
(2012) 11 DEL CK 0244
In the Delhi High Court
Case No : CS (OS) No. 258 of 2000

EMCO Limited

APPELLANT

Vs

Malvika Steel Limited and Others

RESPONDENT

Date of Decision : 19-11-2012

Acts Referred:

Contract Act, 1872 — Section 28

Citation : (2012) 11 DEL CK 0244

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Jay Savla and Ms. Amrita Mishra and Mr. Rajpal Singh, for the Appellant; P.S. Bindra and Mr. Khetan, Advocates for D-2, for the Respondent

Judgement

Valmiki J Mehta, J.—This suit filed by the plaintiff M/s EMCO Ltd. essentially seeks two reliefs, one of recovery of Rs. 1,10,91,347/- alongwith interest against the defendant no. 1 on account of latter's breach of contract in failing to lift the manufactured transformers which were especially made for the defendant no. 1, and second of injunction to restrain the defendant no. 3 from making payment under the bank guarantee dated 24.4.1998 on the ground that the demand made by the defendant no. 2/beneficiary for payment under the bank guarantee is defective i.e. not in accordance with the terms of bank guarantee. The bank guarantee was given by the plaintiff as a performance guarantee. This bank guarantee instead of being given in favour of the buyer/defendant no. 1, was at the request of the defendant no. 1 issued in favour of the defendant no. 2 as the beneficiary.

(i) The facts of the case are that by a purchase order dated 31.10.1996, the defendant no. 1 placed an order on the plaintiff for design, engineering, manufacture, supply supervision of erection, testing and commissioning of 9 numbers 12.5/15 MVA, 33/6.9 KV Transformers alongwith mandatory spares. Originally, the transformers were to be supplied in lots of two on or before April, 1997, May, 1997, June, 1997 and December, 1997, however subsequently, the

purchase order was amended qua the delivery period by an Amendment No. 1 dated 19.4.1997 and by an Amendment No. 3 dated 26.2.1998 whereby the delivery period was extended to 31.12.1998. One more amendment to the purchase order was dated 30.3.1998 whereby the delivery schedule was extended for supply of two units by 30.5.1998, another two units by 31.7.1998 and finally last two units by 31.12.1998.

(ii) Two transformers out of the first lot were delivered by the plaintiff to the defendant no. 1 on 31.3.1998.

(iii) Thereafter, by an Amendment no. 4 dated 15.6.1998, the delivery period of the second and third lots was extended to 28.2.1999 and 31.3.1999 respectively.

(iv) One more transformer was sold and delivered to the defendant no. 1 on 16.9.1998 out of the second lot and on 30.9.1998, one more transformer out of the same second lot was further supplied.

(v) The original bank guarantee dated 24.4.1998 was extended on 3.11.1998 to 31.3.1999 with a claim period till 30.9.1999.

(vi) A final amendment was made to the contract delivery period by the letter dated 18.11.1998 of the defendant no. 2 for date of completion of delivery of equipment for lot nos. 2 and 3 by 31.3.1999.

(vii) The defendant no. 1 by its letter dated 6.4.1999 stated that they would like to cancel the order for the supply of transformers, however, the plaintiff had already informed the defendant no. 1 by its letter dated 6.4.1999 asking the defendant no. 1 to depute their officers for inspection of the transformers at the Jalgaon works of the plaintiff so that delivery could thereafter take place.

2. Disputes and differences arose between the plaintiff and the defendant no. 1, and the plaintiff by its letters dated 20.5.1999 and 21.5.1999 asked for dispatch instructions from the defendant no. 1, which never came. The plaintiff alleges that in the meanwhile it was informed by the defendant no. 3 that the defendant no. 2 by its letter dated 29.9.1999 sought extension of the bank guarantee for a further period of three months failing which the letter dated 29.9.1999 of the defendant no. 2 to the defendant no. 3 was to be treated as a claim for payment of the amount of the bank guarantee of Rs. 25,50,000/-.

3. The subject suit has thereafter come to be filed because the plaintiff claimed that the transformers which were made were specifically and especially designed for the defendant no. 1 and hence were useless for any other buyer. The plaintiff in paras 9 and 10 of the plaint avers that there is no ready buyer in the market for the specialized transformers which were manufactured as per the specifications of the defendant no. 1. The plaintiff has accordingly claimed damages as also injunction to restrain the defendant no. 2 from claiming payment and the defendant no. 3 from making payment under the subject bank guarantee dated 24.4.1998.

4. The defendant no. 3 is a proforma party which has failed to appear. The defendant no. 1 also failed to appear and file a written statement and it was therefore proceeded ex parte. The suit is contested only by the defendant no. 2 being the beneficiary of the bank guarantee dated 24.4.1998.

