
(2011) 03 DEL CK 0200

In the Delhi High Court

Case No : IA No's. 2206 and 6701 of 2009 in CS (OS) No. 313 of 2009

Helm Dungemittel GMBH

APPELLANT

Vs

The State Trading Corporation of India Ltd. and Others

RESPONDENT

Date of Decision : 11-03-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2

Citation : (2011) 3 AD 333 : (2012) 1 BC 146 : (2011) 182 DLT 414 : (2011) 123 DRJ 119

Hon'ble Judges : V.K. Shali, J

Bench : Single Bench

Advocate : A.S. Chandhiok, Additional Solicitor General, Rahul P. Dave, Bhaskar Tiwari and Sumit Chopra, for the Appellant; Ananya Datta, for Defendant No. 1, Pradeep Dewan and Rajiv Samiyar, for Defendant No. 2, for the Respondent

Judgement

V.K. Shali, J.—The question to be decided by the present order is as to whether the Defendant No. 2 can be permitted to invoke the counter guarantee on the basis of which the Defendant No. 2 had furnished the performance guarantee in favour of Defendant No. 1/beneficiary. It may be pertinent here to mention that counter guarantee by Defendant No. 3 was furnished at the instance of the Plaintiff as a part of performance guarantee being furnished in terms of the contractual obligation between the Plaintiff and the Defendant No. 1.

2. In order to make the factual matrix clear, the Plaintiff hereinafter is referred as "German Party", the Defendant No. 1 as "STC", Defendant No. 2 as "Canara Bank" and the Defendant No. 3 as "German Bank".

3. The facts of the case are that the German Party entered into a contract with STC on 01.10.2008 for supply of 3 lac + 10% metric tons of urea @ US Dollar 685.5 per metric ton. The shipment of the last cargo of the urea was to be dispatched latest by 15.10.2008. This was stated to be the essence of the contract. The case of the German Party is that it had shipped and delivered 3,20,563 metric tons of urea which was within the tolerance limit of + 10% and

that this shipment was made within the stipulated time. It was received and accepted by the STC. The delivery was against letters of credit issued by the STC and on the shipment having been received, the letters of credit were encased and thus, the entire payment of the goods supplied by the German Party stood paid to it by the STC and the contract stood discharged by performance.

4. It is not in dispute that according to Clause 13 of the contract between the German Party and the STC, the German Party was required to furnish a performance guarantee in favour of STC to the extent of 10% of the value of the goods. The relevant portion of the performance bank guarantee, the format of which, as well as that of counter guarantee, was furnished by the STC, reads as under:

...Hereby Unconditionally And Irrevocably Guarantee And Undertake To Pay To The Buyers Immediately On First Demand Without Protest Or Demur Or Reference To The Sellers If The Sellers Fail To Perform All Or Any Of Their Obligations Under The Said Contract Or Supply Material - Short Than The Contracted Quantity As Revealed By The Joint Draft Survey At The Discharge Port Or If Penalties Are Levied Due To Quality Deviations (Nutrients/Moisture/Particle Size) From Contractual Specifications As Revealed By Discharge Port Analysis Report Or Liability Towards Dead Freight And Dispatch/Demurrage Not Settled....

5. The case of the Plaintiff is that since the contract itself stood discharged, therefore, the invocation of the performance guarantee by the STC was bad in law, which necessitated the filing of the present suit for injunction.

6. On having invoked the jurisdiction of this Court by way of the present suit, the German Party on 13.02.2009 was able to persuade this Court to pass an exporter ad interim order restraining the release of any amount of performance guarantee in question by the Canara Bank or the German Bank in pursuance of the letter of invocation dated 10.02.2009 by the STC. It may be pertinent here to mention that by the time this order came to be passed on 13.02.2009, the Canara Bank had already on 12.02.2009 credited the guarantee amount to the account of the STC/the beneficiary whereas it was not able to retrieve the said amount by invoking the counter guarantee from the German Bank on 10.02.2009. This order has continued till date and it is this order which is being considered by the Court in order to decide the question whether it should be confirmed or vacated.

