(2008) 09 PAT CK 0029

In the Patna High Court

Case No : CWJC No''s. 12868 of 2006 and 2688 of 2007

Hindustan Steel Works Construction APPELLANT

Vs

State of Bihar and Others RESPONDENT

Date of Decision : 30-09-2008

Acts Referred:
Constitution of India, 1950 — Article 12, 14, 226, 300A

Citation : (2009) 2 PLJR 909

Hon'ble Judges : Navaniti Pd. Singh, J

Bench : Single Bench

Advocate : Ganesh Pd. Singh, Vikash Jain, Rajnish Kant and Manish Kumar, Nadim Seraj and Kumar Pankaj, for the Appellant; Shashi Bhushan Kumar, for the Respondent

Final Decision : Allowed

Judgement

Navaniti Pd. Singh, J.—The petitioner in both these writ petitions are the same being Hindustan Steel Works Construction Limited, a Government of India Undertaking. It had undertaken two road widening-cum-strengthening projects of NABARD for being executed on behalf of the State of Bihar from respective area Executive Engineers. Two bank guarantees for each work were furnished by the petitioner from the Respondent-State Bank of India in favour of the State of Bihar and its invocation and payment thereof by the State of Bihar and the Respondent-State Bank of India respectively is in disputed, the legality and propriety of which is, in question, in the present writ petitions. No facts are in dispute and the plain and simple question is, whether State of Bihar at all legally invoked the bank guarantee and even if they invoked the guarantees, was State Bank of India legally competent and justified in permitting its encashment. The facts and issues being similar in both the writ petitions, with consent of parties the writ petitions were taken up for hearing at the stage of admission itself for its disposal.

2. The petitioner-Hindustan Steel Works Construction Limited is a Government of

India undertaking having its registered Office at Kolkata.

Facts of "CWJC No. 12868 of 2006":

3. Pursuant to notice inviting tender by the Road Construction Department, Road Division No. 1, Muzaffarpur for widening and strengthening Muzaffarpur-Pusa road measuring about 30.08 Kms. and construction of RCC culverts under NABARD scheme, petitioners tendered. The tender was awarded to the petitioner for the said work. Before agreement was executed petitioner-company was required to furnish two bank guarantees. It accordingly requested its banker State Bank of India to issue requisite bank guarantee in favour of the Executive Engineer, Road Construction Department, Road Division No. 1, Muzaffarpur. First was BG No. 0654005 BG 0000174 dated 19.12.2005 (Annexure-3) was issued by the Respondent-State Bank of India in favour of the Respondent-Executive Engineer for Rs. 55,00,000/- and was valid up to 18.6.2006. It is not in dispute that on 15.6.2006 it was revalidated and renewed up to 18.12.2007. The second was BG No. 39/03 dated 5.5.2006 for Rs. 55,61,884/- and was valid up to 4.5.2008 in favour of Respondent-Executive Engineer. The bank guarantees having thus been obtained, on 6.5.2006 agreement being Agreement No. 1F2 of 2006-07 dated 6.5.2006 was executed between the petitioner and the Respondent-Executive Engineer for widening and strengthening work of Muzaffarpur-Pusa road measuring 30.08 Kms. and culvert (Annexure-1). These bank guarantees were invoked by letters dated 19.9.2006 (Annexures-5 and 6 respectively for the two bank guarantees).

Facts of "CWJC No. 2688 of 2007":

4. Pursuant to notice inviting tender issued by the Executive Engineer, Road Construction Department, Vaishali Road Division, Hajipur for strengthening and widening Hajipur-Bhairopur-Mahanar Road measuring about 30.50 Kms. under NABARD scheme, petitioner-company tendered and was selected. Two bank guarantees were furnished being BG No. 0654005 BG 0000151 dated 19.12.2005 for Rs. 48,56,400/- valid up to 18.6.2006. It is not disputed that this bank guarantee was revalidated and renewed up to 18.12.2007. The said bank guarantee was issued by the petitioner''s banker State Bank of India. The second bank guarantee was BG No. 39/04 dated 5.5.2006 for Rs. 52,30,542/- and was valid up to 4.5.2008, both were in favour of the Respondent-Executive Engineer. Thereafter, Agreement No. 3 F2 of 2006-07 dated 31.8.2006 was executed between the parties for the said work. The two bank guarantees have been invoked by letters dated 15.2.2007 and 13.2.2007 respectively and have been encashed.

