
(2017) 04 JH CK 0002

In the Jharkhand High Court

Case No : Writ Petition (C) No. 4179 of 2016

M/s Adhunik Power and Natural Resources Limited

APPELLANT

Vs

Central Coalfields Limited

RESPONDENT

Date of Decision : 11-04-2017

Acts Referred:

Constitution of India, 1950 — Article 12, Article 226

Citation : (2017) 2 JBCJ 443

Hon'ble Judges : Mr. Aparesh Kumar Singh, J.

Bench : Single Bench

Advocate : M/s Jitendra Singh, Senior Advocate, Sumeet Gadodia, Advocate, for the Petitioner; M/s Jagdeep Dhankar, Senior Advocate, A.K. Das, Advocate, for the Resp-CCL

Final Decision : Allowed

Judgement

Mr. Aparesh Kumar Singh, J.— Heard learned counsel for the parties.

2. Petitioner, M/s Adhunik Power and Natural Resources Limited(herein after referred to as A.P.N.R.L) has sought a declaration that the respondent-Central Coalfields Limited (herein after referred to as "CCL") cannot adjust and / or recover the alleged outstanding amount of Rs.13,46,66,861.42 of its Group Company M/s Adhunik Alloys and Power Limited (hereinafter to be referred to as "A.A.P.L") from the Bank Guarantee amount of the petitioner Company lying with the Respondent-CCL pursuant to the Fuel Supply Agreement and / or Memorandum of Understanding for Supply of Coal dated 22.7.2015 (Annexure-3) It has also sought quashing of the letter dated 29.7.2016 issued by the Respondent no.2 to the Respondent-Bank for encashment of the Bank Guarantees of the petitioner, as being wholly arbitrary, illegal and an act of egregious fraud. It has sought restraint upon CCL from adjusting and / or recovering the outstanding amount of Rs. 13,46,66,861.42 being the alleged dues of its Group Company M/s Adhunik Alloys and Power Limited.

3. The relevant facts pleaded by the parties and necessary to be noticed for adjudication of the issue, are being referred to hereinafter in brief :-

Petitioner Company has been registered under the Companies Act, 1956 as per the Memorandum of Articles of Association dated 20.4.2005. The Memorandum of Articles of Association of M/s A.A.P.L. is 9.7.2003 (Annexure-12 and 13 respectively). Petitioner was allotted Ganeshpur Coal Block by the Ministry of Coal in respect of its Power Plant. Respondent-CCL executed a Fuel Supply Agreement(F.S.A.) dated 22.7.2011 and 29.9.2011 with the petitioner in view of the " Tapering Linkage Policy" framed by the Ministry of Coal. The Tapering Linkage Policy enabled the coal block allottees to obtain coal from subsidiaries of Coal India Limited (C.I.L.) primarily during the period when coal block of the allottees was not operational. F.S.A. was renewed for Unit-I on 26.3.2014 (Annexure-16) and in respect of Unit-II on 23.3.2014. The said agreement was valid up to 20.11.2015. Pursuant to the aforesaid F.S.A., petitioner deposited 4 Bank Guarantees (Annexure-1 series) as security deposit in terms of the relevant conditions of the F.S.A. which are as follows:-

Sl.No.

Bank Guarantee No.

Bank Guarantee Date

Valid Up to

Bank Guarantee amount

1

0999811BG000943

31.10.2011

28.02.2017

5,93,82,180.00

2

0999811BG000661

10/08/11

29.11.2016

5,93,82,180.00

3

0999812BG000500

13.06.2012

28.02.2017

89,97,300.00

4

0999812BG000501

13.06.2012

29.11.2016

89,97,300.00

4. According to the petitioner, the Bank Guarantees furnished by it were equivalent to 6 percent of the base price of the grade of coal to be supplied to the petitioner. They were in the nature of advance Bank Guarantees for securing Respondent-C.C.L in respect of value/ price of coal to be supplied to the petitioner. The conditions of the Bank Guarantees have also been referred in support of the submission that they were to be operative until all moneys due to the seller in respect of all liability or liabilities of the purchaser are fully paid. "Purchaser" has been defined in the said Bank Guarantees to include its legal representative, successor and permanent assigns in the case of a company. The F.S.A.'s were directly dependant upon the allotment of coal block in favour of the petitioner. However, in the case of Manohar Lal Sharma v. Principal Secretary, vide judgment dated 24.9.2014, reported in 2014(9) SCC 614 the allotment of coal block by the Ministry of coal in respect of the petitioner and other similarly situated coal block allottees were cancelled. As a corollary thereof , the F.S.A were terminated by the Respondent-C.C.L by communication dated 15.7.2015 (Annexure-2), pursuant to a communication dated 30.6.2015 issued by the Ministry of Coal. However, in order to prevent disruption of power generation system, it provided that coal shall be supplied through a separate MoU till 31.3.2016 or until further policy is framed by Government of India. On 22.7.2015, the Respondent-C.C.L executed MoU with the petitioner in terms of the said communication, initially valid up to 31.3.2016 and subsequently extended up to 30.6.2016(Annexure-3 and 4).