7. The grounds on which the German Party has prayed for confirmation of this ex parte order are as follows:

(i) That the contract having been performed by the German Party to the satisfaction of the STC and the money having been realized, therefore, the contract of supply and purchase of urea stood discharged by performance on both the sides and consequently, invocation of performance guarantee by the STC was bad in law. Reliance is placed on the case titled *Chatturbhuj Vithaldas Jasani Vs. Moreshwar Parashram and Others*, .

(ii) The STC had invoked the performance bank guarantee on extraneous considerations. This is contended on the ground that the STC in its communication dated 06.11.2008 had requested the German Party for reduction of the price of urea as the only outstanding issue. It is not denied by the German Party that its Indian representative M/s. Everest Fertilizers had offered to reduce the price vide communication dated 24.10.2008 but before this communication could be accepted by the STC, the said offer was revoked by the Indian party at the instance of the German Party on 27.10.2008. This argument is raised as a ground to urge that the invocation of performance guarantee by the Defendants is actuated by ulterior considerations. Reliance is placed on M/s. Radhey Shayam Bansal Vs. M/s. Indian Farmers Fertilisers Cooperative Ltd., ; Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and others,]

(iii) The invocation of the performance bank guarantee or the counter guarantee by Defendant No. 2 was not in accordance with the performance bank guarantee and, therefore, the Canara Bank was not obliged to make the payment to the STC in pursuance to the performance bank guarantee and if it has done so, it has been done by the Canara Bank at its own peril. Reliance in this regard was placed on

(a) Harprashad & Co. Ltd. v. Sudarshan Steel Mills and Ors. AIR 1980 Del 174;

(b) Basic Tele Services Ltd. Vs. Union of India and Another,

(c) Puri International (P) Ltd. Vs. National Building Construction Co. Ltd.,

(d) Bhushan Industrial Co. Pvt. Ltd. v. Cimmco International and Anr. 54 (1983) Comp. Cas. 157

(iv) That no one can be allowed to take advantage of his own fraud even if the fraud is detected at a later stage.

8. The Canara Bank, having paid the amount of performance bank guarantee to the STC, has contested the matter vehemently. The case of the Canara Bank is that performance bank guarantee is an independent contract and the same was unconditional and irrevocable envisaging payment of all the amount to the beneficiary on the first written demand without any protest and demur and without reference to the seller namely German Party, if it has failed to perform any of its obligations under the contract.

9. It is the case of the Canara Bank that this performance guarantee was furnished by the Canara Bank to the STC for a sum of \$ 67,86,450 on the counter guarantee having been furnished to it by the German Bank, at the instance of the German Party. It is also the case of the Canara Bank that once the performance bank guarantee was invoked on 10.02.2009 by STC, the entire amount of bank guarantee was credited to the international account of the STC on 12.02.2009, which is also prima facie corroborated not only from the documentary evidence placed on record but also by the affidavit of Mr. S.K. Jain, an official of the Canara Bank. It was contended that it was well within its right

to have the money retrieved by invoking the counter guarantee furnished by Defendant No. 3.

10. The case of the Canara Bank is that on 10.02.2009 on receipt of demand by the STC vide its swift message, it invoked the counter guarantee the same day, i.e., on 10.02.2009 and the German Bank instead of honoring the invocation of counter guarantee referred to the Principal, namely, the German Party and intimated to the Canara Bank that it is investigating into the matter. It is alleged that after taking instructions from the German Party, it wrote back to Canara Bank that the invocation of the counter guarantee by Canara Bank was not in accordance with the terms and conditions of the counter guarantee as it was not stated in the invocation letter whether they were called upon to make the payment by the beneficiary. This was immediately rectified by the Canara Bank and the German Bank was intimated that it has been called upon to make the payment. It is alleged by the Canara Bank that after having parted with nearly 33 cores of rupees, being a Public Sector Bank, it was deprived of a sizeable amount of money out of circulation, by not honoring of counter guarantee by the German Bank, at the instance of the German Party only with a view to gain time and, in the meantime, it obtained the restraint order from the High Court on 13.02.2009 by not disclosing the full and correct facts.