5. Mr. Vikash Jain, learned counsel for the petitioner in the first case has raised a short and simple issue for consideration. He submits on behalf of the petitioner that a reference to the bank guarantees would show that they were not unconditional bank guarantees. The invocation of bank guarantee was subject to fulfillment of conditions mentioned therein and undisputedly in the facts of the

present case those conditions did not at all arise and/or were not fulfilled. Thus, the invocation was on misrepresentation amounting fraud and its encashment is impermissible in law. On the facts obtaining, this submission was adopted and reiterated by Mr. Ganesh Prasad Singh, learned Senior Counsel appearing for the petitioner in the second case. He has further made prayer that substantial amount of pending bills for work already done have not been settled. This may be directed to be settled.

The Bank Guarantees:

6. In order to appreciate the contentions it is first necessary to notice the provisions of the bank guarantee. It is not disputed that except for the change of guarantee No. , date, amount and beneficiary the essential terms of all the four bank guarantees are identical and same. The relevant and essential part of the bank guarantees are quoted hereunder:-

"...THE CONDITIONS of this obligation are:-

(1) If after Bid opening the Bidder withdraws his bid during the period of Bid validity specified in the Form of Bid; or

(2) If the Bidder having been notified of the acceptance of his bid by the Employer during the period of Bid validity:-

(a) Fails or refuses to execute of the Form of Agreement in accordance with the Instructions to Bidders, if required; or

(b) Fails or refuses to furnish the Performance Security and Initial Security Deposit of the contract price.

We undertake to pay to the Employer up to the above amount upon receipt of his first written demand, without the Employer having to substantiate his demand, provided that in his demand the Employer will note that the amount claimed by him is due to him owing to the occurrence of one or any of the two conditions, specifying the occurred condition or conditions.

This Guarantee will remain in force up to and including the date 18.6.2006 after the deadline for submission of Bids as such deadline is stated in the Instructions to Bidders or as it may be extended by the Employer, notice of which extension(s) to the Bank being hereby waived. Any demand in respect of this guarantee should reach the Bank not later than the above date.

Notwithstanding anything herein contained, our liability under this guarantee is limited to Rs. 55,00,000/- (Rupees Fifty five lakhs only) and will remain in force upto dated 18.6.2006 including the date of expiry of the period of the tender validity and any demand in respect thereof must reach the Bank not later than the date of expiry of this guarantee i.e. on or before 18.6.2006 failing which all the right of the employer under the guarantee shall be forfeited and the Bank shall be deemed to be relieved or discharged from all liabilities hereunder.

Notwithstanding anything contained hereinbefore:-

(a) Our liability under this Bank guarantee shall not exceed Rs. 55,00,000/- (Rupees Fifty five lakhs only),

(b) This Bank Guarantee shall be valid upto 18.6.2006

And

(c) We are liable to pay the guaranteed amount or any part thereof under this Bank Guarantee only and only if you serve upon us a written claim or demand on or before 18.6.2006.

(Emphasis supplied by me)

Issues and considerations:

7. The short point that arises from the aforesaid condition is that the bank guarantee could only be invoked under the three conditions specified therein, which is made clear in the bank guarantee itself wherein, it is clearly stated that when the demand is made the employer (beneficiary) will note that the amount claimed by him is due to him, owing to the occurrence of one or any of the two conditions specifying the occurred condition or conditions. A reference to the conditions would clearly show that all the three contingencies are occurrable during the period prior to agreement. This is apparent, if we take each condition separately. The first condition talks about withdrawing the bid after bid opening during the period of bid validity. The second condition is in two parts. It is again operative during period of bid validity. After notifying the acceptance of the bid if agreement is not executed and lastly fails or refuses to furnish performance security and initial security deposit of the contract price. Thus seen, it is not dependent on the performance of the agreement or deficiency in performance thereof. It is only on occurrence of the two conditions which have to be noted and disclosed that letter of guarantee could be invoked and enforced and not otherwise.