5. The defence of the defendant no. 2 is basically that it has validly invoked the bank guarantee within its validity period and therefore no injunction can be granted against it for encashment of the bank guarantee and similarly no injunction can be granted against the defendant no. 3 from making payment of the amount under the bank guarantee to the defendant no. 2.

6. Following issues were framed in this suit on 6.2.2004.

1. Whether this Court has territorial jurisdiction to try and entertain the present suit? OPD.

2. Whether the present suit is maintainable in its present form? OPP

3. Whether the plaint is signed and verified by a duly authorised person on behalf of the plaintiff? OPP.

4. Whether the defendant no. 1 was justified in taking delivery of 3rd lot of ordered transformer as contracted? OPD

5. Whether the plaintiff has delayed the delivery of the transformer and failed to adhere to the delivery schedule as contemplated under the purchase orders? OPD.

6. Whether the plaintiff has failed to provide pre-delivery inspection of the manufactured transformer as per the purchase order? OPD.

7. Whether the defendant is guilty of breach of contract by failing to take delivery of ordered transformers in terms of the contract? OPP

8. Whether the invocation by defendant NO. 2 vide its letter dated 29.9.1999 and 16.12.1999 is valid invocation in terms of the bank guarantee dated 24.4.1998? OPP.

9. Whether the plaintiff is entitled to an order of permanent injunction in terms of prayer (d) of the plaint? OPP.

10. Whether the plaintiff is entitled for a declaration that the bank guarantee dated 24.4.1998 has expired and that defendant no. 1 and/or defendant no. 2 is liable to return to the plaintiff said bank guarantee duly discharged and cancelled? OPP.

11. Whether the plaintiff is entitled to a decree of Rs. 1,01,91,347/- against the defendant No. 1 towards balance price of the transformers ordered, insurance and storage charges incurred and interest? OPP

12. Whether the plaintiff is entitled to claim future interest @ 18% on the total

amount claimed from the date of the suit till the date of payment ?OPP.

13. Relief.

ISSUE NO. 1

7. This issue of territorial jurisdiction is only qua the defendant no. 2. Since the defendant no. 2 admittedly has its office within the territorial jurisdiction of this Court, this Court would have territorial jurisdiction so far as the defendant no. 2 is concerned. I may also note that the bank guarantee in question was issued to the defendant no. 2 at its office at New Delhi. Injunction is a relief which can be enforced by the personal obedience of the defendant and therefore so far as the relief of injunction against the defendant no. 2 is concerned, this Court would have territorial jurisdiction inasmuch as and as already stated above, the office of defendant no. 2 is situated in New Delhi. I, therefore, decide this issue in favour of the plaintiff and against the defendant no. 2.

ISSUE NO. 2

8. This defence is vague. Why the suit is not maintainable in the present form is not understood and nor argued before me. This issue is therefore decided in favour of the plaintiff and against the defendant no. 2.

ISSUE NO. 3.

9. Issue no. 3 is not pressed on behalf of the defendant no. 3 and therefore, it is held that the plaint is duly signed and verified and the suit is properly instituted.

ISSUE NOS. 4 TO 6

10. These issue nos. 4 to 6 are really unnecessary because the defendant no. 2 has no locus standi to raise these issues. The issue of breach of contract is and can only be between the plaintiff and the defendant no. 1. Defendant no. 1 has chosen not to appear and contest the suit. Defendant no. 2 therefore cannot as a proxy of the defendant no. 1 argue the case of the defendant no. 1. Defendant no. 2 is restricted so far as its defence qua the subject bank guarantee is concerned. In any case issues of justifiability or otherwise of breaches under the contract are not issues which are relevant for payment under a bank guarantee. These issues therefore are decided in favour of the plaintiff and against the defendant no. 2.

Issue nos. 7, 11 and 12.

11. These issues can be dealt with together inasmuch as they pertain to the aspect of breach of contract alleged by the plaintiff against the defendant no. 1 and the consequence with respect to the claim of the plaintiff for damages against the defendant no. 1 along with interest. As already stated defendant no. 1 has chosen not to contest the suit.

12. Plaintiff has led evidence of its witnesses to prove the breach of contract by the defendant no. 1. On behalf of the plaintiff an affidavit has been filed of Sh.

