
(1993) 06 GUJ CK 0052
In the Gujarat High Court

Hindustan Zinc Ltd.

APPELLANT

Vs

Vijaysinh Amarsinh and Co. and Another

RESPONDENT

Date of Decision : 18-06-1993

Acts Referred:

Arbitration Act, 1940 — Section 27(4)

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 105, 11, 11

Citation : (1994) 1 GLR 161

Hon'ble Judges : S.D. Shah, J

Bench : Single Bench

Judgement

S.D. Shah, J.—Having consistently failed to obtain an order of injunction against encashment of duly executed Bank Guarantee from the Court of Civil Judge, Senior Division, Jamnagar, in Special Civil Suit No. 104 of 1988, from the learned Single Judge of the High Court of Gujarat in Appeal From Order No. 186 of 1992 as back as 3rd of April, 1992 and also from the Supreme Court of India, in the petition for Special Leave to Appeal being No. 6356 of 1992 as back as 13th May, 1992, the stubborn recalcitrant M/s. Vijaysinh Amarsinh and Company has by filing second suit on the same cause of action and more or less for same reliefs in the same Court (different Judge) has succeeded in getting an order of injunction against the encashment of the Bank Guarantee. The Civil Judge, Senior Division, Jamnagar (V.N. Shah) has by the impugned order dated 7th August, 1992 not only rendered meaningless binding directives of the superior Courts, i.e., the High Court of Gujarat and the Supreme Court of India, but has wilfully and deliberately helped recalcitrant litigant in not obeying the orders of the Apex Court of the State and the Apex Court of the Country. It is this order of Civil Judge, Senior Division, Jamnagar, which has given rise to these two Appeals From Orders, one by Hindustan Zinc Limited, in whose favour, the Bank Guarantee was executed and another by Vijaya Bank, who was to encash the Bank Guarantee by making over payment to Hindustan Zinc Limited.

2. In order to appreciate questions of larger importance, which arise in Appeals From Orders, relevant facts are stated hereunder:

(I) M/s. Vijaysinh Amarsinh and Company (Plaintiff contractor) entered into a contract with M/s. Hindustan Zinc Limited (Appellant in Appeal From Order who has not been impleaded as party in the suit) for construction of "Besunda Dam" situated in Udaipur District of Rajasthan State after inviting tenders from general public. The tender of plaintiff was lowest and was accepted.

(II) According to the plaintiff, the contract was in two parts and the work was to be completed in two stages. The work of the first stage was substantial while the work for the second stage was nominal for only Rs. 30 lakhs. It was his case that he completed the first stage of the contract for Hindustan Zinc Limited, but despite his readiness and willingness to do the work for the second stage, it was not given to him. There was option in Hindustan Zinc Limited to assign the work of the second stage to the contractor by 31st December, 1988, but by notice dated 8th August, 1988, the plaintiff contractor withdrew from the contract.

(III) According to the plaintiff, contract of the second stage was not assigned to the plaintiff, an agreement for that part of the contract was without any consideration and, therefore, he filed the suit for declaration and for permanent injunction restraining the defendants, both Hindustan Zinc Limited and Vijaya Bank from encashing and/ or invoking the Bank Guarantee given by the bank in favour of Hindustan Zinc Limited. Along with the suit he filed an application for injunction restraining Hindustan Zinc Limited from invoking the Bank Guarantee during the pendency of the suit.

(IV) In such Civil Suit being No. 104 of 1988, ex-parte ad interim injunction was granted by the trial Court, which came to be vacated as back as 12th March, 1992 (after four years).

(V) It was the case of Hindustan Zinc Limited that the contractor committed breach of the contract and without even completing the work of the first stage, he withdrew from the contract, so as not to permit the company to exercise the option at the second stage. It was the case of the company that the contract provided for exclusive jurisdiction of Udaipur Court in the State of Rajasthan. Still, however, the suit was filed in Jamnagar Court and even notice which was issued by the contractor on 8th August, 1988 was received by the company after the contractor obtained ex-parte injunction from the Civil Court on 12th August, 1988. Despite repeated attempts made by the company to get the said ex-parte injunction vacated, the contractor was successful in getting the hearing delayed and hence Special Civil Application No. 138 of 1992 was filed in the High Court of Gujarat and the High Court directed the Civil Judge, Senior Division, Jamnagar, to decide Exhibit 5 application within ten days from 9th January, 1992. The contractor once again adopted delaying tactic by filing Review Application, being Misc. Civil Application No. 84 of 1992, which was also rejected. Direction of the High Court was not carried out and when the trial Court was proceeding to decide Exhibit 5 Application on merit, the contractor filed Civil Revision Application No. 297 of 1992 in the High Court of Gujarat to restrain the trial Court from deciding Exhibit 5 application on merit. Such Civil Revision Application was rejected on

25th February, 1992 and by judgment and order dated 12th March, 1992, the trial Court vacated the ex-parte injunction against the encashment of Bank Guarantee.

(VI) The contractor challenged the order of Civil Judge, Senior Division, by filing Appeal From Order No. 186 of 1992, which came to be decided by C.K. Thakker, J. by reported judgment in the case of Vijaysinh Amarsinh and Co. Vs. Hindustan Zinc Ltd. and Another, , by which the Appeal From Order was dismissed and the order of the trial Court vacating the injunction was confirmed.

(VII) The contractor thereupon requested the Court to extend ad interim injunction which was extended upto 27th April, 1992, to enable the contractor to prefer appeal before the Supreme Court. On further request for extension, ad interim relief was extended upto 30th April, 1992 without interest and upto 15th May, 1992 on the condition that after 30th April, 1992, the contractor would be liable to pay 18 per cent interest on the outstanding amount.

(VIII) The contractor then approached the Supreme Court by petition for Special Leave to Appeal, being No. 6356 of 1992, which came to be dismissed on 13th May, 1992. The contractor thereupon filed a fresh Special Civil Suit No. 95 of 1992, in the same Court of Civil Judge, Senior Division, Jamnagar, as by that time the Civil Judge, who passed the earlier order was transferred and in this suit, the contractor deliberately did not implead Hindustan Zinc Limited as party. He applied for ex-parte ad interim injunction, which was granted by new Judge on 20th May, 1992 and by the impugned order dated 7th August, 1992, the learned trial Judge confirmed the ad interim order and it is this order, which is under challenge before this Court.

(IX) Hindustan Zinc Limited came to know about such order and it applied for Leave to Appeal before this Court and K. G. Shah, J. granted Civil Application 25th February, 1993. The Civil Application for condonation of delay was granted by this Court on 31st March, 1993 and thereafter the Appeal From Order was admitted and was fixed for final hearing on 12th April, 1993 and was finally heard.

3. In the aforesaid fact situation, this Court is called upon to decide the question as to whether the second suit for the same relief was maintainable and as to whether the trial Court was justified in granting interim injunction on the same cause of action between the same parties when such injunction was vacated by its predecessor-in-office, by High Court of Gujarat in Appeal From Order and by the Supreme Court of India in Special Leave Petition. This Court is also required to decide as to what extent the contractor should be found guilty of abuse of the process of the Court by committing Contempt of Court by resorting to abuse of the process of the Court. This Court shall have also to incidentally decide the question of the propriety on the part of Civil Judge, Senior Division, Jamnagar (V.N. Shah) in passing the order of injunction despite full knowledge of the fact that on the very facts between the same parties, his predecessor-in-office has

vacated the injunction and such order is confirmed by the High Court and by the Supreme Court.