8. The petitioner''s further case is that a reference to the invocation letter would show that the invocation was not for any conditions, as specified in bank guarantee, but for the sole reason that having entered into the agreement, the petitioner was unable to expeditiously execute the work, thus, the ground for invocation is failure to perform the agreement/contract. Undisputedly, this is not one of the contingencies under which guarantee could be invoked. The invocation was on misrepresentation amounting to fraud and the conditions not being satisfied much less mentioned even in the letter, of invocation, the State Bank of India acted contrary to the terms of conditions of guarantee and de hors the same, which was mala fide in law. The State Bank of India could not and ought not to have permitted encashment of bank guarantee, as it had a responsibility towards the petitioner in that regard commensurate to the obligation towards the beneficiary under the guarantee.

9. The State of Bihar in its counter affidavit has first questioned the maintainability of the writ petitions. They submit that the dispute essentially arises out of a contract and as such the only remedy to the petitioner was through the process of Civil Court and the writ petitions are not maintainable.

10. As to the issues raised on behalf of the petitioners they have not even attempted to justify invocation of bank guarantee with reference to any of the conditions specified in the bank guarantee but maintain that as the petitioner failed to perform the agreement in the manner prescribed, to the satisfaction of the Respondent-State, under the agreement they had a right to rescind the agreement and forfeit security and thus they had a right to invoke the four bank guarantees irrespective of the conditions therein being satisfied or not.

11. On behalf of State Bank of India, though, initially a feeble attempt was made to urge that the bank guarantees were unconditional for which reference was made to the use of expression "notwithstanding anything herein contain/ contained hereinbefore", in the last two paragraphs of the bank guarantee, as referred to above. But, when confronted with the substantive part of the condition of obligation under the bank guarantee which specifically provided for declaration of the conditions having occurred, all that was said was that the bank acted bona fide in pursuance to the bank guarantee given, ''duly'' honored its obligation. Though, in the counter affidavit it clearly recognized that the bank guarantee could be invoked only on the conditions being specified, it even did not attempt to justify that any of the conditions was even referred to in the letter of invocation much less satisfied. Yet, they found themselves bound to honor the guarantee and thus made the entire payment secured by the guarantee to the State of Bihar and debited the same to the account of the petitioner.

12. The issue thus is, firstly, whether the bank guarantee was unconditional or not? Secondly, whether it was necessary for the State of Bihar to note and specify that any of the conditions was satisfied for invocation of the bank guarantee before invoking the same and lastly in absence of any such mention, more particularly, in view of a totally different contingencies being mentioned was the Respondent-State Bank of India obliged in fact and in law to honor its commitment under the bank guarantee, consequently, whether the petitioner is entitled to any relief in these proceedings.

13. First, I would like to deal with the question of maintainability of the writ petitions, as raised by the respondents. In nutshell, their submission is that we (respondents) may have committed a wrong but the said wrong can only be remedied by petitioner by resorting to civil suit and not by preferring writ petition under Article 226 of the Constitution.

14. In my view, the proposition is too general and too wide to be accepted. In my view, it is not mere breach of contract in private law domain simpliciter but a highly and grossly arbitrary action in wrongly and virtually verging on fraud committed by State in public law domain in invoking guarantee and in the State

Bank of India honoring such invocation. The contract between State and petitioner and the bank guarantee given by the State Bank of India to the State of Bihar on behalf of the petitioner was consequence to the public functions of the State and thus within public law domain. If what was submitted by respondents is to be accepted then no writ petition could be filed under Article 226 in the High Courts in matters arising out of contract. But, regrettably, such is not the case, for, there is enormous number of cases both of High Courts and the Apex Court, where in contractual matters interference has been there in the writ jurisdiction. It is by now well established that where the actions of the State or its instrumentality, being State within the meaning of Article 12 of the Constitution either act de hors the contract or in contravention to the contract, the actions are per se arbitrary or in violation of statutory provisions writ petitions have been held to be maintainable, the actions being violative of Article 14 of the Constitution.

