contract, the Supreme Court held, were to be investigated and determined on the basis of evidence which might be led by the parties in a properly instituted civil suit rather than by a Court exercising prerogative of issuing writs.

48. In the case before us, the writ-petitioner simply relies upon the admission of the appellant that excess amount had been paid after adjustment of Rs. 15 crore received from the State Bank of India and by virtue of that admission prayed for direction for refund of the securities as the act of the appellant, a "State" within the meaning of Article 12 of the Constitution of India was arbitrary in not returning the securities notwithstanding excess payment and shifting of account at its instance. In such circumstances, we are prepared to accept the contention of the appellant that the Writ-Court should not go into the defence of the appellant that due to fraud practised by the writ-petitioner such admission was made provided the benefit received by the appellant out of such alleged fraudulent agreement is returned by the appellant. If the appellant is not willing to return such benefit, we shall direct the appellant to return the securities without prejudice to the right of the bank to recover the alleged excess amount by taking recourse to the regular statutory remedy available to it. We, thus, find that the said decision does not help the appellant in anyway.

49. Moreover, we are conscious that it was the appellant who induced the writ-petitioner to shift its account to other bank for the reason not disclosed. It appears that on such repeated pressure from the appellant, the writ-petitioner decided to shift its account by contracting the State Bank of India and made arrangement for paying off the entire dues of the appellant and thus, in this case at the instance of the appellant, the writ-petitioner altered its position by making new contract with the State Bank of India with the understanding of closing down the existing account. In such a situation, in our opinion, a writ-application is very much maintainable. In this connection, we propose to rely upon the following observations of the Supreme Court in the case of Bai Chanchal and Others Vs. Syed Jalaluddin and Others,

Public bodies are as much bound as private individuals to carry out representations of facts and promises made by them, relying on which other persons have altered their position to their prejudice. The obligation arising against an individual out of his representation amounting to a promise may be enforced ex contractu by a person who acts upon the promise: when the law requires that a contract enforceable at law against a public body shall be in certain form or be executed in the manner prescribed by statute, the obligation if the contract be not in that form may be enforced against it in appropriate cases in equity. In Union of India (UOI) and Others Vs. Indo-Afghan Agencies Ltd., this Court held that the Government is not exempt from the equity arising out of the

acts done by citizens to their prejudice, relying upon the representations as to its future conduct made by the Government. This Court held that the following observations made by Denning, J., in *Robertson v. Minister of Pensions* (1949) 1 KB 227 applied in India.

The Crown cannot escape by saying that estoppels do not bind the Crown for that doctrine has long been exploded. Nor can the Crown escape by praying in aid the doctrine of executive necessity, that is, the doctrine that the Crown cannot bind itself so as to better its future executive action.

We are in this case not concerned to deal with the question whether Denning, L. J., was right in extending the rule to a different class of cases as in *Falmouth Boat Construction Co. Ltd. v. Howell* (1950) 1 All ER 538, where he observed at page 542:

Whenever Government officers in their dealings with a subject take on themselves to assume authority in a matter with which the subject is concerned, he is entitled to rely on their having the authority which they assume. He does not know, and cannot be expected to know, the limits of their authority, and he ought not to suffer, if they exceed it.

It may be sufficient to observe that in appeal from that judgment *Howell v. Falmouth Boat Construction Co. Ltd.* (1950) 1 All ER 538 Lord Simonds observed after referring to the observations of Denning, L. J.:

The illegality of an act is the same whether the action has been misled by an assumption of authority on the part of a government officer however high or low in the hierarchy."* * * The question is whether the character of an act done in force of a statutory prohibition is affected by the fact that it had been induced by a misleading assumption of authority. In my opinion the answer is clearly: No.

If our nascent democracy is to thrive different standards of conduct for the people and the public bodies cannot ordinarily be permitted. A public body is in our judgment, not exempt from liability to carry out its obligation arising out of representations made by it relying upon which a citizen has altered his position to his prejudice.

Mr. Gokhale appearing on behalf of the Municipality urged that the petition filed by the Company apparently raised questions of fact which in the view of the High Court could not appropriately be tried in the exercise of the extraordinary jurisdiction under Article 226. But the High Court has not said so, and on a review of the averments made in the petition this argument cannot be sustained. Merely because a question of fact is raised, the High Court will not be justified in requiring the party to seek relief by the somewhat lengthy, dilatory and expensive process by a civil suit against a public body. The questions of fact raised by the petition in this case are elementary.

50. In our opinion, the aforesaid principle is equally applicable to the facts of our case on the basis of admitted facts of the case excluding the allegation of fraud

and thus, the aforesaid two decisions cited by Mr. Pal do not support his client in the facts of the present case.