4. Case of Contractor in Previously Instituted suit:

The contractor instituted Special Civil Suit No. 104 of 1988 in the Court of Civil Judge, Senior Division, Jamnagar for declaration and for permanent injunction against Hindustan Zinc Limited (defendant No. 1) and Vijaya Bank (defendant No. 2), so as to restrain them from encashing and/or invoking the Bank Guarantee. Along with the plaint, the contractor filed an application for temporary injunction, restraining Hindustan Zinc Limited from invoking the Bank Guarantee during the pendency of the suit, which was initially granted and was extended from time to time. The claim for declaration and injunction was based on the ground that the tender of the Contractor was accepted and the contract was entered into between the contractor and Hindustan Zinc Limited. The contract was for Rs. 2.49 crores. As per the condition of contract, 10 per cent of the tender amount was agreed to be given by way of Bank Guarantee and accordingly the contractor gave Bank Guarantee of Rs. 20 lakhs on March, 17, 1987. According to the contractor the contract was in two parts and the work was to be completed in two stages. So far as the first stage was concerned, it was the case of the contractor that the same was substantially completed and that work for the second stage was only for Rs. 30 lakhs. It was his case that even though he was ready and willing to do the work, he could not do that work as that work was not assigned to him and, therefore, he was constrained to revoke the work of the second stage by notice dated 8th August, 1988. It was his contention that since the contract of the second stage was not given to him, an agreement for that part of the contract was without consideration and, therefore, null and void. Hindustan Zinc Limited was, therefore, not entitled in law to invoke the Bank Guarantee for the work of the second stage since such work was not entrusted to the contractor and even if the Bank Guarantee was to be invoked for failure of the contractor to complete the second stage of the contract, Hindustan Zinc Limited can invoke the Bank Guarantee to the tune of Rs. 3 lakhs only, i.e., for the second stage of the contract.

5. The aforesaid was the foundation in the earlier suit and this fact is more than clear if reference is made to the judgment and order of C.K. Thakker, J. in Appeal From Order, which is now reported in case of Vijaysinh Amarsinh and Co. Vs. Hindustan Zinc Ltd. and Another, more particularly paras 2, 4 and 5 of the judgment. The Contractor has further raised a contention that there was a fraud on the part of Hindustan Zinc Limited in not permitting the contractor to complete the contract in its entirety and therefore also it was not entitled to invoke the Bank Guarantee and lastly it was submitted that arbitration proceedings were pending and, therefore, Hindustan Zinc Limited was not entitled to invoke the Bank Guarantee. I have referred to the contentions of the contractor in previously instituted suit in detail because I will hereafter point out that these very contentions are reiterated in the subsequently instituted suit

before the same Court as well as in Appeal From Order before this Court.

6. The aforesaid contentions raised by the contractor in the application for temporary injunction were negatived by the trial Court in its judgment and order dated 12th March, 1992 as well as by C.K. Thakker, J. in the aforesaid reported decision. As regards the aforesaid contention, this Court held that the contract was one indivisible and that two independent and separate contracts have not been entered into by the parties. Two stages have been mentioned in the contract because of the nature of the work, which was to be undertaken by the contractor. The period of giving of contract of the second stage was to be over on 31st December, 1988, but prior thereto, by notice dated 8th August, 1988 the contractor withdrew from the contract. Immediately on the next day, the contractor filed the suit and obtained ad interim relief. As regards the question as to whether there was breach of contract on the part of the contractor or on the part of Hindustan Zinc Limited or whether the contractor voluntarily withdrew from continuing the work or was constrained to do so, C.K. Thakker, J. held that it can be decided only after appreciating the evidence that may be led. This submission of the contractor, therefore, that for the second stage of the contract, there was no concluded contract and that for such stage of contract, Bank Guarantee cannot be invoked, was specifically raised, considered and decided against the contractor in the previously instituted suit. As regards, invocation of the Bank Guarantee after referring to the various decisions of the Supreme Court, C.K. Thakker, J. held that, Courts should not normally grant injunction restraining the performance of the contractual obligations arising out of a letter of credit or a Bank guarantee. For applications of this doctrine, it is immaterial whether such contract is between "a banker and a banker" or "a banker and a customer". Commercial transactions are commercial transactions and commitments of the banks must be honoured and saved from interference by Courts. C.K. Thakker, J., therefore, held that the order of the trial Court vacating the injunction was pre-eminently just and proper and was well considered order passed after appreciating all material facts. C. K. Thakker, J. also found that the trial Court has reached a finding that the contractor has not come with clean hands and such finding was just and proper and, therefore, neither in law nor in equity it was a fit case to grant interim relief restraining Hindustan Zinc Limited from invoking or encashing the Bank guarantee. The aforesaid judgment and order of C, K. Thakker, J. passed in Appeal From Order came to be confirmed by the Supreme Court of India and petition for Special Leave to Appeal was summarily rejected.

7. Subsequently instituted suit and contentions raised therein:

The contractor immediately thereafter filed Special Civil Suit No. 95 of 1992 in the Court of Civil Judge, Sr. Division, Jamnagar for declaration and injunction, but, this time, knowingly and deliberately omitting to implead Hindustan Zinc Ltd. as party defendant The suit was filed only against Vijaya Bank. In such suit, it was averred that Vijay Bank has given Bank guarantee in favour of Hindustan

Zinc Limited and Hindustan Zinc Limited was likely to get such Bank Guarantee encashed illegally and unlawfully through Vijaya Bank and, therefore, suit for declaration and permanent injunction was filed. The contractor in such suit also applied for temporary injunction by Exhibit-5 and inter alia prayed for two reliefs in para 2-A and 2-B.

Para 2-A If Vijaya Bank has pursuant to Bank Guarantee dated 17th March, 1987, paid any amount or is to pay hereafter, the Bank should be restrained by temporary injunction from recovering any amount from the property of the plaintiff or from margin money produced by the plaintiff or from security furnished by the plaintiff, and

Para 2-B Since Hindustan Zinc Limited has not in the prescribed form claimed any ascertainable and specific amount and since competent authority has yet not decided amount payable to Hindustan Zinc Limited, restrain the Bank by temporary injunction from encashing the Bank Guarantee.

8. It may be noted that the application for temporary injunction is dated 20th May, 1992 and the Supreme Court has dismissed the SLP on 13th May, 1992.

9. From out of the aforesaid two reliefs, "Relief B" is squarely and in every respect identical to the relief which was prayed in previously instituted suit and it was not granted by three Courts. It was the relief in the proceeding instituted between the same parties and against the same party, namely - Vijaya Bank. Excepting the fact that in the second suit, most necessary party, who was in every respect directly affected and against whom, the relief was specifically prayed, was not impleaded as party and surprisingly enough the Civil Judge, Senior Division passed the following ex-parte order:

Heard learned Advocate Shri H.O. Bhatt for the plaintiff (Proxy Advocate). Perused the papers. Status quo to be maintained till further orders. Issue urgent show cause notice.

10. It appears that Vijaya Bank, the only defendant, immediately appeared and moved for vacating the ad interim relief by filing application at Exh. 5 on 3rd June, 1992, wherein full details of the previously instituted suit and vacation of interim relief by three Courts were elaborately stated. The Advocate of the contractor strongly objected to the application for temporary injunction being heard and applied for adjournment and Civil Judge, Senior Division, Jamnagar passed following order below Exh. 15:

Fixed for hearing and reply.