15. Without being exhaustive in this matter I would first refer to a Division Bench judgment of the Delhi High Court in the case of Bottle Glass Pvt. Ltd. Vs. Union of India and Others, . In that case a bank Guarantee which had been sought for by the government was being sought to be invoked and a writ petition was filed. The question arose whether such an action could be brought in a writ proceeding. It was answered thus:-

"...When the Government obtains a bank guarantee when it is entering into commercial transaction with another party, then the Court would be hesitant in staying the operation of the bank guarantee. In the case like the present, however, the bank guarantee was demanded by the respondents not as a part of a commercial transaction but in exercise of its statutory or executive power as a Government. If bank guarantee has been furnished by a party on its being required to do so by the Government, by exercising its statutory or executive power, then the Courts can examine the action of the Government when it seeks to invoke the bank guarantee. A Government is required to act fairly and judiciously. Any action of the Government which is regarded as arbitrary is per se violative of Article 14 of the Constitution. If it can be shown, therefore, that the decision of the Government to invoke the bank guarantee is arbitrary or mala fide then that decision can be challenged...."

16. Next, I may refer to the judgment of the Apex Court in the case of M/s Hyderabad Commercials vs. Indian Bank and Others since reported in AIR 1991 Supreme Court 247. In that case the appellant had deposited certain money in their account but the Bank having credited the same to the appellant''s account, later transferred it to another person''s account. The appellant protested, the Bank accepted its mistake and intimated that it would be recredited to their account but they failed to do so. The appellant filed a writ petition, where Bank took a plea that it was transferred from the appellant''s account to the other person''s account on oral instructions of the appellant. The writ petition was dismissed on the ground that the case involved disputed questions of fact. The

appellant moved the Apex Court. The Apex Court noted that on such admission as made by the Bank, which is an instrumentality of the State it was under a legal obligation to pay back the disputed amount to the appellant. While, setting aside the order of the High Court dismissing the writ petition, the appeal was allowed with directions to the Respondent-Bank to recredit the amount to the appellant''s account alongwith interest. While doing so, their Lordships observed thus in paragraph 5, thereof:-

"Paragraph 5: Since the basic facts regarding the unauthorized transfer of the disputed amount from the appellant''s account as well as the Bank''s liability was admitted, there was no justification for the High Court to direct the appellant to file suit on ground of disputed questions of fact. The respondent-Bank is an instrumentality of the State and it must function honestly to serve its customers."

17. It would be seen from this case that it was pure and simple contractual matter but as the actions of the Bank, which was State instrumentality, was violative of Article 14 of the Constitution, the writ petition was held to be maintainable, especially, as there were no disputed questions of facts.

18. We then come to the case of Hindustan Petroleum Corporation Limited and Another vs. Dolly Das since reported in (1999)4 Supreme Court Cases 450, wherein in paragraph 9 their Lordships held thus:-

"Paragraph 9: We may now advert to the contention that the writ remedy is not appropriate in this case. Where interpretation of a contract arises in relation to immovable property and in working such a contract or relief thereof or any other fallout thereto may have the effect of giving rise to an action in tort or for damages, the appropriate remedy would be a civil suit. But if the facts pleaded before the Court are of such a nature which do not involve any complicated questions of fact needing elaborate investigation of the same, the High Court could also exercise writ jurisdiction under Article 226 of the Constitution in such matters. There can be no hard and fast rule in such matters. When the High Court has chosen to exercise its powers under Article 226 of the Constitution we cannot say that the discretion exercised in entertaining the petition is wrong."

19. Then, again I may refer to the well known judgment of the Apex Court in the case of Chairman, Railway Board and Others vs. Mrs. Chandrima Das. and Others since reported in AIR 2000 Supreme Court 988, wherein, in paragraph 9 their Lordships held thus:-

"Paragraph 9: ...It was found that though initially a petition under Article 226 of the Constitution relating to contractual matters was held not to lie, the law underwent a change by subsequent decisions and it was noticed that even though the petition may relate essentially to a contractual matter, it would still be amenable to the writ jurisdiction of the High Court under Article 226. The Public Law remedies have also been extended to the realm of tort...."