51. In the case of *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, , it was held that the State, its corporation and instrumentalities, have the public duty to be fair to all concerned. Even when some defect is found in the decision making process, the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. According to the said decision, the Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not and only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene. In our opinion, if the said principle is applied to the facts of the present case, the writ-petitioner is entitled to get the relief claimed in the writ-application because the appellant, a public authority, should not be permitted to harass a citizen of this country, after making admission of excess payment in its favour, nevertheless, by withholding the securities simply on the ground that it apprehended some fraud although no criminal has yet been initiated against such citizen and even during the pendency of the writ- application, the appellant did not care to institute any proceeding for recovery of the alleged dues and it is only after suffering a mandamus, decided to institute regular proceeding for recovery of money on the ground of fraud and that too, without returning the benefit of the alleged fraud admittedly received by it.

52. We are, therefore, of the view that in this type of a case if we do not intervene, we shall be approving the arbitrary act of a nationalized bank in withholding the securities even after recording admission of full payment merely on the allegation of fraud although it is not willing to return the admitted benefit received from the agreement which it seeks to avoid. Therefore, the said decision rather supports the writ-petitioner.

53. In the case of *V.K. Majotra Vs. Union of India (UOI) and Another*, , by relying upon the paragraph 8 of the judgment, Mr. Pal contended that the Writ-Court should be well advised to decide the points raised in the petition and if in a rare case, keeping in view the facts and circumstances of the case, any additional points are to be raised, then the concerned and affected parties should be put to notice on the additional points to satisfy the principles of natural justice. The said decision further states that the parties cannot be taken by surprise. We fail to appreciate how such a point can arise in the present case. In this case, the writ-petitioner has disclosed the entire materials justifying their claim for refund of securities and in reply, the bank alleged fraud. The Court granted the relief by not deciding the question of fraud. We, as Appellate Court, merely wanted to point out that by relying on the plea of fraud, one can avoid an admission provided the benefit received out of such fraud is returned. The appellant is not willing to return Rs. 15 crore admittedly paid by the new banker of the writ-petitioner while shifting the account. In such circumstances, we are of the view

that bank must be prepared to return the securities as the plea of fraud, at least, in this proceedings is not tenable if it is unwilling to return the benefit subject however to its right to recover appropriate dues in accordance with law. The said decision does not help the appellant.

54. In the case of Union of India (UOI) Vs. R. Bhusal, , the question was whether in an application under Article 226 of the Constitution conclusion arrived at by the High Court from the pleading was justified. In the case before us, the allegation is clearly stated in the writ-application and the appellant got opportunity of controverting those allegations and in the process, took the plea of fraud for overcoming its admission but at the same time, refused to return the benefit received by it from the agreement of shifting of account which it wants to avoid by taking the plea of fraud. In such a case, in our opinion, a Writ-Court is justified in granting the relief prayed for by the writ- petitioner. It is needless to mention that if the appellant succeeds in the Debts Recovery Tribunal and any amount is decreed, it will have the right to execute the decree against the writ-petitioner in accordance with law notwithstanding our direction for return of the security and further, the appellant will also be entitled to pray for interim relief before the Tribunal if its case is so strong on merit on the basis of materials placed before such Tribunal. But there was no justification of withholding the securities merely on the plea that in future that the bank will institute civil proceedings. The said decision, thus, is not relevant in the facts of the present case.

55. In the Union of India (UOI) and Others Vs. Jai Prakash Singh and Another, , the High Court described the policy of the appellant to be arbitrary but in the writ-application the legality of the policy was not challenged. In such circumstances, the Supreme Court was of the view that the High Court travelled beyond the pleadings and it did not grant any opportunity to the appellant to file even counter-affidavit. We have already pointed out that in this case, the writ-petitioner proceeded on the basis of admission of the appellant and described the act of the appellant to be arbitrary where full opportunity was given to the appellant to justify its stance but the pre-requisite for taking the plea of fraud as provided under the Contract Act has not been fulfilled.

56. Thus the Writ-Court is entitled to grant relief to the writ-petitioner subject to its right to recover the amount on proving fraud before appropriate forum.

57. In the case of K.D. Sharma Vs. Steel Authority of India Ltd. and Others, , the Supreme Court relied upon the well-known decision of A.V. Papayya Sastry and Others Vs. Government of A.P. and Others, where it was held that a judgment, decree or order obtained by practising fraud on Court is a nullity in the eye of law and such a judgment, decree or order, passed by the first court or by the final court, has to be treated as nullity by every court and it can be challenged in any Court and at any time, in appeal or in revision or even in collateral proceedings. In arriving at such conclusion, the Supreme Court pointed that fraud is an act of deliberate deception with the design of securing something by taking unfair

advantage of another. The Supreme Court further pointed that in fraud one gains at the loss and cost of another. We do not for a moment dispute the aforesaid proposition of law but we fail to appreciate how the said principle can be of any avail to the appellant who is taking the plea of fraud without returning the benefit arising out of such fraud and the alleged fraud is yet to be established in a court of law.