11. The Canara Bank has alleged that the German Party and the German Bank are in collusion with each other. Firstly, the German Bank approached a Court at Hamburg in Germany and obtained a restraint order that German Bank should not make payment to Canara Bank which was vacated with the direction that the guarantee be honored subject to the decision passed by the High Court of Delhi and thereafter the present petition was filed in which the correct facts were not presented before the Court inasmuch as by the time the order was passed on 13.02.2009, the Canara Bank had already released the amount in favour of the STC and, therefore, what survived on 13.08.2009 was only the realization of the amount by the Canara Bank in pursuance of the counter guarantee whereas the counter guarantee itself was not even on record.

12. So far as the allegation of the fraud with respect to the invocation of the counter guarantee is concerned, it is the case of the Canara Bank that there is absolutely no allegation much less a prima facie proof with regard to the fraud having been played by the STC or by the Canara Bank in obtaining the counter guarantee from German Bank. On the contrary, if at all, there is any prima facie evidence of fraud having been played, it is by the German Party with the help of the German Bank because the latter has notably remained absent and silent by not filing even the written statement and remaining absent during the course of entire proceedings.

13. I have heard Mr. A.S. Chandhiok, learned Additional Solicitor General on behalf of the Plaintiff, namely, the German Party, Mr. A.B. Dial, learned senior counsel for STC and Dr. A.M. Singhvi and Mr. Pradeep Dewan, learned Counsel for Canara Bank.

14. At the outset, it is pertinent to mention that after the conclusion of the arguments, Mr. Chandhiok, learned Additional Solicitor General, on behalf of the Plaintiff, namely, the German Party, had given a suggestion that he is prepared to go for arbitration to resolve the entire dispute between the German Party and the STC, provided the STC refunds the entire amount of the performance guarantee to the Canara Bank and so far as the interest of the STC is concerned, it will be sufficiently protected by the Plaintiff by either furnishing a bank guarantee in the name of Registrar General or by depositing the requisite amount with the Registrar General as the pre-condition for reference of the dispute to the Arbitral Tribunal for adjudication.

15. Mr. A.B. Dial, learned senior counsel for STC, at the outset, on instructions rejected this offer. Consequently, the matter has to be considered on its merits as to whether the interim order dated 13.02.2009 staying the invocation of the counter guarantee can be permitted to continue in favour of the Plaintiff and to the detriment of the Canara Bank.

16. The law regarding bank guarantee has been the subject matter of intense litigation not only in High Courts but also before the Apex Court and repeatedly the courts have voiced concern that the invocation of bank guarantee can be stayed only in two circumstances, firstly, in case there is a fraud of egregious nature or secondly if there is an irretrievable injustice caused to the party on account of the invocation of the bank guarantee. The Court has also observed that it is very essential to impart the credibility to the commercial transactions whether national or international between the contracting parties, namely, the Bank and the beneficiary. It has also been observed that the disputes which may arise with regard to the performance or the alleged non-performance of the principal contract in pursuance to which the guarantee is furnished or its interpretation cannot be permitted to be used as a bone of contention for avoiding the liability under the bank guarantee. It will be worthwhile to reproduce a couple of passages from one of the reported judgments of the Apex Court in *Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd.*, and another, :

21. Numerous decisions of this Court rendered over a span of nearly two decades have laid down and reiterated the principles which the courts must apply while considering the question whether to grant an injunction which has the effect of restraining the encashment of a bank guarantee. We do not think it necessary to burden this judgment by referring to all of them. Some of the more recent pronouncements on this point where the earlier decisions have been considered and reiterated are *Svenska Handelsbanken v. Indian Charge Chrome, Larsen & Toubro Ltd. v. Maharashtra SEB Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd.* and *U.P. State Sugar Corpn. V. Sumac International Ltd.* The general principle which has been laid down by this Court has been summarized in the case of *U.P. State Sugar Corpn.* as follows: (SCC p. 574, para 12)

The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence, if there is such a fraud of which the beneficiary seeks to take the advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encasement of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country.