20. Now, we come to a very recent decision of the Apex Court in the case of ABL

International Limited and Another vs. Export Credit Guarantee Corporation of India Limited and Others since reported in (2004)3 Supreme Court Cases 553. In that case the question of maintainability of writ petition including monetary claims was considered in detail. In the said judgment the Apex Court examined its judgment in the case of State of Bihar vs. Jain Plastic and Chemicals Limited since reported in (2002)1 Supreme Court Cases 216 [: 2002(1) PLJR (SC)142]. This later case is often relied on by respondents to question the maintainability of writ petition for alleged breach of contract. In fairness to the learned State Counsel in the present case he has sought to rely on the case of Jain Plastic (supra). In this case [ABL International Limited (supra)] the judgment of Jain Plastic has been considered in paragraphs 15 and 16 of the reports. Their Lordships have held thus in paragraph 16:-

"Paragraph 16: A perusal of this judgment though shows that a writ petition involving serious disputed questions of facts which requires consideration of evidence which is not on record, will not normally be entertained by a court in the exercise of its jurisdiction under Article 226 of the Constitution of India. This decision again, in our opinion, does not lay down an absolute rule that in all cases involving disputed questions of fact the parties should be relegated to a civil suit...."

21. Further, their Lordships have explained the law in paragraph 19 of ABL International Limited (supra), which is quoted hereunder:-

"Paragraph 19: Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of Gunwant Kaur this Court even went to the extent of holding that in a writ petition, if the facts require, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact."

22. I may also usefully refer to what has been noted by the Apex Court in paragraph 23 of the said reports, which is quoted hereunder:-

"Paragraph 23: It is clear from the above observations of this Court, once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India...."

23. In the end their Lordships have summarized the legal principles in paragraph 27 of the reports, which is quoted hereunder as follows:-

"Paragraph 27: From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:-

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable."

24. In a very recent decision of the Apex Court in the case of Food Corporation of India and Another vs. Seil Limited and Others since reported in (2008)3 Supreme Court Cases 440 [: 2008(2) PLJR (SC)108], the matter with regard to interference in writ jurisdiction in relation to contractual disputes was considered again. The Apex Court relied upon the judgment of ABL International Limited (supra) and held that where F.C.I., which was a State within the meaning of Article 12 withheld payment without legal justification, writ petition was maintainable. It was further held that while exercising the jurisdiction, the writ Court not only acts as a Court of law but also as a Court of equity. In that case the writ petitioners claimed interest oh the principal sum which was directed to be paid by the High Court. The High Court reviewed its judgment and accepted its mistake and granted the relief of interest to the respondent. Before the Apex Court, this was not interfered in view of the law as they considered was the correct law.

25. Thus, seen in the present case, it would be seen that what has been alleged by the petitioner if ultimately found correct by this Court it would be a gross case verging on fraud being perpetuated by State and State instrumentality the State Bank of India on the petitioner and depriving the petitioner of over Rs. 2 crores by way of wrongful encashment of bank guarantee.

26. We may look at the problem from another angle. If on the facts as alleged, there being no dispute, wrongful encashment of bank guarantee is established, then if this Court relegates the petitioner in ordinary civil proceedings in a Civil Court, it would take years if not decades to reach the finality and all along the petitioner would be out of funds and may not even survive to see the end of the litigation because of wrongly having been deprived of money/its capital.

27. In this connection, I may refer to two decisions of the Apex Court. The first being in the case of M/s Hindustan Sugar Mills vs. The State of Rajasthan and Others since reported in AIR 1981 Supreme Court 1681. In this case, which was upon a review application the Apex Court in the original judgment had held that it was true and they were aware that there was no legal obligation on the Central Government to reimburse the sales tax on freight but in spite of that their Lordships held that it must be remembered that we are living in a democratic society governed by rule of law and every Government which claims to be inspired by ethical and moral values must do what is fair and just to the citizens, regardless of legal technicalities. It was then in the review application shown that

there were provisions for reimbursement in the contract, their Lordships have held thus, as is quoted hereunder:-

"...Where there is such a clause, the Central Government is bound to pay the amount of sales tax on the freight component of the price and we hope and trust that the Central Government will honour its legal obligation and not drive the appellant to file a suit for recovery of the amount of such sales tax. We hopefully expect that the Central Government will not try to shirk its legal obligation by resorting to any legal technicalities, for we maintain that in a democratic society governed by the rule of law, it is the duty of the State to do what is fair and just to the citizen, and the State should not seek to defeat the legitimate claim of the citizen by adopting a legalistic attitude but should do what fairness and justice demand..."