V.L. Bangali as PW-1. The witness PW-1 has duly proved and exhibited the purchase order as Ex. PW-1/1. The amendments made subsequently to the purchase order are proved and exhibited as Ex. PW1/2 to Ex. PW1/4 and Ex. PW1/6. This witness has proved that four transformers were sold and delivered to the defendant no. 1, and the remaining two transformers with regard to the second lot were to be supplied by March, 1999 and the remaining two were to be delivered by 31.3.1999. The letter dated 15.10.1998 in this regard has been proved and exhibited as Ex. PW1/7. The bank guarantee which was extended up to 31.3.1999 with a claim period upto 30.9.1999 is exhibited as Ex. PW1/8. The further amendment made by defendant no. 1 in the delivery schedule has been proved by the document exhibited as Ex. PW1/9. The plaintiff's letter dated 10.3.1999 to the defendant no. 1 informing the defendant no. 1 of the requirement to carry out final inspection and testing on 17th & 18th March, 1999 has been proved and exhibited as Ex. PW1/10. The fact that the defendant no. 1 wrongly deferred their requirement of 5 out of 9 transformers is proved from the letter dated 6.4.1999 of the defendant no. 1 and which is exhibited as Ex. PW1/13. The letters of the plaintiff sent to the defendant no. 1 for dispatch instructions are dated 20.5.1999 and 21.5.1999, and they have been proved and exhibited as Ex. PW1/14 and Ex. PW1/15. The witness of the plaintiff has reiterated the contents of para 9 of the plaint that the specially manufactured transformers cannot be disposed of in the market like other commodities, and some of them were ultimately dismantled in order to mitigate the damages and loss which were being continuously caused to the plaintiff. In the cross-examination of this witness on behalf of the defendant no. 2 it has come on record that the different parts of the transformers were subsequently sold as scrap.

13. At the outset, I was reluctant to grant any damages as prayed for by the plaintiff inasmuch as in order to pass a decree for damages, it is necessary for the Court to know the difference between the contractual value and the price at which the scrap was sold in the market, but, what was the value at which scrap was sold does not emerge from the record. Counsel for the plaintiff has however relied upon a judgment of a learned Single Judge of the Bombay High Court in the case of Maharashtra State Electricity Distribution Vs. DSL Enterprises Pvt. Ltd., to argue the proposition that the Court is always entitled to make an honest guesswork of the damages once it is proved that there is in fact a breach of contract. It is argued on behalf of the plaintiff by relying on the observations of the aforesaid judgment that merely because there may not be sufficient evidence on record, would not mean that damages cannot be granted once the breach of contract by defendant no. 1 is proved and also the causing of loss to the plaintiff. The following paragraphs of the said judgment are relied upon:-

62. In the case of A.V. Joseph Vs. R. Shew Bux, it was held that even when damages with regard to all the items which were required to be deducted from the amount claimed were not proved, only nominal damages cannot be granted upon the breach which came to be proved. The Plaintiff auctioned the goods. The

Plaintiff himself bought back the goods upon auction as there were no other auction purchasers. The Plaintiff had not given sufficient evidence to show the cost. The Plaintiff was to show the loading charge, custom duty, insurance and the freight. Freight was the largest item for deduction. Evidence showed that freight less rebate was rupees 16-8 annas per ton. The Plaintiff's notice asserted that freight actually incurred was 28 rupees. It was held by the Privy Council that that amount of freight could be deducted from the amount claimed as the loss upon breach, though the Plaintiff had failed to prove the exact freight incurred. Their Lordships observed this aspect as follows:

Then that leaves the one large item, the freight. As regards the freight, it is possible that plaintiff will suffer owing to his carelessness, but their Lordships think the safe thing to do is to take it at the largest figure which has been suggested here, namely, that figure which he threatened the other side with, in the letter to which their Lordships have referred. That would be at the rate of rupees 28 or, with a deduction of rupee 1 rebate, rupees 27. Making those deductions their Lordships bring out the figure of damages at rupees 18,502 and that, in their Lordships' opinion, is the sum for which judgment should be entered.

63. This case was followed in the case of Smt. Pani Bai and Others Vs. Smt. Sire Kanwar and Others, which was a case for measure of damages, in which there was no evidence on record as to the price the goods would have fetched and hence, the damages could be correctly determined. Relying upon the case of A.V. Joseph (supra) the Court considered the fact of the Plaintiff not having led sufficient evidence to show the details of damages, despite which the Privy Council held that the Plaintiff cannot be granted only nominal damages. Hence, reasonable damages came to be granted after considering a number of judgments as well as texts on the law of contracts. Hence, it has been held in paragraph 13 @ page 187 of this judgment thus:

13. The fact that damages are difficult to estimate or could not be assessed with certainty or precision cannot relieve the wrong doer of the necessity of paying the damages for the breach of his duty to abide the instructions of the principal and the lack of evidence in such matters would not be sufficient ground for awarding only nominal damages.... the other party should be accorded the benefit of every reasonable presumption for the loss suffered. Thus, when faced with such a situation that a precise quantum of damages could not be calculated because of insufficiency of material placed on the record, the Court may form its own conclusions on matters in respect of which there is no evidence, on a reasonable basis and the defendants must be paid reasonable compensation for the loss suffered by them. The Court, in such a situation, should try to place the principal in such a position in which he would have been placed if the agent would not have committed breach of the instructions on his principal.