Be it noted that despite full knowledge of the fact that Hindustan Zinc Limited was the most interested party and encashment of Bank Guarantee in its favour was being enjoined by the Court, the Court did not think it fit even at that stage to insist for implement of Hindustan Zinc Limited or to issue notice of its order to Hindustan Zinc Limited.

11. The Civil Judge, Senior Division thereafter heard the application for temporary injunction and by judgment and order dated 7th August, 1992, allowed the application for temporary injunction by passing following order:

ORDER

This application is partly allowed. Defendant Vijaya Bank is allowed to release the amount of Bank Guarantee with interest as observed by the Hon"ble High Court in Sp.C.S. No. 104 of 198S after finalisation of the suit deciding various other issues promptly within three month's time If possible, the matter may be proceeded with day to day. Parties are directed to co-operate accordingly. Costs in the cause.

12. The learned Civil Judge, Senior Division, Jamnagar, by a very ingenuous device, not only rendered inoperative and meaningless the order of his predecessor in office, the order of the High Court and the Order of the Supreme Court of India but again brazen facedly proceeded to direct the Bank to release the am unt of Bank Guarantee after finalisation of the suit within the period of three months. In substance he injuncted the encashment of the Bank Guarantee upto the decision of the suit. He, therefore, virtually directed the Bank not to release the amount of Bank Guarantee till suit is finally decided. With respect to the learned trial Judge, it must be stated that with full knowledge of the earlier proceedings and with full knowledge of the fact that order of injunction against encashment of the Bank Guarantee was refused by three Courts including the Hon"ble the Supreme Court of India, he most indiscreetly, improperly and dubiously articulated the operative portion of the order granting the interim relief, in such words so as to suggest that he was directing the Bank to encash the Bank Guarantee consistent with the order of the High Court and yet in fact he rendered the orders of the trial Court, the High Court and the Supreme Court inoperative and meaningless. It is thus clear that the contractor filed second suit on the same cause of action against the same party. He deliberately omitted to implead the party, viz., Hindustan Zinc Limited, which was most vitally affected and prejudiced by the nature of the relief prayed for. The contractor also knew that the averments made in the plaint and the cause of action in the previously instituted suit were the same as in the subsequently instituted suit. Mr. S.M. Shah, learned Counsel appearing for the contractor has fairly stated before this Court that prayer in para 2B of the application for temporary injunction was squarely covered by the prayer prayed for, in the previously instituted suit and he, therefore, sought oral permission of the Court during the course of his submission to permit the contractor to delete the prayer from the application. It is an attempt to show failness at this stage having succeeded in obtaining injunction from the trial Court and in the fact and circumstances of the case I reject such permission as the plaintiff contractor has prima facie committed acts which may amount to committing contempt of Court.

13. Submissions of the Contractor:

Mr. S.M. Shah, learned Counsel appearing for the contractor has strenuously urged before this Court that the subsequently instituted suit was in every respect an independent suit for an independent relief and was one which could be legally and lawfully filed in the Civil Court. He submitted that there is no prohibition in any law including the Code of Civil Procedure, prohibiting the party from filing successive Civil Suits on the same cause of action and, therefore the contractor was not acting contrary to law in filing second Civil Suit. On merits, he submitted that from the contract it was clear that the work was to be done in two stages and for the second stage, no final contract was awarded to the contractor And before it could be awarded by 31st December, 1988, the contractor has revoked his offer for the second stage by letter dated 8th March, 1988. He submitted that since there was no offer for the second stage by the contractor, there was no concluded contract for the second stage and that such offer was revoked before it could be accepted and, therefore, in absence of any contract for the second stage, Bank Guarantee cannot be invoked. In the alternative, he submitted that since there was no completed contract for the second stage of the contract, prayer prayed for in Para-2A was required to be granted. He lastly submitted that if reference is made to Clauses 10 and 11 of the contract, it could be clear that the Bank Guarantee was to be invoked only to indemnify Hindustan Zinc Limited in case of default of the contractor. He referred to the following Clauses of the Bank Guarantee:

1. We Vijaya Bank of Jamnagar (hereafter called "the Bank") do hereby irrevocable guarantee to you the due payment of the said sum of Rs. 25.00 lakhs by the contractor to you in terms of the said Tender conditions in contract and their due performance of the obligations in this behalf and undertake and agree with you that in the event of owner being satisfied that the default has been made by M/s. Vijaysinh Amarsinh & Co., i.e., the contractor in performing any of the terms and conditions of the tender and/or purchase order or in payment of any money payable to you, i.e., Hindustan Zinc Limited under the said Tender/purchase order conditions/contract, we shall on demand pay to you without demur in such manner as you may direct the said amount of rupees twenty-five lacs only or such portion thereof not exceeding the said sum as you may from time to time require or is payable to you by the contractor for all or any such default and you can look to us as the principal debtor.

2. You will have the full liberty without reference to us and without affecting this guarantee, postpone for any time or from time to time the exercise of any of the powers and rights conferred on you under the said contract with he said M/s Vijaysinh Amarsinh & Co., Jamnagar and to enforce or to forebear from enforcing any powers or right or by reason of time being given the said M/s. Vijaysinh Amarsinh & Co., Jamnagar which under law relating to the sureties would but for the provision have the effect of releasing us. Any such time/ indulgence/ forbearance and/or any act or omission, commission on your part will not vitiate our this guarantee.

3. Your right to recover the said sum of Rs. 25.00 lacs (Rupees Twenty-five lacs only) from us in manner aforesaid or responded by reason of the first that any dispute are pending before any officer Tribunal or Court.

4. Our liability under this guarantee is restricted to Rupees Twenty-Five lacs only and this guarantee shall remain in force until 17-6-1991 unless a claim to enforce the guarantee is filed with us within six months from 17-6-1991 (which is date of expiry of guarantee) all our rights under the said guarantee shall be forfeited and we shall be relieved and discharged from all liabilities thereunder.

14. Based on the aforesaid clauses, Mr. Shah submitted that in absence of any concluded contract between the parties for the second stage of the contract, invocation of the Bank Guarantee by Hindustan Zinc Limited was not permissible and such invocation as well as encashment was required to be restrained by an order of injunction.