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

...The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged.

17. In the light of the aforesaid legal position, I have considered carefully the submissions made by the learned Counsel for German Party. The main contention of the learned Counsel in order to confirm the ad interim order against the invocation of the performance guarantee has been that the contract regarding supply of urea which was executed between the German Party and the STC having been performed, inasmuch as the goods having been supplied and the price having been realized, it stood discharged by performance and consequently the performance bank guarantee which was furnished by the German Party through the chain of German Bank furnishing counter guarantee to Canara Bank and Canara Bank furnishing performance guarantee to the beneficiary, namely, STC, came to an end and neither of the two guarantees - performance or the counter guarantee could have been invoked. The learned senior counsel had placed reliance on *Chatturbhuj Vithaldas Jasani Vs. Moreshwar Parashram* and

Others, where it has been observed as under:

The question then is, does a contract for the supply of goods terminate when the goods are supplied or does it continue in being till payment is made and the contract is fully discharged by performance on both sides? We are of opinion that it continues in being till it is fully discharged by performance on both sides.

18. No doubt, in *Chatturbhuj's Case*, it has been held that a contract stands fully discharged by performance on both sides but the observations passed in that case were not in the context of invocation of a bank guarantee. That case was dealing with the question of execution of a contract between the Central Government and a private party where the question of discharge of contract had arisen as to whether it could be said that the contract had been discharged merely on the supply of goods or only when the payment for the said supply is received and it was in this context that the observations were passed by the Apex Court. The Supreme Court in *Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another*, has observed that the law enunciated by judgment is not like a theorem which is to be applied blindly without reference to the facts of the case in the light of which that pronouncement has been made. The facts of the case in which the judgment has been given should correlate with the facts of the case in hand and only then it has to be seen as to whether the ratio laid down in the said judgment can be applied to the facts of the present case.

19. Going by this parameter, the ratio laid down by the Apex Court in *Chatturbhuj's Case*, which the learned senior counsel for the German Party has observed to be a locus classics, cannot be said to be applicable to the facts of the present case.

20. The judgment in *M/s. Radhey Shyam's Case*, where a similar proposition has been laid down by the learned single Judge is also distinguishable from the facts of the case. In that case also, the invocation of the bank guarantee was stayed on the ground that the contract having been performed the performance guarantee stood discharged. But in that case, the invocation letter was not placed on record by the party concerned which prompted the Court to pass a restraint order whereas in the present case, the said documents have been placed on record by the Defendants, i.e., STC and the Canara Bank. Therefore, the facts of this case are distinguishable. Similar would be the position with regard to *Larsen and Toubro's Case* where the invocation of the bank guarantee which was conditional was stayed because of irretrievable injustice.

21. One thing I must observe that there is a growing tendency on the part of the counsel to cite plethora of judgments so that the Court gets lost in the maze of papers and judgments and the main issue gets sidetracked and secondly, that merely because a restraint order has been issued in a particular case on the Court being satisfied about the existence of facts, warranting the grant of such a stay in the said case does not necessarily mean that as a matter of course, the

stay must follow in the facts of the case which is in hand.

22. In addition to this, it has not been admitted by the Canara Bank in the plaint or during the course of arguments that the contract stood discharged on account of performance. On the contrary, it has taken the plea in the written statement that the performance guarantee has been invoked by STC, which was unconditional and therefore, they invoked the counter guarantee. It is also not open to the Plaintiff namely the German Party to contend that there was no dispute regarding the quantity, quality, demurrage, dispatch or terms of performance, and, therefore, the guarantee could not be invoked. The invocation letter dated 10.02.2009 raised by the STC, the beneficiary, against the Canara Bank/Defendant No. 2 and the consequent invocation of counter guarantee by the Canara Bank intimating that they have been called upon to make the payment, was a complete answer to this contention of the learned Counsel for the Plaintiff. Therefore, in the light of above facts, I do not agree with this contention of the learned Counsel for the Plaintiff that the contract stood discharged by performance.