69. What is the measure of damages when there is an available market is well known. However, when there is no available market for the goods which in fact

happens when goods are manufactured to order and are required essentially and only by the buyer, the measure of damages depends upon the loss suffered by the aggrieved party upon breach by the defaulting party.

72. The case of *Re Vic Mill Limited* which was extensively considered and followed in the case of *Interoffice Telephones Limited* was a case where "there was no available market in which the goods could have been promptly sold ". The observation in the last paragraph of the judgment is that the damages will vary according to the state of the market, including the questions of "supply and demand

73. In the case of *W.L. Thompson Ltd. v. R. Robinson (Gunmakers)* 1955 AELR 154 it has been observed that there is a comparative absence of authority on the meaning of the phrase "Available market ". The case of *Marshall & Co. v. Nicoll & Son* 1919 S.C. 244 (H.L.) was considered (on page 129) for ascertaining the position in law when there was no available market for the goods. It was held that available market was a situation where particular goods could freely be sold, and that there was a demand sufficient to absorb readily all the goods that were thrust on it, so that if a purchaser defaulted, the goods in question could readily be disposed of. The judgment had considered the situation of the market for motor cars in the recent past. In that case where there was demand for the motor cars, it was observed that whenever a car could be spared by the manufacturer it was "snatched ". If any purchaser fell out, many would take his place. In such cases the award for damages would have been purely nominal. The Court considered that the situation in that case was different and that there was, then no demand for the motor cars such that they could be readily absorbed whenever available for sale. Hence, it was held that if the purchaser defaulted, the sale was lost and there was no means of readily disposing of the car contracted to be sold, so that there was not, even on the extended definition, an available market ". It was held that the Plaintiff were entitled to the compensation for the loss of their bargain to the extent of the profit.

(underling is added)

14(i). In view of the facts of the present case, and the judgment of the Bombay High Court in the case of *Maharashtra State Electricity Distribution*(supra) as relied upon by the plaintiff, I am of the opinion that on a fair assessment damages can be granted to the plaintiff inasmuch as plaintiff has proved on record that it had manufactured two transformers for the defendant no. 1 and which were as per the specific specification of the defendant no. 1. The defendant no. 1 however failed to lift the transformers in the breach of the contract with the plaintiff. Plaintiff has further proved that the transformers were specially manufactured for the defendant no. 1 and could not be sold in the open market as no market is available for the specialized transformers. The transformers were therefore ultimately dismantled, and sold as scrap.

(ii) The contracted value of the two transformers is Rs. 96,59,977/-. Considering

that the transformers were of high value, the scrap value would also be substantial and therefore, making an honest judgment/assessment I am of the opinion that the plaintiff can be granted after reducing the value of scrap damages of Rs. 80 lacs instead of Rs. 96,59,977/- being the contracted value of the transformers. Plaintiff will also be entitled to pendente lite and future interest till payment against the defendant no. 1 at 12% per annum simple considering that the transaction is a commercial transaction. These issues are accordingly decided in favour of the plaintiff and against the defendant no. 1. Issue Nos. 8, 9 and 10

15. These issues can be disposed of together as they pertain to the claim of injunction of the plaintiff against the defendant no. 2 and the entitlement of the defendant no. 2 to claim the amount under the subject bank guarantee dated 24.4.1998 of Rs. 25,50,000/-. That the bank guarantee in question dated 24.4.1998 was issued in favour of the defendant no. 2 is undisputed between the plaintiff and the defendant no. 2. It is also not disputed that this bank guarantee of Rs. 25,50,000/- was at first valid up to 30.6.1998 with the claim period of 31.12.1998, and which last date was thereafter extended up to 31.3.1999 with a claim entitlement to be made up to 30.9.1999. The defendant no. 2 invoked the bank guarantee by its letters dated 29.9.1999 and 16.12.1999 (Ex. P-3(earlier) or Ex. PW1/16) and (Ex. P-4) respectively. The issue in the present case really boils down to the fact as to whether the demand made by the defendant no. 2 upon the defendant no. 3-bank vide Ex. P-3 is in terms of the bank guarantee. So far as the second letter dated 16.12.1999 of the defendant no. 2 to the defendant no. 3 is concerned, the same is admittedly beyond the last date of 30.9.1999 and which was the end date of the grace period for invocation of the bank guarantee and therefore this letter of invocation beyond the period of invocation provided, does not bind the defendant no. 3 and does not confer any rights on the defendant no. 2. Also it is this letter Ex. P-4 which is equally defective like Ex. P-3 because the invocation is not in terms of the bank guarantee, an aspect which is discussed hereafter.