15. Are the contentions raised in the Second Suit in any way different from those raised in the previously instituted suit:

Mere look at the submissions which are made before this Court as well as before the trial Court by the contractor in the subsequently instituted suit would suggest that the same contentions more or less were raised before the trial Court in the previously instituted suit. The contention that there was no concluded contract for the second stage of the contract and that in absence of any contract, there cannot be enforcement of Bank Guarantee was precisely raised in the previously instituted suit and was negatived by the trial Court as well as by C.K. Thakker, J. in the case of Vijaysinh (supra). I have elaborately referred to the contentions raised in the earlier proceedings by the contractor before this Court and I have no manner of doubt in holding that very contentions are repeated in the second suit before the trial Court as well as before this Court. The ultimate relief which the contractor prayed for in the earlier suit was for injunction against enforcement/encashment of Bank Guarantee in favour of Hindustan Zinc Limited and that is the very prayer which the contractor has prayed for in the subsequently instituted suit. The application for temporary injunction in the subsequently instituted suit was, therefore, in every respect barred by principle of res judicata inasmuch as application for temporary injunction between the same parties, on the same cause of action based on the same contract was dismissed by the trial Court and such dismissal was confirmed by the High Court and the Supreme Court and hence second application was barred. I, therefore, do not find it necessary in this Appeal From Order to examine the legality and validity of the submissions made by Mr. S.M. Shah, learned Counsel appearing for the contractor because I am of the opinion that all such submissions are squarely answered by the trial Court in the previously instituted suit while deciding application at Exhibit-6 and the same were also squarely answered by the High Court (C.K. Thakker, J.) in the reported decision of Vijaysinh (supra). For the very reasons, which found favour with C.K. Thakker, J. and without undertaking the exercise of reappreciating the submissions, I am of the opinion

that neither on facts nor in law or in equity, contractor was entitled to injunction as prayed for. On merits, in view of the decisions of the Supreme Court of India in the case of United Commercial Bank Vs. Bank of India and Others, , in the case of Centax (India) Ltd. Vs. Vinmar Impex Inc. and Others, in the case of U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., as well as the recent decision of the Supreme Court in the case of General Electric Technical Services Company Inc. Vs. M/s. Punj Sons (P) Ltd. and another, , it must be held that no injunction could be granted under Order 39 Rules 1 and 2 of the CPC against enforcement of Bank Guarantee. It is only in exceptional cases that the Court can interfere with the machinery of irrevocable obligations assumed by banks. They are the life blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the bank have notice, the Courts will leave the merchants to settle their disputes under the contracts by litigations or arbitration as available to them or stipulated in the contracts. The Courts are not concerned with their difficulties to enforce such claims. These are risks which the merchants take. Injunction to restrain the bank from performing the Bank Guarantee cannot be granted. One cannot do indirectly what one is not free to do directly. The Courts should not, therefore, extend their helping hand by granting injunction against enforcement of Bank Guarantee because the aggrieved party is not remediless. Such a party was not to suffer any injustice which was irretrievable. Such a party can sue the other party for damages.

16. From the aforesaid position of Law as stated by the Supreme Court in the "aforesaid decisions, I fail to understand as to how and under what circumstances injunction in this case could be granted especially when on merits after considering all possible contentions, injunction was refused in the previously instituted suit to the contractor against the same parties and when such order was confirmed by the High Court and the Supreme Court of India. The order passed by the trial Court, therefore, cannot be permitted to stand both on facts as well as on Law for following reasons:

(I) It is now well established that principle of res judicata applies to orders at different stages of the trial. Even as regards interlocutory orders such as stay of injunction it is well established that it would be an abuse of the process of the Court to apply for same relief by successive applications when such relief is already rejected by the Court. This general principle of law is clearly stated by the Supreme Court in the case of Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another, in following words:

The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily, it applies as between past litigation and future litigation. When a matter whether on a question of fact or a question of law has been decided between two parties in one suit or proceeding and the decision is final, either

because no appeal was taken to a higher Court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. The principle of res judicaia is embodied in relation to suits in Section 11 of the Code of Civil Procedure; but even where Section 11 does not apply the principle of res judicata has been applied by Courts for the purpose of achieving finality in litigation. The result of this is that the original Court as well as any higher Court must in any future litigation proceed on the basis that the previous decision was correct.

The principle of res judicata applies also as between two stages in the same litigation to this extent that a Court, whether the trial Court or a higher Court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.

Having so stated the law the Supreme Court proceeded to consider the question as to what would be the position when at an earlier stage of the litigation a Court has decided an interlocutory matter in one way and no appeal has been taken therefrom or no appeal did lie and the principle of res judicata is pressed into service before the higher Court at a later stage of the same litigation. The Supreme Court considered three decisions of the Privy Council and observed:

The very fact that in future it will not be open to either of the parties to challenge the correctness of the decision in a matter finally decided in a past litigation makes it important that in the earlier litigation the decision must be final in the strict sense of the term. When a Court has decided the matter it is certainly final as regards that Court. Should it always be treated as final in later stages of the proceedings in a higher Court which had not considered it at all merely on the ground that no appeal lay or no appeal was preferred.

The question which was posed was answered by the Supreme Court thus:

It is clear, therefore, that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay, an appeal was not taken could be challenged in an appeal from the final decree or order. A special provision was made as regards orders of remand and that was to the effect that if an appeal lay and still the appeal was not taken the correctness of the order of remand could not later be challenged in an appeal from the final decision. If however an appeal did not lie from the order of remand the correctness thereof could be challenged by an appeal from the final decision as in the cases of other interlocutory orders. The second Sub-section did not apply to the Privy Council and can have no application to appeals to the Supreme Court, one reason being that no appeal lay to the Privy Council or lies to the Supreme Court against an order or remand.

It is thus clear that with a view to giving finality to the order of the Court rendered in the same proceeding between the same parties principle of res judicata is held applicable so far as the Court passing the order is concerned.

This very principle was affirmed by the Supreme Court in the later case of Arjun Singh v. Mohindra Kumar reported in AIR 1964 SC 1993 by following observations:

That the scope of the principle of res judicata is not confined to what is contained in Section 11 but is of more general application is also not in dispute. Again, res judicata could be as much applicable to different stages of the same suit as to findings on issues in different suits.

The Court then proceeded to consider its earlier decision in the case of Satyadhyan (supra) and after quoting relevant passage from the same judgment proceeded to state the law thus:

If the Court which rendered the first decision was competent to entertain the suit or other proceedings, and had, therefore, competency to decide the issue or matter, the circumstance that it is a tribunal of exclusive jurisdiction or one from whose decision no appeal lay would not by themselves negative the finding on the issue by it being res judicata in later proceedings. Similarly, as stated already, though Section 11 of the Civil P.C. clearly contemplates the existence of two suits and the findings in the first being res judicata in the later suit, it is well established that the principle underlying it is equally applicable to the case of decisions rendered at successive stages of the same suit or proceedings. But, where the principle of res judicata is invoked in the case of the different stages of proceedings in the same suit, the nature of the proceedings, the scope of the enquiry which the adjectival law provides for the decision being reached, as well as the specific provisions made on matters touching such decision are some of the material and relevant factors to be considered before the principle is held applicable.

The Supreme Court thereafter proceeded to consider Section 105 of the Civil P.C. and the decisions of the Privy Council which were considered in Satyadhyan's case (supra) and thereafter it elaborately re-stated the law thus:

It is needless to point out that interlocutory orders are of various kind; some like orders of stay, injunction or receiver are designed to preserve the status quo pending the litigation and to ensure that the parties might not be prejudiced by the normal delay which the proceedings before the Court usually take. They do not, in that sense, decide in any manner the merits of the controversy in issue in the suit and do not of course put an end to it even in part. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts, or new situations which subsequently emerge. As they do not impinge upon the legal rights of the parties to the litigation the principle of res judicata does not apply to the findings on which these orders are based, though if applications were made for relief on the same basis after the same has once been disposed of the Court would be justified in rejecting the same as an abuse of the process of Court. There are other orders which are also interlocutory but would fall into a different category.