23. I also do not agree with the contention of the learned Counsel for the Plaintiff that the invocation of the performance guarantee by the STC was on account of ulterior considerations. The Plaintiff has referred to the ulterior considerations by drawing the attention of the Court to the correspondence exchanged between the Indian representative of the German Party and the STC regarding its offer to reduce the price of the urea and the said offer having been withdrawn as well as the letter purported to have been written by STC, after withdrawal of the letter by its Indian representative, the only outstanding issue is with regard to reduction of the price of urea.

24. If one sees the contents of these three letters in a sequential order, the letter where the STC has made reference to an outstanding issue regarding the reduction of price is a subsequent letter written by them to German Party after having not only received the offer from its Indian representative regarding reduction of price of the urea voluntarily but also unilaterally withdrawing the said offer without any rhyme or reason and this cannot be permitted to be used as a ground or a shield for honoring the performance guarantee which has been invoked by the beneficiary from Canara Bank. The question of reduction or non-reduction of the price of the urea as alleged by the German Party even if assumed to be correct, pertains to a dispute sought to be raised between the two contracting parties, namely, the German Party and the STC, but it has nothing to do with the performance guarantee which is a contract between the beneficiary, i.e., STC and the guarantor, i.e., the Canara Bank. Permitting the stoppage of payment on the plea of the German Party raised herein before will not only be adding a condition to the counter guarantee but it would be also against the settled legal position of law laid down by the Supreme Court in a catena of authorities that the guarantee is an independent contract where the scope of stoppage is very limited by the Court and is available only in the eventuality of

fraud or irretrievable injustice being cause to the party.

25. The reference to the various authorities such as M/s. Radhey Shyam Bansal's Case and Larsen & Toubro's Case is also inappropriate keeping in view the pronouncement of Apex Court in Haryana Financial Corpn.'s Case.

26. So far as the judgment in Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and another, and U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., which have been relied upon by the Plaintiff is concerned, I am of the considered opinion that the same instead of supporting the submissions of the Plaintiff, namely, the German Party, support the contention of the Respondent that the bank guarantee is an independent contract and its invocation cannot be stayed except in two aforementioned circumstances.

27. Admittedly, so far as the Plaintiff is concerned, it is not his case that any irretrievable injustice will be caused to the German Party on account of the invocation of the bank guarantee. However, fraud has been taken as a ground by the German Party for stopping the invocation of the bank guarantee. Simply by making an averment, it cannot be said that fraud has been played in invocation of the bank guarantee, there must be prima facie evidence to show that fraud has been committed in obtaining the guarantee. The learned Counsel has referred to the observations passed by the Apex Court wherein it has been observed that fraud may not be played initially and it may be revealed by the subsequent facts on the record, even if this preposition of the German Party is accepted to be correct, there is no denial of the fact that fraud prima facie must be established. In the instant case, it is my opinion that the German Party has failed to establish by any prima facie evidence that fraud has been played in either obtaining the performance guarantee or the counter guarantee. As a matter of fact, there is no allegation qua the counter guarantee given by the German Bank to the Canara Bank which is the only surviving point. Further, the only allegation which the Plaintiff namely the German Party is making in order to urge its point of fraud is that the contract stood discharged by the performance and, therefore, the bank guarantee was invoked by the STC only for the purpose of reduction of the price. These points have already been dealt hereinabove and could hardly be said to be a ground for staying restraining the invocation of the counter guarantee.