28. The second case would be the case of Gaya Prasad vs. Pradeep Srivastava since reported in (2001)2 Supreme Court Cases 604, wherein, in paragraph 19 of the reports their Lordships have held thus:-

"Paragraph 19: ...If a citizen is told that once you resort to legal procedure for realization of your urgent need you have to wait and wait for 23 to 30 years, what else is it if not to inevitably encourage and force him to resort to extra-legal measures for realizing the required reliefs. A Republic, governed by rule of law, cannot afford to compel its citizens to resort to such extra-legal means which are very often contra-legal means with counterproductive results on the maintenance of law and order in the country...."

29. Lastly, in my view, the respondents by asking this Court to relegate this petitioner to civil remedy in a matter which could be decided on pleadings by this Court in this summary jurisdiction in a short time are only seeking to delay the inevitable which cannot be permitted to State or its instrumentality. They cannot be permitted to enjoy an unjust enrichment even for a moment.

30. Thus, in my view, as facts do not appear to be in dispute and no complicated questions of resolution of facts are in issue, the writ petition complaining as regards grossly arbitrary action of State and its instrumentality, even though, arising out of contractual field and consequentially related to money claims is maintainable and the writ petitioner in such a situation cannot be relegated to the onerous remedy of Civil Court.

31. Now having crossed the hurdle of maintainability, let us examine the facts. The relevant part of the four bank guarantees have been quoted above. On the plain meaning and the understanding of what is stipulated therein, it is clear that the jurisdiction to invoke the bank guarantee can arise and is restricted to the three specific and definite contingencies, as mentioned in the two conditions contained, therein. On any one or more of the conditions being satisfied, State had a right to invoke the guarantee. It is further to be seen that in categorical terms in the bank guarantee, it is stated that the bank would be liable to honor the obligation upon notice in writing clearly declaring that either of the

contingencies have occurred. Therefore, this is the second stage that is the disclosure by the State in writing of the contingency occurring to the bank. On these two conditions being complied the bank then is unconditionally bound to honor its commitment. In my view, merely to say that the bank guarantee is unconditional is not correct. Bank guarantee is conditioned and contingent upon stated terms and then becomes unconditional. It only means that if stated terms/ conditions are satisfied and disclosed so to Bank then the bank will be bound to unconditionally honor its promise to pay but not otherwise. As noted above, in the present case neither the State nor the Bank has set up, pleaded or even attempted to argue that any of the three contingencies had at all occurred. On the facts it is not disputed that the petitioner had not withdrawn his bid after bid opening, inasmuch as it is admitted that its bid was accepted and agreement entered. Similarly, the petitioner did not refuse to execute the agreement for it is admitted case of all parties that agreement was duly executed by the petitioner after his bid had been accepted, nor is it the case of the respondents that the petitioner failed to furnish the performance security or initial security deposit. Thus, none of the contingencies in fact had occurred. To the contrary, the case of the State was specific that the petitioner failed to perform the agreement with due punctuality which condition is missing and is not to be found in any of the bank guarantees. Thus, no right had accrued in the State to invoke the bank guarantee at all and thus the State was not competent and/or authorizes either in fact or in law to invoke the guarantee.

32. Coming to the second stage, the guarantee provided for intimating in writing to the Bank that the money payable became due to the State owing to the occurrence of one or any of the two conditions. The letters of invocation clearly do not state any such thing. On the contrary, they clearly state and indicate that due to failure of the petitioner to perform the agreement it had been ordered to be cancelled and security forfeited, as such, the Bank was directed to encash the guarantee and pay it to the State. This is not in compliance with the stipulations as contained in the bank guarantee. Now, coming to the third stage in regards to the conduct of the Bank. State Bank of India is one of the biggest banks in this country having supposedly the vast experience and exposure to commercial transactions, yet, totally unmindful of its legal obligations and in ignorance to the duty it held towards the petitioner, it obeyed and complied with the wrongful request of the State. If neither of the contingencies had occurred nor so notified by the State to the State Bank and in law, Bank had no authority to permit encashment of the bank guarantee, rather, it was under obligation to turn down the request of the State. Even with vast experience at hand, regrettably, it did not act accordingly and acted in violation of all settled principles of law and permitted encashment of bank guarantee and pay the amount to the State and consequently debited the entire amount covered by the four bank guarantees to the account of the petitioner. Both of which action was clearly arbitrary, unlawful and illegal and without authority of law and violative of Article 14 of the Constitution.