58. Moreover, one in order to avoid one's own admission on the ground of fraud must initiate appropriate legal action before the appropriate legal forum within the prescribed period of limitation as one is required to avoid an order of an authority as an outcome of fraud. By merely describing one's own admission as outcome of fraud and hence nullity, one cannot ignore the right accrued in favour of other party by such admission. In order to get rid of such admission on plea of fraud, the party admitting something must institute judicial proceedings for declaration of fraudulent act of the other in inducing him to make such declaration and so long in such proceedings, the fraud is not established and the declaration sought for is granted, such admission will be binding. In this connection, we may preferably refer to the following observations of the Apex Court in the case of *Pune Municipal Corporation Vs. State of Maharashtra and Others*, made while considering the effect of an order which is sought to be avoided as nullity:

It is well settled that no order can be ignored altogether unless a finding is recorded that it was illegal, void or not in consonance with law. As Prof. Wade states: "The principle must be equally true even where the "brand of invalidity" is plainly visible; for there also the order can effectively be resisted in law only by obtaining the decision of the Court.

37. He further states:

The truth of the matter is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the Court may refuse to quash it because of the plaintiff's lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason. In any such case the "void" order remains effective and is, in reality, valid. It follows that an order may be void for one purpose and valid for another, and that it may be void against one person but valid against another.

38. In *Smith v. East Elloe Rural District Council* 1956 AC 736 at 769 : (1956) 1 All ER 855, Lord Redcliffe had an occasion to consider a similar argument (that the order was null and void). Negating the contention, the Law Lord made the following off-quoted observations:

This argument is in reality a play on the meaning of the word "nullity". An order even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or

otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.

59. Therefore, so long the admission of the appellant about settlement of dues is not set aside by a competent judicial forum as a product of fraud practised at the instance of the writ-petitioner, the same is binding upon the appellant and the above decision does not help the appellant in anyway.

60. In the case of *Kisan Sahkari Chini Mills Limited and Ors. v. Vardan Linkers and Ors.* reported in (2008) 12 SCC 500, it was pointed out that in exercising the writ-jurisdiction if the High Court found that exercise of power in passing an order of cancellation was not arbitrary or unreasonable, it should normally desist from giving any finding on any disputed question of fact as to whether there was a contract and relegate the petitioner to the remedy of a Civil Court. It was further pointed that even in cases where the High Court finds that there is a valid contract if the impugned administrative action by which the contract is cancelled, is not unreasonable or arbitrary, it should still refuse to interfere with the same, leaving the aggrieved party to work out his remedies in a Civil Court. In other words, the Supreme Court proceeded, when there is a contractual dispute with a public law element, and a party chooses the public law remedy by way of a writ-application instead of a private law remedy of a suit, he will not get a full-fledged adjudication of his contractual rights, but only a judicial review of the administrative action. According to the Supreme Court, the question whether there was a contract and whether there was a breach may, however, be examined incidentally while considering the reasonableness of the administrative action. But where the question whether there was a contract, is seriously disputed, the High Court should not assume that there was a valid contract and on that basis, examine the validity of the administrative action.

61. In the case before us, the learned Single Judge has not entered into the question of fraud and after the disposal of the writ-application, the appellant has approached the Debts Recovery Tribunal claiming recovery of money on the basis of its defence of fraud. But the question still before us is whether an instrumentality of a "State" within the meaning of Article 12 of the Constitution of India should be permitted to take the plea of fraud for the purpose of retaining the securities after inducing a citizen to shift his account to another bank and while shifting, admitting "no claim" after adjusting Rs. 15 crore taken from his new banker, if it is not prepared to return the admitted benefit it has received out of alleged fraud. In our opinion, if fraud is ultimately established, the appellant will have its full benefit by executing the decree that will be passed in its favour. But it cannot withhold the security on a mere plea of fraud without refunding the admitted benefit it has received out of the alleged tainted transaction. The position, however, would have been different if the appellant immediately after entering appearance expressed its desire to return the benefit it had received out of the agreement of shifting of account and asked the court to dismiss the writ-application on the plea of alleged fraud by returning the benefit; in such a

situation, it would have been the duty of the Writ-Court to dismiss the writ-application in view of a tenable defence taken by the bank. As an Appellate Court, we also gave the same proposal to the appellant but the appellant refused. The said decision, thus, cannot have any application to the fact of the present case.