The difference from the ones just now referred to lies in the fact that they are not directed to maintaining the status quo, or to preserve the property pending the final adjudication, but are designed to ensure the just, smooth, orderly and expeditious disposal of the suit. They are interlocutory in the sense that they do not decide any matter in issue arising in the suit, nor put an end to the litigation. The case of an application under Order IX, 7 would be an illustration of this type. If an application made under the provisions of that Rule is dismissed and an appeal were filed against the decree in the suit in which such application were made, there can be no doubt that the propriety of the order rejecting the reopening of the proceeding and the refusal to relegate the party to an earlier stage might be canvassed in the appeal and dealt with by the appellate Court. In that sense, the refusal of the Court to permit the defendant to "set the clock back" does not attain finality. But what we are concerned with is slightly different and that is whether the same Court is finally bound by that order at later stages, so as to preclude its being reconsidered. Even if the Rule of res judicata does not apply, it would not follow that on every subsequent day on which the suit stands adjourned for further hearing, the petition could be repeated and fresh orders sought on the basis of identical facts. The principle that repeated applications based on the same facts and seeking the same reliefs might be disallowed by the Court does not however necessarily rest on the principle of res judicata. Thus, if an application for the adjournment of a suit is rejected, a subsequent application for the same purpose even if based on the same facts, is not barred on the application of any Rule of res judicata, but would be rejected for the same grounds on which the original application was refused. The principle underlying the distinction between the rule of res judicata and a rejection on the ground that no new facts have been adduced to justify a different order is vital. If the principle of res judicata is applicable to the decision of a particular issue of fact, even if fresh facts were placed before the Court, the bar would continue to operate and preclude a fresh investigation of the issues, whereas in the other case, on proof of fresh facts, the Court would be competent nay would be bound to take those into account and make an order conformably to the facts freshly brought before the Court.

From the aforesaid observations of the Supreme Court it becomes clear that the principle of res judicata though may not apply *sfricto sensu* to interlocutory proceedings such as for stay or temporary injunction repeated applications for the same reliefs made on the same basis should be rejected as amounting to the abuse of the process of the Court. In the absence of any fresh or new material having bearing on the grant of relief, which is already refused, it is not open to a party to apply once again for the same relief and the Court would be justified in rejecting such applications, though not on the principle of res judicata but on the ground that such application having been rejected earlier on merits, it would amount to an abuse of the process of the Court to entertain the same. It is pertinent to refer in this connection to second proviso to Rule 4 of Order 39 of Civil P.C. which is inserted by Amendment Act of 1976, which reads as follows:

Provided further that where an order for injunction has been passed after giving to a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances or unless the Court is satisfied that the order has caused undue hardship to that party.

The party against whom the injunction is granted after hearing is bound by it subject to his right of appeal, during pendency of the suit. The Legislature has, however, now provided two exceptional circumstances, namely, change in the circumstances and resultant undue hardship to enable such party to apply to the same Court for discharge, variation or setting aside of an order of injunction passed after hearing the parties is allowed only in two exceptional cases and none other, so far as the same Court is concerned. The principle of finality of such an order, except in two exceptional cases is how statutorily established.

It is clear that every trivial, immaterial or insignificant change in the circumstances shall not justify variation or modification of the order already passed. It must be a material, significant change having substantial bearing on the grant of temporary order.

The second exception which is added by the Amending Act of 1976 is referable to situation when "undue hardship" has resulted or is to result to the party by the order of the Court. The expression "undue hardship" in the context of Section 27(4) of the Arbitration Act, 1940 is now interpreted by the Supreme Court in the case of *Sterling General Insurance Co. Ltd. Vs. Planters Airways Pvt. Ltd.*, to mean something which is not merited by the conduct of the claimant. If the operation of the order is so oppressive, so burdensome as to be altogether out of proportion to the fault, it may be said that there is undue hardship. Undue must mean something which is not merited by the conduct of the claimant or is very much disproportionate to it.

Against the aforesaid background, let me examine as to whether the plaintiff has any cause or reason for grant of order of injunction which was refused in the previous suit. Neither in the pleadings nor in the oral submissions any such cause or reason is made out. In fact, the order in the earlier suit refusing similar interim injunction was subjected to challenge both in the High Court as well as in the Supreme Court. Within a month from the date of the order of the Supreme Court the plaintiff has instituted another suit on the same cause of action, for the same relief and against the same parties except Hindustan Zinc Ltd., whom he has deliberately and dubiously omitted to implead, although it is vitally interested party. In the earlier suit there was threat of encashment of Bank Guarantee while in the second suit there was request for encashment of Bank Guarantee. This circumstance can never be said to be material circumstance, la fact, earlier application was decided on assumption of the right of invoking Bank Guarantee. The trial Court, High Court and the Supreme Court refused to grant interim injunction thereby accepting right of Hindustan Zinc Ltd. to invoke Bank

Guarantee. Thus no change of circumstances existed or was shown to exist so as to necessitate grant of interim relief in the present suit which was already refused in the previous suit. No case of "undue hardship" is also made out which would justify the trial Court to grant relief which was refused in the course of the previous suit by three Courts including High Court and the Supreme Court.

I am conscious of the fact that the principle laid down in *Satyadhyan Ghosal's* (supra) and *Arjun Singh's* (supra) and the statutory provision in question apply to successive applications in the same suit seeking the same relief or seeking variation/discharge of the same relief already granted, as the case may be. However, when two suits substantially based on the same cause of action and seeking the same relief are successively filed and in the second suit an application for injunction in same terms is made, there is no reason why the same principle should not be extended and made applicable. Not to do so will result in abuse of the process of the Court on the part of an adventurous litigant who may file successive suits of similar nature with an end in view to obtain an interim relief which denied to him in the previously instituted suit(s). This is exactly the situation which obtains in the present case.

(II) The order which the trial Court proceeded to pass injuncting Vijaya Bank from encashing the Bank Guarantee during the pendency of the suit at the instance of the plaintiff contractor was in total disregard of the declaration of Law made by the Apex Court of the country. Law as to enforcement/encashment of Bank Guarantee and jurisdiction of Civil Court to injunct the same at the instance of party, who has given the Bank Guarantee is so well established and is so well known that the trial Court cannot feign ignorance about such declaration of Law made in the case of *United Commercial Bank Vs. Bank of India and Others*, , in the case of *Centax. (India) Ltd. v. Vinmar Impex Inc. and Ors.* reported in Apt 1986 SC 1924, in the case of *U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd.*, and in the case of *General Electric Technical Services Company Inc. Vs. M/s. Punj Sons (P) Ltd. and another*, . The decision of the trial Court was in blatant disregard of declaration of Law made by the highest Court of the country and since C.K. Thakker, J. in the reported decision referred to all the binding judgments of the Supreme Court, the trial Court cannot be permitted to state that it was ignorant of such binding declaration of Law.

(III) The trial Court was quite conscious of the fact that the very relief which the plaintiff contractor has prayed for in the subsequently instituted suit on the same cause of action between the same parties was refused by the trial Court in the previously instituted suit and the same order was confirmed by the High Court as well as by the Supreme Court of India. Yet, the trial Court deliberately proceeded to pass the order of injunction so as to circumvent and frustrate the lawful orders passed by the Superior Courts.

(IV) No new ground or change of circumstances was urged or agitated before the trial Court or before this Court in the subsequently instituted proceedings.