16. In order to appreciate the issue as to whether the demand made is or is not in accordance with the bank guarantee, it is necessary to reproduce the language of the bank guarantee as also the letters Ex. P-3 and Ex. P-4. The bank guarantee in question reads as under:-

Bank Guarantee

The Industrial Finance Corporation

of India Limited

4th Floor, Core No. 5, P.B. No. 3043

Scope Complex 7

Lodhi Road

This Guarantee is made on the 24th day of April, 1998 by the Sakura Bank Limited, having its Head Office at 2-B, Mittal Court, 224, Nariman Point, Mumbai-400 021 (hereinafter referred to as the "Guarantor" which expression unless repugnant to the context shall include its successors, assigns, etc.) in favour of the Industrial Finance Corporation of India Limited, a company formed under the Indian Companies Act, 1956 and having its registered office at Bank of Baroda Building, 16 Sansad Marg, P.B. No. 363, New Delhi-110 001 (hereinafter referred to as the "IFCIL" which expression unless repugnant to the context shall include its successors, assigns, etc.)

WHEREAS IFCIL has entered into an agreement vide their Purchase Order No. DRO/MSL/ELS/100/98-2401 dated 30/03/1998 (hereinafter referred to as the said Contract) with M/s Emco Transformers Industrial Estate, Thane-400 604 (hereinafter referred to as the "Supplier" which expression unless repugnant to the context shall include its successors, assigns, etc.) for supply of 6 Nos. 12.5/15 MVA 33/6.9 KV Power Transformers for Malvika Steel Ltd.'s Integrated Steel Project Jagdishpur. And whereas under the terms and conditions of the said Contract IFCIL has agreed to pay to the Supplier a down payment of Rs. 25,50,000/- (Rupees Twenty Five Lacs Fifty thousand only) being Ten (10%) percent of the price for supply of equipment of the Supplier furnishing a Bank Guarantee for equivalent amount in the manner herein contained.

And Whereas the Contract provides for the reduction in the guarantee liability suitably with adjustment of down payment in the Supplier's bills for despatches by the supplier. Now in consideration of IFCIL making the down payment of Rs. 25,50,000/- (Rupees Twenty Five Lacs Fifty Thousand only) to M/s. Emco Transformers Limited. We, The Sakura Bank Limited, the Guarantor, agree as follows:

- 1) We hereby unconditionally and irrevocably guarantee the refund to IFCIL and sums upto Rs. 25,50,000/- (Rupees Twenty Five Lacs Fifty Thousand only) on IFCIL's first demand in writing stating that the sum or sums claimed is/are due to IFCIL by reason of Supplier's failure to fulfil any of the obligations under the contract.
- 2) We, the Guarantor will be bound to pay without demur to IFCIL the amount due under this guarantee and the amount stated by IFCIL be so due shall be final and binding on the Guarantor notwithstanding and disputes or controversy between the Supplier and IFCIL arising out of this contract, or any other contract.
- 3) Neglect of forbearance on the part of IFCIL in enforcement of payment monies the payment where of is intended to be hereby secured or giving of time by IFCIL for repayment thereof or any amendment in contract without reference to guarantor shall not in any way relieve us, the guarantor or our liability under this guarantee.

4) Not withstanding anything contained herein before our liability under this guarantee is restricted to Rs. 25,50,000/- (Rupees Twenty Five Lacs Fifty Thousand only). Our guarantee shall remain in force upto 30/06/1998.

Unless a demand in writing for claim under this guarantee is lodged with us within six months of the expiry of this guarantee i.e. within 31/12/1998 all your rights under this guarantee shall be forfeited and we shall be relieved and discharged from all liabilities thereunder.

17. The documents Ex. P-3 and P-4 read as under:-

Document Ex. P-3

Dated: September 29, 1999

DRO/MSL/ELS100/781/99-

Deputy General Manager

The Sakura Bank, Limited

2B, Mittal Court, 224 Nariman Point

Mumbai-400 021.

Sir,

Reg.: Malvika Steel Limited-Extension of Bank Guarantees in respect of Advance Payment made to M/s. EMCO Transformers for supply of 12.5/15 MVA Transformers under our ELS Assistance.

This is with reference to the Bank Guarantee No. 3843, dated 24.04.1998, issued in favour of IFCI, New Delhi, by your Bank for a sum of Rs. 25,50,000.00 and paid to the above mentioned supplier towards advance for supply of 12.5/15 MVA Transformers against our Purchase Order No. DRO/MSL/ELS/100//98-2401 dated 30.03.1993.