33. Here, first, I may refer to a very well known principle of law for interpreting contractual documents. It is "expressio unius est exclusio alterius". Simply said it means express mention of one implies exclusion of others. This principle has been noticed in the case of Hukam Chand Shyam Lal vs. Union of India and Others since reported in AIR 1976 Supreme Court 789, wherein, in paragraph 18 their Lordships have held thus:-

"Paragraph 18: It is well settled that where a power is required to be exercised by a certain authority in a certain way, it should be exercised in that manner or not at all, and all other modes of performance are necessarily forbidden. It is all the more necessary to observe this rule where power is of a drastic nature and it is exercised in a mode other than the one provided...."

34. Here, in fairness to the counsel for the Respondent-Bank I must note that referring to the terms of the bank guarantee, as noted above, it would be seen that at two places the expression "notwithstanding anything contained" and "notwithstanding anything contained hereinbefore" have been used. It is sought to be impressed that the conditions stood overridden and merely for the asking by the State the Bank was obliged to pay. The contention has been noted only to be rejected, for, the said expressions preceded some other things which ought not to be ignored and only qualify that the liability of the Bank would be limited to the amount mentioned, therein and would be valid if enforced by a particular date, but, it does not override or negate or neutralize the conditions of guarantee in any manner.

35. My findings on the question of law, as regards, the bank guarantee and effect of conditions, therein, find full support from the Division Bench judgment in the case of Harparshad and Co. Ltd. Vs. Sudarshan Steel Mills, Punjab National Bank, , wherein, their Lordships have held that there is distinction between absolute liability, as when the money under 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. The intentions of parties have to be judged from the language used in the bank guarantee. 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 in the plaint. Just as a plaint is liable to be rejected for non-disclosure of the cause of action, a demand by the beneficiary of the bank guarantee is liable to be rejected by the Bank, if it does 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 if not fulfilled the amount under the bank guarantee does not become due for payment to the beneficiary. I may here notice the decision of Bombay High Court in the case of Kirloskar Pneumatic Company Limited vs. National Thermal Power Corporation Limited and Another since reported in AIR 1988 Bombay 308. In that case the bank guarantee was conditioned upon the fact that if the contract was to be awarded and the contractor failed to furnish contract performance guarantee then the

bank guarantee could be invoked. In that case before the bid could be accepted the contractor revoked his bid and thus there was no question of acceptance of the bid or formation of contract. Court held that the situation being thus and there being no contract, no case for invoking bank guarantee could at all arise.

36. Here, I may note a word of caution. There is lots of case law that ordinarily court should not step in and obstruct or injunct encashment of bank guarantee, for bank guarantees now a days commerce is its backbone. Any intrusion by Courts restraining invocation of bank guarantee would normally have serious repercussion on commerce, but, at the same time interference is permitted at least on two counts that is fraud or misrepresentation. In this connection, I may refer to the judgment in the case of Synthetic Foams Ltd. Vs. Simplex Concrete Piles (India) Pvt. Ltd., , wherein their Lordships while dealing with cases of fraud, misrepresentation have held thus:-

"...In this context, misrepresentation or suppression of material facts or violation of terms of the guarantee can be treated as a species of the same genus as fraud...."

37. Now, I may refer the judgment of the Apex Court in the case of Hindustan Construction Co. Ltd. Vs. State of Bihar and Others, . The Apex Court in paragraph 8 have held thus:-

"Paragraph 8: What is important, therefore is that Bank Guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the Bank Guarantee or the person on whose behalf the Guarantee was furnished. The terms of the Bank Guarantee are, therefore, extremely material. Since, the Bank Guarantee represents an independent contract between'' the Bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the Bank Guarantee; or else the invocation itself would be bad."