(V)Invocation of the jurisdiction of the trial Court once again on the same facts with the change of Judge without impleading the vitally interested party was dubious diabolical device adopted by the contractor and was most outrageous abuse of the process of the Court to suit his own purposes so as to render orders of the competent Courts negatory, meaningless and otiose, and

(VI) The Civil Judge, Senior Division, unfortunately knowingly and deliberately for some extraneous consideration proceeded to grant relief indirectly, which he cannot grant directly and he most brazen facedly rendered the binding orders of the Superior Courts absolutely meaningless by knowingly granting injunction which was refused to the contractor in the previously instituted proceedings.

17. Process of reasoning adopted by Civil Judge, Senior Division, in this subsequently instituted suit:

From the perusal of the judgment and order passed by the Civil Judge, Senior Division, it becomes clear that the learned Judge was fully conscious of previously instituted proceedings and outcome thereof, as in die very first paragraph of the judgment, he has noted as under:

That with a view to safeguard the guarantee for and on behalf of the applicant-plaintiff by Vijaya Bank, a suit was Bled bearing Special Civil Suit No. 104 of 1988. Interim injunction order not to part with such Bank Guarantee is stated to have been given vide order below Ex. 6 passing the order of status quo which was ultimately vacated on 12-3-1992 modifying the same on 9-11-1990. Being aggrieved by the said order, the applicant had preferred an appeal before the Hon"ble High Court, bearing No. A.O. 186 of 1992 which was rejected on 3-4-1992 over which further appeal was also preferred before the Hon"ble Supreme Court bearing No. SLP 6356 of 1992 which was also rejected at the admission stage only. As per the order passed in the earlier suit, Hindustan Zinc Limited was held entitled to recover such guarantee amount. Pending the said earlier suit, Hindustan Zinc Limited moved the plaintiffs Bankers Vijaya Bank, Jamnagar to pay up Rs. 25.00.000/- as per their letter dated 23-11-1991.

18. It cannot, therefore, be said that the trial Court was unaware of orders passed by its predecessor, the High Court and the Supreme Court of India in favour of Hindustan Zinc Limited and against the plaintiff contractor in previously instituted suit. Despite the factual position, the trial Court proceeded to refer to averments made by the plaintiff contractor in the plaint to the effect that both Vijaya Bank as well as Hindustan Zinc Ltd. have misinterpreted the documents as well as die order of the Courts in the previously instituted suit and summarised the gist of the pleadings thus:

(A) That at the time of the institution of earlier suit, there was no proceedings initiated by Hindustan Zinc Limited for invoking the Bank guarantee. This fact is corroborated by the letter, dated 23-11-1991 and hence, there is now new cause of action.

(B) That in the earlier suit, there was no existence of contract work with regard to stage II. Not only that even if there is no injunction order for invoking the Bank Guarantee by Hindustan Zinc Ltd. prima facie passed by the Honourable High Court and so the present suit is filed on the ground of dispute arose with regard to the conditions of tenders and Bank guarantee.

(C) That the present suit is filed to restrain Hindustan Zinc Ltd. from encashing the amount of Bank Guarantee as it was decided in the previous suit that the said Company has right to recover the amount of Bank Guarantee.

(D) That at the time of filing earlier suit, the present applicant was not given any opportunity of audience and even the present applicant as beyond the imagination that the said Company would try to recover the amount of Bank guarantee straightway.

(B) That the said Company has not taken into consideration the amount recoverable from the present applicant and straightway written the letter for recovery of the amount of Bank Guarantee which shows mala fide on the part of the Company, and so also, new cause of action has accrued for filing the present suit.

(P) The applicant apprehends that in view of the letter dated 23-11-1999) and that the Company and the Bank both are Government institutions, the Bank is likely to pay up the amount of guarantee to the Company and so also, the present suit is required to be filed.

(G) Thus on the aforesaid grounds, the facts of both the suits, i.e. present and the earlier one differ from each other so far as the cause of action is concerned.

19. Having so summarised the basis of the second suit, the trial Court has recorded in para 9 following finding:

The earlier litigation from the Civil Court and upto the Highest Court of India and the respective orders are also hardly disputed. The lower Courts are bound to obey the order of Higher Courts in their respective jurisdiction.

20. The trial Court thereafter proceeded to discuss the contentions raised by the plaintiff contractor as to whether there was concluded contract for the second stage and as to whether any liability for not completing the work of the second stage could be fastened on the contractor. The Court in this connection observed as under:

It is the case of the plaintiff that as there was no condition for the work of Stage-11, the agreement would be void and the plaintiff was therefore entitled to revoke the same. Further it is also submitted that as per the terms and conditions mentioned in the tender, on committing the breach of any of the conditions or for any default, Hindustan Zinc Limited is entitled to the Bank Guarantee as executed on 17-3-1987. Thus in the earlier suit, the declaration with regard to Vijaya Bank having no right to execute such a Bank Guarantee

was prayed along with injunction further praying to declare such an agreement to be void in absence of the conditions for the work of Second Stage. Ultimately the interim orders passed and modified in the earlier suit were withdrawn. Then the appeal was preferred in 1992 in the Hon''ble High Court against these orders which was also dismissed on 3-4-1992. Thus we find that since 1988 thjs plaintiff was not able to do the work till date, even though the orders are already passed by the Higher and Apex Court of the Country.

Appeal over the order of the Hon''ble High Court in SLP was preferred in the Hon''ble Supreme Court which was also rejected. Thus, the order passed by the Civil Judge (S.D.), Jamnagar stands in force. Under the situation, the Bank Guarantee can be invoked.

21. The trial Court Judge was also conscious of the fact that as per decision of the Supreme Court as well as Gujarat High Court, the trial Court should interfere in the case of enforcement of Bank Guarantee only in exceptional cases. He was also conscious of the fact that the previously instituted suit and the suit which was being tried by him were same between the same parties and for the same reliefs. He, therefore, observed as under:

It is submitted for and on behalf of the plaintiff that the cause of action and the reliefs sought for are altogether different in both the suits, but to a greater extent it cannot be said so clearly, according to me. I agree only on the point of ascertainiog of dues for such a breach and to that extent, the Bank is liable to disburse the amount.

22. At another stage in para 12 of the judgment, the trial Court observed as under:

The reliefs claimed in both the suits more or less reflect upon the same relief and the cause of action and the parties concerned are also the same. Distinction of words and change of relief so indicated would hardly change the over-all situation and therefore, when the point at issue of invoking such a Hank Guarantee is already and ultimately decided by the Highest Forum, this Court cannot go beyond it.

23. Despite the aforesaid findings which are categorically reached by the trial Court, it adopted a rather strange approach to the problem. By relying upon the Clause of Bank Guarantee, it took the view that there was liability of Vijaya Bank to indemnify the Hindustan Zinc Limited in case of default and simply because default was conveyed by Hindustan Zinc Limited, it would be risky to accept the say of Hindustan Zinc Limited and, therefore, unless and until such a default was established, the Bank Guarantee cannot be permitted to be encashed. It should be noted that in the previously instituted suit, the contractor apprehended invocation of Bank Guarantee. The very terms and conditions of the Bank Guarantee were examined by the trial Court arid the trial Court vacated the injunction against the encashment of Back Guarantee. In Appeal From Order, C.K. Thakker, J. after reference to binding precedents of the Supreme Court of

India, confirmed the order of the trial Court holding that both on facts and in law as well as in equity no case was made out for grant of injunction against invocation of Bank Guarantee. As pointed out hereinabove, the trial Court has clearly noticed that factual situation and it was very much conscious of the fact that order of the High Court and the Supreme Court were binding on it. Despite this factual situation, the Court adopted a device of running away from such binding orders of the Courts by holding that both the suits were pending in the Court and that existence of arbitration Clause is not denied. It further how that the parties have waited since 1988 till 1992, and if suits are expedited, it would serve the ends of justice and would diminish the multiplicity of the litigation and if plaintiff fails in the suit ultimately, the plaintiff would be liable to pay the amount and therefore the trial Court held as under:

Earlier suit bearing Special Civil Suit No. 104 of 1988 is also filed in Jamnagar and the present one is also lying before us. If in the larger interest both the suits are proceeded with jointly, it would serve the purpose, if within a prescribed time limit the evidence is directed to be led by either side. In my humble opinion, if any order is passed at this stage to the contrary either party will be moving the appellate authority and it would normally take few months more and ultimately the matter would be decided at that stage only and the specific purpose and the rest of the points will remain undecided.