In this connection, we have to advise that the aforesaid Guarantee has expired on 31.03.1999, with a claim period valid till 30.09.1990. We hereby request you to get the said Bank Guarantee extended for a further period of three months and send the same after needful by return post.

In case the aforesaid Bank Guarantee is not extended as requested above, this letter be treated as demand for claim of above sum and proceeds of the Guarantee be immediately permitted to us.

Sd/-

Asst. General Manager (T)

DRO/MSL/ELS100/781/99-1079

Copy for information to:

Malvika Steel Limited

New Delhi-110 044.

EMCO Transformers Ltd.

Thane, Mumbai Asst. General Manager (T).

Document Ex. P-4

DRO/PR./GR. 1/781/99

Sakura Bank Ltd.,

2B, Mittal Court,

224, Nariman point,

Mumbai-400 021

Sir,

Re: Emco Transformers Ltd.-A/c. Malvika Steel Ltd.-

Encashment of Bank Guarantees

Please refer to our letter No. DRO/MSL/ELS 100/781/99-1078 dated 29th Sept., 99, on the subject.

Please note that in terms of the contract entered into between M/s Malvika Steel Ltd.(MSL), our Lessee and M/s. Emco Transformers Ltd. New Delhi, and the purchase order issued to M/s. Emco Transformers Ltd., for supply of 12.5/15 MVA Transformers, we have made advance down payment aggregating to Rs. 2,550,000/- to Emco Transformers Ltd. The adjustment/refund of the said amount by Emco Transformers, has been guaranteed by you vide your Bank Guarantee No. 3483 dated 24.04.98. We would like to inform you that out of the above advance paid by us to the supplier, Rs. 1,254,497/- has already been adjusted against various payments. The amount of Rs. 1,295,503/- are yet to be recovered from Emco Transformers.

In terms of the said guarantee, you have unconditionally and irrevocably guaranteed the refund of the said sum on demand.

In view of the above, we hereby call upon you to pay to us as the beneficiary under the said guarantee, the said sum of Rs. 1,295,503/- (Rupees One million two hundred ninety five thousand five hundred three only) immediately on receipt of the letter, failing which we shall be constrained to take appropriate legal action against you for realising the dues under the said guarantee at your own risks as to costs and other consequences.

Yours faithfully,

Sd/-

(Y.V. LUTHRA)

Asst. General Manager

18. I may note for the sake of completion of narration that the extension of bank guarantee is in terms of the document exhibited as Ex. PW1/8 and which reads as under:-

The Industrial Finance Corporation

of India Limited

4th Floor, Core No. 5, P.B. No. 3043

Scope Complex 7

Lodhi Road

New Delhi-110 003

Sub: Extension of Original Bank Guarantee No. 3843 dt. 24/04/1998 for Rs. 25,50,000/- favouring The Industrial Finance Corporation of India Ltd. is now extended from 01/07/1998 to 31/03/1999.

At the request and on behalf of M/s. EMCO TRANSFORMERS LIMITED, PLOT No. F-5, Road No. 28, Wagle Industrial Estate, Thane-400 604 we hereby extend the validity of the original Bank Guarantee No. 3843 dt. 24/04/1998 for Rs. 25,50,000/- (Rupees Twenty Five Lacs Fifty Thousand only) favouring The Industrial Finance Corporation of India Ltd. is now extended from 01/07/1998 to 31/03/1999.

All other terms and conditions of the original Bank Guarantee remains unchanged.

Notwithstanding anything contained here in above our liability is restricted upto Rs. 25,50,000/- (Rupees Twenty Five Lacs Fifty Thousand only) and valid upto 31/03/1999. Unless demand is made on the Bank in writing on or before 30/09/1999, we shall be discharged and relieved from all liabilities thereunder.

FOR THE

SAKURA BANK, LTD.

19. It is now settled law that a demand made for payment with respect to a bank guarantee has to be in terms of the bank guarantee. It is said that a letter invoking payment under the bank guarantee has to be like plaint in a suit containing a cause of action for invocation of a bank guarantee. The law is well settled that if invocation is not in terms of the bank guarantee, no payment can be claimed under the bank guarantee. The basic judgment in this regard of this Court is a Division Bench judgment reported as Harparshad and Co. Ltd. Vs. Sudarshan Steel Mills, Punjab National Bank, . The relevant ratio is contained in the following portion of the head note of the judgment which reads as under:-

There is a distinction between absolute liability as when the money under the bank guarantee is payable on demand like a promissory note and the absolute liability which arises after the terms of the bank guarantee are fulfilled. In the instant case the intention of the parties according to the language of the bank was that the absolute liability should arise only after the terms of the bank guarantee are fulfilled. The duty of the beneficiary in making the demand on the bank is like the duty of the plaintiff to disclose the cause of action to be rejected for non-disclosure of the cause of action, a demand by the beneficiary of the bank guarantee is liable not state the facts showing that the conditions of the bank guarantee have been fulfilled. It is only after this obligation is performed by the beneficiary that the liability of the bank becomes absolute. The terms of the bank guarantee having not been fulfilled the amount under the bank guarantee has not become due for payment to the beneficiary.