28. On the contrary, if at all, there was any prima facie evidence of fraud, it was a fraud which was sought to be played not only by the Plaintiff but also perpetrated by the German Party on the Canara Bank. This has been felt by the Court on account of the fact that admittedly in the instant case, the restraint order has been passed on 13.02.2009 when the amount of Rs. 33 cores or so in terms of performance bank guarantee having been invoked on 10.02.2009, had been credited to the international account of the STC by the Canara Bank and this fact was well within the knowledge of the German Bank. So, obviously, it must have been conveyed to its Principal, namely, the German Party. Apart from this, the Indian representative of the German Party i.e. Everest Fertilizers was

aware about this fact or even if not aware is deemed to be aware because of the correspondence which was being exchanged between the parties. The German Party cannot take the plea of being ignorant of the fact that on 13.02.2009 when the restraint order was passed, they knew that the amount had already been paid to the beneficiary but still they did not point out to the Court that the money having been paid by the Canara Bank to the beneficiary in pursuance of the performance guarantee the only stay which was required to be passed was against the invocation of the counter guarantee on 11.02.2009. Moreover, in the entire plaint, the German Party is making averments of fraud only with regard to performance guarantee whereas it is only in the prayer they seek restraint against invocation of the counter guarantee.

29. These facts were not pointed out though a relief against invocation of counter guarantee by Defendant No. 3 was obtained by the Plaintiff and that too without attaching a copy of the counter guarantee along with the plaint. Another fact which shows that there was an active collusion and a fraud perpetrated by the German Party in collusion with the German Bank was that the German Bank did not raise any objection to the letter of invocation dated 10.02.2009 by Canara Bank invoking counter guarantee and stated that it is investigating into the matter though it was none of its business to raise such an objection to the honoring of its obligation. In the meantime, referred the matter to its Principal, namely, the German Party who instigated it to move the Court in Hamburg in Germany and got a temporary relief by obtaining a restraint order against the realization of the counter guarantee. Despite this, the German Bank neither appeared nor filed any written statement before this Court and remained notably silent which clearly shows that if at all there was any fraud, it was sought to be played on a public sector bank by the German Party with the help of German Bank. Therefore, I feel that even this ground of fraud is not available to the Plaintiff to continue to enjoy the stay of the invocation of bank guarantee by Defendant No. 2. On the contrary, there is fairly good amount of circumstantial evidence to show that the German Party in collusion with the German Bank was trying to take undue advantage to mislead the Court which has the features of playing a fraud.

30. The aforesaid reasoning would be equally meeting the point or the submission which has been urged by the Plaintiff, namely, the German Party against the Defendant No. 2 that no one can be allowed to take advantage of his own fraud.

31. So far as the plea of the learned senior counsel for the German Party raising the question of invocation of the bank guarantee to be a formality by reproducing the parrot like language of the guarantee is concerned, I do not feel that it can be said that the invocation of the bank guarantee has been taken as a parrot like reproduction of the words by the STC or the Canara Bank. But at the same time, the invocation of the bank guarantee or the contents of the said letter are not to be subjected to hair splitting analysis as is being sought to be done by the

learned Counsel for the Plaintiff.

32. I have also gone through the various other judgments which have also been cited by the learned senior counsel for the Plaintiff which I do not find to be of any help to the Plaintiff namely the German Party although there cannot be any dispute about the proposition of law laid down therein which broadly remains the same as has been reproduced in para 21 of the Dwarikesh's Case hereinbefore.

33. For the reasons mentioned above, I am of the considered opinion that there is absolutely no fraud and no merit in the application under Order XXXIX Rule 1 & 2, CPC filed by the Plaintiff which will warrant staying of the invocation of the counter guarantee by Defendant No. 2 namely the Canara Bank against Defendant No. 3 which was granted in favour of the Plaintiff on 13.02.2009 much less the continuance of the same.

34. I, accordingly vacate the stay order and permit Defendant No. 2 to realize the amount of counter guarantee from German Bank. The IA No. 2206/2009 is dismissed. So far as the IA No. 6701/2009 wherein the Plaintiff had prayed for a direction to the STC to produce certain records has also become in fructuous on account of the fact that an affidavit of Mr. S.K. Jain, a senior employee of the STC has been filed indicating that the amount of performance guarantee was credited to the international account of the STC on 10.02.2009 itself.

35. It is clarified that the amount, dates, etc. mentioned hereinbefore if they are at variance with the record, the latter should be taken to be correct. Further expression of any opinion herein may not be treated as an expression on the merits of the case.

36. Dusty on payment of usual certified copy charges.