24. On the aforesaid reasoning, the trial Court has proceeded to grant the interim order, which is already reproduced hereinabove. Lastly, before passing the operative order in paras 19 and 20 of the order, the trial Court has made the following observations:

From the above overall situation, I feel that both the suits seem to be identical one to a greater extent and the main relief claimed for non-disbursement of Bank guarantee is already decided and under the situation even if there is little prima facie case of the plaintiff in both the applications, it would be better if they are proceeded together leading required evidence for final conclusion of the dispute. At this juncture considering the above over-all situation, I feel to partly decide this point in the affirmative so that the ultimate relief prayed would not get frustrated in both the suits and fair justice can be reached ultimately by allowing the parties to lead sufficient evidence once for all putting required conditions for prompt action by the learned Advocates of either side.

No doubt, such a Bank guarantee can be parted with straightway as per the order of the Hon''ble Apex Court of the Country, but at the same time, the diligence and care is required to be taken before parting with the same as ordered in the earlier suit which is confirmed by the respective appellate authorities. Hindustan Zinc Limited and Vijaya Bank are more or less Corporate bodies and are Government undertakings while the plaintiff happens to be private individual doing such minor contractual works. It is clearly and prima facie made out that he had only withdrawn his offer for the second stage of work. There seems to be hardly any dispute and it is not even the case of the

defence that even stage-I work has also been left out. It is true that Hindustan Zinc Limited has not been made a party here, but they are very much in know of such a pending suit as they are deprived of the Bank Guarantee amount due to the status quo order passed by my learned predecessor in the said suit.

Conduct of Civil Judge, Senior Division:

25. From the aforesaid quotations from the judgment and order of the trial Court, I have no manner of doubt in holding that firstly the trial Court was conscious of the fact that there was earlier litigations between the same parties for the same reliefs and this very relief was refused by the trial Court, High Court and the Supreme Court of India. Secondly from the perusal of the reported judgment of the High Court and even otherwise it shall have to be accepted that the trial Court was fully knowing the declaration of Law made by the Supreme Court of India as regards enforcement/encashment of Bank Guarantee and the absolute limited jurisdiction of the Court to injunct the same in exceptional cases. The trial Court deliberately ignored the declaration of Law made by the Highest Court of the country. Thirdly the trial Court also ignored consciously and deliberately the salutary principle of *res judicata* as well as undesirability of entertaining successive applications for the same relief as it knew that this very relief between the same parties on (he same cause of action was refused in the previously instituted suit. Fourthly the trial Court also rendered meaningless the binding orders of the Superior Courts by ignoring the order of the High Court as well as of the Supreme Court in the previously instituted suit. Fifthly from the perusal of the plaint and application for temporary injunction of the previously instituted suit, it was abundantly clear that the contentions of the plaintiff contractor about withdrawal of offer by him from the second stage of the work and resultant contention that there was no enforceable contract between the parties was squarely raised in the previously instituted suit and the same was considered and answered against the plaintiff contractor in the earlier suit both by the trial Court as well as C.K. Thakker, J. The trial Court has clearly recorded that the relief claimed in both the suits were same and were based on the same cause of action and were between the same parties and despite this consciousness, it has proceeded to pass the order of the temporary injunction during the pendency of the suit. Sixthly the trial Court has also noticed that the most vitally interested party, viz., Hindustan Zinc Limited was deliberately omitted to be impleaded by the plaintiff contractor and it was also conscious of the fact that any order which it might pass would directly and immediately affect Hindustan Zinc Limited, it knowingly proceeded to pass such order so as to keep the most vitally interested party unaware of the order. It is somewhat difficult to assume or believe that the learned Judge exercising powers of a Senior Division Court was not aware that what he was doing was a conscious and even a deliberate act amounting to bypassing the salutary principle of *res judicata*, ignoring the declaration of Law made by the Apex Court in no uncertain terms and circumventing the lawful orders passed by superior Courts. One can only guess the motivating factors but taking the most charitable view it can be said

that the Civil Judge, Senior Division has played into the hands of the litigant who was out to abuse the process of the Court and to bring the administration of justice into ridicule.

The trial Court having held that "the reliefs claimed in both the suits more or less reflect upon the same relief and the cause of action and the parties concerned are also the same" and having further recorded that "distinction of words and change of relief so indicated would hardly change the over-all situation and therefore when the point at issue of invoking such a Bank Guarantee is already and ultimately decided by the Highest Forum, this Court cannot go beyond it" and having also noticed that "the lower Courts are bound to obey, the order of Higher Court in their respective jurisdiction", abashedly, consciously and deliberately proceeded to grant the temporary injunction as prayed for by the plaintiff contractor. For the reasons which are beyond comprehension and which defy logic and rationality and which fail to stand judicial scrutiny, the learned trial Judge has despite the aforesaid findings proceeded to grant temporary injunction so as to direct Vijaya Bank to encash Bank Guarantee after the suit is finally decided. In my opinion, the order passed by Civil Judge, Senior Division (V.N. Shah) though one apparently passed in exercise of his judicial discretion, was one which could be said to be inconsistent with the faithful and sincere discharge of his functions and duties as Judicial Officer and may well lead to an inference that he acted in an irregular manner, hastily and presumably with a view to confer undue favour upon a litigant and failed to maintain devotion to duty. Ordinarily, as held by the Supreme Court of India, in the case of Chandrakala Menon (Mrs) and Another Vs. Vipin Menon (Capt.) and Another, and Union of India and others Vs. A.N. Saxena, no disciplinary action can be taken when an officer in exercise of his judicial or quasi-judicial powers has passed an order. Ordinarily, if the order of the judicial or quasi-judicial officer is wrong the remedy is by way of an appeal or revision. For every wrong order of judicial or quasi-judicial officer, disciplinary action is not the remedy because it would jeopardise the exercise of judicial functions. If an order is passed in exercise of judicial powers, no disciplinary action is taken. Such a person even while exercising judicial function is not acting as a Judge. On the facts and in the circumstances of the case and in light of the findings hereinabove recorded this may be a case where the learned Judge could be appropriately dealt with in disciplinary jurisdiction. Since, however, this is a first case in which such a seriously lapse and unb-fitting conduct on the part of the learned Judge has come to this Court's notice, it would meet the ends of justice and serve the cause of administration of justice to direct the Registrar of this Court to make an entry in the Confidential Record of Civil Judge, Senior Division, Jamnagar (V.N. Shah) by incorporating para 25 of the judgment in his Confidential Dossier and also to place in his Service Record a copy of this judgment.