(underlining is added)

This ratio has thereafter also been adhered to in other Single Bench judgments of this Court.

20. The Supreme Court has also in the case of Hindustan Construction Co. Ltd. Vs. State of Bihar and Others, held that unless the demand is made in accordance with the bank guarantee, the payment under the bank guarantee cannot be made. In the case before the Supreme Court, the invocation letter with respect to the bank guarantee was to be issued by the Chief Engineer, but the bank guarantee was invoked by the Executive Engineer, and therefore the Supreme Court held that since the invocation letter was not in terms of the language of the bank guarantee thus the bank guarantee could not be encashed. The relevant paragraphs of the judgment of the Supreme Court in the case of Hindustan Construction Co. Ltd. (supra) are paras 19 to 21 and which read as under:-

19. It is contended by Mr. Nariman that "Performance Guarantee" constituted an independent contract between the Bank and the Chief Engineer. The Guarantee was furnished by the Bank to the Chief Engineer and, therefore, it could be invoked only by the Chief Engineer and not by the Executive Engineer.

20. Learned Counsel appearing on behalf of the defendants has contended that in the general conditions of contract appended to the agreement between the HCCL and the State of Bihar, the word "employer" has been defined to mean the Governor of Bihar acting through the Chief Engineer or his authorised representatives. The word "Engineer Incharge" or "Engineer" has been defined separately to mean Superintending Engineer or the Engineer appointed from time to time by the "employer" and notified in writing to the contractor to act as Engineer, It is contended that Executive Engineer who has invoked the guarantee would be covered not only by the definition of "employer" but also by the definition of "Engineer Incharge" or "Engineer" as set out in the general conditions of contract. We are not prepared to accept this contention.

21. As pointed out above, Bank Guarantee constitutes a separate, distinct and independent contract. This contract is between the Bank and the defendants. It is independent of the main contract between the HCCL and the defendants. Since the Bank Guarantee was furnished to the Chief Engineer and there is no definition of "Chief Engineer" in the Bank Guarantee nor is it provided therein that "Chief Engineer" would also include Executive Engineer, the Bank Guarantee could be invoked by none except the Chief Engineer. The invocation was thus wholly wrong and the Bank was under no obligation to pay the amount covered by the "Performance Guarantee" to the Executive Engineer.

(underlining added)

21. (i). When we look at the language of the subject bank guarantee, it is clear that the bank guarantee could only have been paid when the demand states that the sum or sums have become due to the defendant no. 2 on account of the plaintiff's/seller's failure to fulfill its obligations under the contract.

(ii). A reference to the language of the letters Ex. P-3 and Ex. P-4 shows that there is no language contained in these documents that there is any failure of the plaintiff/supplier in fulfilling the obligations under the contract. The demand therefore made vide Ex. P-3 and Ex. P-4, does not contain the requisite language as required by the terms of the bank guarantee. In view of the judgments stated above which require that the demand must be strictly made in accordance with the bank guarantee, I have no option but to hold that the plaintiff would be entitled to injunction against the defendant no. 2 and 3 from claiming and making payment under the subject bank guarantee dated 24.4.1998 for Rs. 25,50,000/-. No doubt, the law in this regard is technical but in view of the judgments of this Court and also of the Supreme Court, the plaintiff will be entitled to necessary injunction.

22. At one stage, an argument was sought to be raised on behalf of the defendant no. 2 relying upon Section 28 of the Contract Act, 1872 (although there were no pleadings to this effect and nor was an issue framed) that the period by which extension of time was granted for payment up to 30.9.1999 is void on account of Section 28 of the Contract Act, 1872, inasmuch as, a right cannot be extinguished in terms of Section 28 of the Contract Act. Prima facie, the argument appeared to have some appeal, however, on a deeper examination, the argument was found to be without substance inasmuch as there is a difference between creation of a right and extinguishing of a right. What Section 28 of the Contract Act bars is curtailing the period of enforcement of a right or extinguishment of a right which is already created. Where however the right itself is not created, there cannot be any application of Section 28 of the Contract Act because Section 28 comes into play after a contractual right comes into existence. Surely, banks are entitled to give bank guarantees which are limited for a particular period only, inasmuch as, banks are entitled to say that no interminable bank guarantees can be given. Once, the bank guarantee is only for a particular period, and if such bank guarantee is not encashed within the period