62. In the case of *Indian Bank v. Godhara Nagrik Cooperative Credit and Anr.* reported in (2008) 12 SCC 541, it was held that the question as to whether fraud have been committed by the officers of the bank which was pending consideration before the Criminal Court and there was other various disputed questions which were required to be gone into in the said proceeding including the role played by some of the writ-petitioner, such seriously disputed question of fact should not have been gone into by the Writ-Court. We fully appreciate the said decision and for that reason we have not gone into the question of fraud when the matter has now been taken to the Debts Recovery Tribunal after suffering the order impugned, but at the same time, by mere taking a plea of fraud, the appellant cannot be permitted to take advantage of its own wrong by not restoring the benefit, it had received out of the alleged fraud and such conduct on the part by a nationalized bank by refusing to return the benefit of the alleged fraud violates Article 14 of the Constitution of India and in such a case, the appellate Court can compel the bank to return the security by asking it to have its remedy through the appropriate forum and in this case, it has after suffering the order from the Writ-Court already approached the Debts Recovery Tribunal. Mere filing of civil proceedings alleging fraud after suffering an order of return of security on basis of admission of "no due" cannot be a tool in the hand of the appellant for setting aside the order of Writ-Court before its appellate forum simply on that ground. But the order of the Writ-Court will be without prejudice to his right in the civil proceedings for establishing the alleged fraud including his right to get interim relief, if any, therein in accordance with law.

63. In the case of *Shanti Devi Vs. State of Sikkim and Another*, , a Writ-Court completely disregarded the civil law relating to eviction and directed the writ-petitioner on her own writ- petition to handover possession of the tenanted premises to the Respondent No. 2, a totally different relief beyond the scope of the writ-application. In such circumstances, the Supreme Court pointed out that the High Court appeared to have lost sight of the fact that they were deciding a writ-petition for relief prayed for by the writ-petitioner and not a civil suit for eviction against her and that in such a proceeding, no mandatory order of eviction could be passed against her. By relying upon the said decision, Mr. Pal tried to convince us that in this writ-application we cannot pass a direction for return of Rs. 15 crore as that was not the prayer in the writ- application. We have already pointed out that we have no intention of passing a direction but at the same time, we have right to direct the appellant to return the security and that we propose to do; on the other hand, if the bank of its own could come forward indicating its intention to return the amount it had received out of the said transaction, we would not grant the relief to the writ-petitioner and would

dismiss the writ-application directing the writ-petitioner to settle the dispute in the ordinary forum. But if the bank, takes the plea of fraud in defence, does not show existence of any criminal case against the writ-petitioner, does not care to institute even any civil proceedings for recovery and over and above, refuse to return the benefit which it had derived out of the alleged tainted transaction, a Writ-Court will be justified in passing direction for return of the security subject to the final adjudication on the disputed question of fraud in future litigation before the appropriate forum. Therefore, the said decision does not suit to the fact of the present case.

64. We, thus, find that the decisions cited by Mr. Pal do no help his client in anyway.

65. On consideration of the entire materials on record, we, therefore, do not find any reason to interfere with the ultimate direction given by the learned Single Judge in view of the submission of Mr. Pal that his client will not restore the benefit of Rs. 15 crore admittedly taken by it as a part of the dealings of shifting the account of the writ-petitioner which was suggested by the appellant itself.

66. We make it clear that we have otherwise not gone into the question of fraud alleged by way of defence and our observations made herein while dealing with this appeal will not be binding upon the other forum on the merit of the disputes where the appellant has already initiated proceedings for recovery of its alleged dues after the disposal of the writ-application.

67. This appeal is, thus, disposed of with the above observations.

68. In the facts and circumstances, there will be, however, no order as to costs.

Prasenjit Mandal, J.

69. I agree.

Later:

70. Mr. Sen, the learned advocate appearing on behalf of the appellants, prays for stay of operation of our order for a limited period to enable his clients to move higher forum.

71. In this case, the Hon''ble Supreme Court granted stay of operation of the order of the learned Single Judge, which we have affirmed today till a limited period which has already expired on March 1, 2010 and at the time of delivery of judgment, there was no stay. When the Supreme Court itself limited the stay for a particular period which has already expired, while dismissing the appeal we cannot grant a fresh stay. We, thus, refuse the prayer of Mr. Sen.

72. Let Photostat certified copy of this judgment and order, if applied for, be supplied to the parties by day after tomorrow, subject to compliance with necessary formalities.