Conduct of Plaintiff Contractor:

26. From the aforesaid discussion, it becomes clear that plaintiff contractor, any

how, wanted to see that Hindustan Zinc Limited is not permitted to encash the Bank Guarantee which it has right to encash and which encashment was not enjoined despite attempts of the plaintiff contractor by three Courts, viz. The trial Court, the High Court of Gujarat and the Supreme Court of India. The question is so as to whether action of the plaintiff contractor in instituting another suit on the same cause of action for the same relief in the same Court without impleading Hindustan Zinc Limited as a party to the suit would amount to abuse of the process of the Court calculated to hamper the due course of a judicial proceeding. A course of conduct which abuses and makes a mockery of the judicial process and which thus extends its pernicious influence beyond the party to suit (Hindustan Zinc Limited) may prima facie amount to Contempt of Court". In such a fact situation, the Court has the power to commit for Contempt of Court, not only in order to protect the dignity of the Court against insult or injury, but to protect and to vindicate the right of the parties that the administration of justice shall not be prevented, prejudiced, obstructed or interfered with. The Court is required to take into account the whole course of the continuing contumacious conduct of the plaintiff contractor from the very beginning. It may be stated that since 1988 plaintiff contractor has been successful in enjoying the order of injunction against encashment of Bank Guarantee and such injunction was vacated by the trial Court and such vacation of injunction was confirmed by the High Court of Gujarat and the Supreme Court of India. The plaintiff contractor was thereafter made liable to even pay interest from 1st May, 1992, at the rate of 18 per cent as directed by C.K. Thakker, J. of this Court and the Hon'ble Supreme Court of India has also confirmed such order. Despite this, the plaintiff contractor gathered courage to file the second suit on the same cause of action in the same Court (different Judge), this time deliberately omitting to implead the party in whose favour the Bank Guarantee was to be encashed, viz., Hindustan Zinc Limited. Prima facie, the action of bringing the second suit for same relief without impleading the most vitally interested party was designed to circumvent, defeat or nullify the effect of the orders of the trial Court, single Judge of the High Court as well as the Supreme Court. The institution of the second suit and filing an application for temporary injunction and deliberately omitting to implead Hindustan Zinc Limited as party was nothing but daring "raid" on the Court and each act was an abuse of the process of the Court, calculated to obstruct the due course of judicial proceeding and the administration of justice. In such a situation, I am reminded of that oft quoted dictum of Curtis-Raleigh in *Jennison v. Baker* 1972 (1) All ER 997 -The Law should not be seen to sit by simply, while those who defy it go free, and those who seek its protection lose hope". In Halsbury's Laws of England, 4th Edition, Vol. 9, paragraph 38, what can be abuse of the process of the Court is summarised as under:

Certain acts of lesser nature may also constitute an abuse of process as, for instance, initiating or carrying on proceedings which are wanting in bona fides or which are frivolous, vexatious, or oppressive. In such cases the Court has

extensive alternative powers to prevent, an abuse of its process by striking out or staying proceedings or by prohibiting the taking of further proceedings without leave. Where the Court, by exercising its statutory powers, its powers under Rules of Court, or its inherent jurisdiction, can give an adequate remedy, it will not in general punish the abuse as a Contempt of Court. On the other hand, where an irregularity or misuse of process amounts to an offence against justice, extending its influence beyond the parties to the action, it may be punished as a contempt.

27. In the case of Advocate-general, State of Bihar Vs. Madhya Pradesh Khair Industries and Another, Justice O. Chinnappa Reddy, despite the unconditional apology tendered in the High Court, imposed sentence of fine of Rs. 500/- in default simple imprisonment for two weeks in a case where the respondents initiated an application under Article 226 of the Constitution in a High Court other than the one within whose jurisdiction the subject-matter of the dispute was situated and the single Judge of the High Court allowed the same. The Court held that instituting a petition in a Court which has no jurisdiction to entertain it would prima facie justify an inference that the application was not bona fide but was intended to harass and oppress the opposite parties. Application after application was thereafter filed before the same single Judge, everyone of them being designed to circumvent, defeat or nullify the effect of the orders of the Division Benches of the High Court having the jurisdiction of the case. It was in this fact situation that the Court held that every application was a daring "raid" on the Court and each was an abuse of the process of the Court, calculated to obstruct the due course of a judicial proceeding and the administration of justice.

28. In my opinion, prima facie, the action of the plaintiff contractor in filing the second suit on the same cause of action for same relief by omitting to implead the most vitally affected party was designed to circumvent, defeat or nullify the effect of the orders of the trial Court, the single Judge of the High Court as well as of the Supreme Court. However, since this Court has extensive alternative power to prevent abuse of such process by staying the proceedings of the second suit before Civil Judge, Senior Division permanently, consistent with the statement of Law on the subject as extracted above from Halsbury's Laws of England, in my opinion, it would be just and proper to stay Special Civil Suit No. 95 of 1992 pending in the Court of Civil Judge, Senior Division, Jamnagar, permanently. The Full Bench of the Bombay High Court in the case of Narayan v. Janaklbai reported in ILR 39 Bom 604 has held that the High Court has power to make an order directing the subordinate Court not to proceed further with the suit pending in the later Court with a view to preventing abuse of the process of the Court. In my opinion, it would be eminently just and proper to stay the proceedings of Special Civil Suit No. 95 of 1992 in the Court of Civil Judge, Senior Division, Jamnagar permanently.

29. In the result those appeal succeed. The judgment and order of the Civil Judge, Sr. Divn., Jamnagar below Exh. 5 in Spl. C.S. No. 95 of 1992 is hereby

quashed and set aside with direction to Vijaya Bank to make over payment of amount of bank guarantee to Hindustan Zinc Ltd. within 48 hours and the plaintiff-contractor is directed to pay interest @ 18% p. a. from 1-5-1992 as directed by C.K. Tbakker, J. till realisation. In the facts and the circumstances of the case I also award exemplary costs directing M/s. Vijaysinh Amarsinh & Co. to pay costs of Rs. 5,000/- to Hindustan Zinc Ltd. and Rs. 5,000/- to Vijaya Bank Ltd. for this proceeding in this Court.

30. I also permanently stay the proceedings of Special Civil Suit No. 95 of 1992 in the Court of Civil Judge, Senior Division, Jamnagar. I also direct the Registrar of this Court to make an entry in the Confidential Record of Civil Judge, Senior Division, Jamnagar (V.N. Shah) by incorporating Para 25 of the judgment in his Confidential Dossier and also to place in his Service Record the copy of this judgment.

31. At this stage Mr. S.M. Shah, learned Counsel appearing for the original plaintiff requests the Court that the judgment and order of this Court should be suspended for some reasonable period so as to enable the plaintiff to have further recourse to law by preferring Spl. Leave Petition to the Supreme Court of India. In the peculiar facts and circumstances of this, especially when the legality and validity of the order refusing the injunction in favour of the plaintiff was already examined by the Supreme Court of India in the month of May, 1992 and when despite such order, plaintiff has been successful in avoiding the implementation of the order of the Court and more particularly in view of the fact that encashment of Bank Guarantee is being stayed continuously since 1988, I am not inclined to grant the request made by Mr. S.M. Shah. The request is, therefore, rejected.