of the bank guarantee (and thereafter even in the additional grace period) really it is the right which does not come into existence inasmuch as, the bank guarantee has not been enforced within the period of its validity. If right does not come into existence, there does not arise any issue of the same allegedly being extinguished. Also, this issue is no longer *res integra* inasmuch it has been decided by a learned Single Judge of this Court in the case reported as *Explore Computers Pvt. Ltd. Vs. Cals Ltd. and Another*, that if a bank guarantee is not invoked within the valid period, no right is created and it cannot be argued that requirement to invoke the bank guarantee within the particular valid period is hit by Section 28 of the Contract Act. The relevant paras of the judgment in the case of *Explore Computers Pvt. Ltd. (supra)* are paragraphs 56 and 57 which read as under:-

56. The question however remains whether the same principal would apply in case of the invocation of the bank guarantee which is distinct from a suit or claim to be filed by the plaintiff on account of refusal of defendant No. 2 to pay the amount under the bank guarantee. That is the first question mentioned above. In my considered view, Section 28 would have no play in such a case where matter is only relating to the terms of the guarantee to the extent it requires a party to invoke the guarantee during the life time of the guarantee. The sequester to this would be to consider whether the plaintiff did invoke the bank guarantee within this period specified. The answer to this question depends on the interpretation of the terms of the bank guarantee in view of the two dates stipulated and the different phraseologies used for the same. The observations of the Supreme Court in *State of Maharashtra v. Dr. M.N. Kaul* case (*supra*) do make it clear that it is the terms under which the guarantor has bound himself which have to be seen and in case of ambiguity when all other rules of construction fail, the guarantee must be interpreted *contra proferentem*. On a reading of the bank guarantee, in my considered view, there is really no ambiguity if the guarantee is read as a whole. The last paragraph of the bank guarantee is being once again reproduced for purposes of reference

Notwithstanding anything contained herein above, our liability under this guarantee shall be limited to an amount of Rs. 10.00 lacs (Rupees ten lacs only), and shall remain valid up to 12.01.1997 unless suit to enforce any claim under the guarantee is filed against us on or before 12.02.1997 all the rights of *Explore Computers Private Limited* shall be relieved and discharged from all liabilities there under.

57. The said clause, a "notwithstanding" clause, makes it clear that irrespective of what had been stated prior to Clause (a) in the bank guarantee, the liability of the bank under the guarantee was limited to the amount specified and was to remain valid only up to dates specified which was 22.02.1997 (extended up to 11.07.1997 by Ex D-3). The second qualification was that the suit to enforce any such claim under the guarantee was to be filed on or before 22.03.1997 (extended up to 11.08.1997 as per Ex. D-3). Thus two things had to be done: a)

the claim under the bank guarantee had to be lodged prior to a particular date and b) the suit had to be filed before another date one month thereafter. It is only the second part of the guarantee which would be hit by Section 28 of the Contract Act and the first part would remain alive. In fact this is the view even expressed in the Food Corporation of India v. National Insurance Company Case (supra). It may be noticed that the Supreme Court in the said judgment has taken note of the earlier judgment in the The Food Corporation of India Vs. The New India Assurance Co. Ltd. and others, where it was held that the restriction contained in the insurance agreement that a person to be indemnified shall have no right after six months from termination of the principal contract does not mean that the suit to enforce insurance has to be filed within six months. Only the payment had to be made to the insurer within six months and it is a condition precedent for filing the suit. In the facts and circumstances, there is similarity between the views expressed in the Food Corporation of India Case (supra) and the present case.

(underlining added)

Therefore, even assuming that even the defendant no. 2 is entitled to raise this plea as legal plea, the plea that the grace period requiring invocation of the bank guarantee by 30.9.1999 is violative of Section 28 of the Contract Act is an argument without merit and is accordingly rejected.

Relief:

In view of the aforesaid, the suit of the plaintiff is decreed against the defendant no. 1 for a sum of Rs. 80 lacs along with pendent lite and future interest till payment with interest at 12% per annum simple. Plaintiff is also entitled to injunction restraining the defendant no. 3 from making any payment to the defendant no. 2 under the bank guarantee dated 24.4.1998 for a sum of Rs. 25,50,000/- and which grace period ended on 30.9.1999. Defendant no. 2 is also restrained from claiming any payment under the aforesaid bank guarantee from the defendant no. 3. Parties are left to bear their own costs. Decree sheet be prepared.