38. Thus, from the aforesaid judgments it would be seen that firstly, the contract of guarantee by Bank is a separate and independent contract as between the parties. Any dispute between the petitioner and the State in regards performance of the contract cannot effect the right of the Bank as that right and obligation is under an independent contract, as between the Bank and the State, but, even then, independent of the principal agreement, the conditions of the bank guarantee are to be satisfied if bank guarantee is to be invoked and encashed. Whether the agreement as between the State and the petitioner was rightly cancelled is not the issue and cannot be made the issue for invocation of bank guarantee. It is the condition of bank guarantee that would govern its invocation and if the conditions are not satisfied then no party has jurisdiction to invoke the bank guarantee and the bank is not obliged to honor such a misconceived invocation.

39. In fairness to the learned counsel for the Bank, I must notice a very recent judgment of the Apex Court, as cited on behalf of Bank being Bank of India vs. Nangia Constructions (I) Private Limited & Others since reported in Judgments Today 2008(7) Supreme Court 107. In that case the Court found that bank guarantee had been validly invoked within the validity period and Bank could not decline making payment. All Courts had so consistently held in that case, still, the Bank chose to challenge the same before the Apex Court. It is in that context that in paragraph 14 their Lordships have held thus:-

"Paragraph 14: It is unfortunate that a nationalized bank is finding excuses for refusing to make the payment on totally untenable and frivolous grounds. The Division Bench was fully justified in making observations regarding the conduct of the nationalized bank. The entire trust, faith and confidence of people depend on the conduct and credibility of the nationalized bank. In the present day world, the national and international commercial transactions largely depend on bank guarantees. In case the banks are permitted to dishonour their commitments by adopting such subterfuges, the entire commercial and business transactions will come to a grinding halt. This principle has been reiterated in large number of cases by this Court. We do not deem it appropriate to burden this judgment by reiterating all those judgments."

40. In my view, the case at hand is just otherwise and the same observation of the Apex Court would equally apply to the Bank in the present case. If the Bank were to disregard the terms and conditions of the bank guarantee and started accepting invocation and encashing bank guarantees, merely for the asking, then the entire trust, faith and confidence of the people which depends on the conduct and credibility of the Nationalized Bank would crumble. As in the present day, the national and international commercial transaction largely depends on bank guarantees. In case, Banks are permitted to honor bank guarantees in such a casual manner then the entire commercial and business transactions will come to a grinding halt.

41. Thus, seen on fact and in law neither did the Respondent-State have even a semblance of authority to invoke the bank guarantee, nor did the wrongful invocation permit encashment of the bank guarantees, yet, they acted otherwise much to the detriment of the petitioner who lost over Rs. 2 crores by this wrongful invocation and wrongful payment. The State arbitrarily, unjustly, illegally and unlawfully enriched itself with tacit connivance of the Bank. There cannot be grosser example of an arbitrary action, not only violative of the terms of guarantee but being violative of Article 14 and Article 300A of the Constitution. Such an act is not expected of either party that is the State or the State Bank of India being State and State instrumentality respectively.

42. In the circumstances aforesaid as the Apex Court did in the case of Hyderabad Commercial Bank (supra), I direct the Bank who had abdicated its legal obligation to the petitioner, to forthwith within one month refund the amounts debited to the account of the petitioner to the extent of four bank

guarantees alongwith interest @ 6% per annum. I leave it to the Bank to take appropriate remedial measures for recovery of its money from the State, because, the Bank was at fault and voluntarily paid the amount, which it was not bound to pay in fact or in law.

43. So far as, plea taken in the second writ petition by Mr. Ganesh Prasad Singh, learned Senior Counsel with regard to payment of pending bills by the State is concerned, this Court is not in a position to give any positive direction except observation that State must do what is just and fair and must not take technical pleas to drive parties to litigation. It is expected that if any amount is due to the petitioner, State would honor its obligation and correctly assess it and pay the same. With these observations and direction, the writ petitions are allowed to the extent as indicated above.