5. Learned counsel for the petitioner has relied upon clause 7 of the MoU dated 22.7.2015, as per which the security deposit of Rs.13,67,58,960/- earlier submitted will be considered as security deposit against the present MoU. According to learned Senior counsel for the petitioner, Bank Guarantees could be forfeited in case of breach of MoU after giving prior notice of 30 days to the petitioner. It is further pleaded that period of MoU had already expired on 30.6.2016 and there is no breach by the petitioner of its terms and conditions nor are there any liabilities arising in respect of the same against the petitioner Company. Learned counsel for the petitioner submitted that even as per the Respondent C.C.L, there was no breach on the part of the petitioner in respect of the F.S.A or subsequent MoU. It can be ascertained from the counter affidavit of the respondent C.C.L that there were no dues or liabilities outstanding against

the petitioner. However, the respondent CCL has invoked the Bank Guarantees of the petitioner on the allegation that one of the group Company M/S AAPL has certain outstanding dues with CCL. Learned counsel for the petitioner has referred to statements made at para 7 to 40 and 44 to 50 of the counter affidavit containing the stand of the respondents to justify the invocation of the Bank Guarantees.

6. Respondent CCL have taken the following grounds to justify the impugned action :-

(i) M/s A.A.P.L. and A.P.N.R.L, both are partners of M/s Adhunik Group Industries as is apparent from their website "www.adhunikgroup.com"

(ii) Controlling authority and Center of both Offices are M/s Adhunik Group

(iii) Registered Office and Corporate Office of both the Companies are the same as described at Para 11

(iv) 4 directors are common in both companies as named at para 9.

(v) The Reserve Bank of India has defined the term "Group Company" to mean that the Group Companies are two or more enterprises which directly and indirectly are in possession of (i) Excess of 26% or more of voting right in other enterprises (ii) and appointing more than 50% of members of Board of Directors to the other enterprises.

7. According to the Respondent, M/s AAPL had entered into 3 separate FSA with CCL in respect of the sponge iron units, Kiln-I and Kiln-II and Captive Power Plant. However, it started showing dissatisfaction on the execution of the Tapering Supply Agreement with respect to Captive Power Plant on the plea that it is not the end use Plant for the coal block. Letters were written by the Coal India Limited on 30.7.2009 / 11.8.2009 wherein it was mentioned that coal block has been allocated to M/s A.A.P.L. Company only on receipt of 2 sponge iron kilns and no other kiln or Captive Power Plant can be supplied coal based on Ministry of Coal letter dated 10.7.2009. The Coal India Limited through letter dated 18/19.8.2009, relating to allocation of coal and extension of supply of coal for a further period of three months, informed CCL that it is with respect to only the Sponge Iron Plant and not the Captive Power Plant. Therefore Tapering Linkage Policy is not applicable to the said plant. Therefore C.C.L started treating the said F.S.A with respect to the Captive Power Plant of M/s A.A.P.L as a non tapering linkage and accordingly issued a letter dated 2.9.2009 informing that F.S.A relating to Tapering Linkage Policy has been withdrawn. M/s A.A.P.L continued availing coal supply under the normal F.S.A without paying cost of coal as per the terms and conditions of the Tapering Linkage Policy till supply of coal to the said company was suspended on 3.3.2014. Coal India Limited had by then clarified through letter dated 13.02.2014 that Captive Power Plant was also linked to the coal block as an end use plant and Tapering Linkage Policy was also applicable to it. Issues were raised with respect to price of coal by applying the conditions of

tapering linkage policy and a bill was raised. However, the Company avoided to meet their liability and pay the dues.

8. Respondents in their counter affidavit in the relevant paragraphs have also taken a plea that M/s A.P.N.R.L was created for establishing power plant on the land of M/s A.A.P.L. after allocation of coal block to M/s A.A.P.L. in 2006. The power plant of the petitioner Company has been constructed on the land of M/s A.A.P.L. under two lease deeds dated 28.2.2013 and 15.3.2013. These deeds were made to operate retrospectively with effect from 2008 to 2010 at a meager amount. M/s A.A.P.L become liable for payment of Rs.16.23 Crores as they lifted coal from C.C.L under normal F.S.A. though they were required to lift it at higher price under the Tapering Linkage Policy. C.C.L therefore raised bills of differential amount and demand from M/s A.A.P.L. It invoked the Bank Guarantees of Rs.2.96 Crores furnished by the said Company and recovered part of the outstanding dues. Thereafter the said company was not turning up. C.C.L had in their possession bank guarantees furnished by its sister concern M/s A.P.N.R.L, the petitioner Company. By applying the principle of lifting of corporate veil on the basis of the materials available, C.C.L, proceeded to recover the remaining dues by invoking Bank guarantees furnished by the petitioner company. Respondents in their counter affidavit have therefore refuted the stand of the writ petitioner that petitioner company is a separate juristic person in the eyes of law and cannot be made liable to meet the outstanding demands of M/s A.A.P.L.

9. Learned counsel for the petitioner while contesting the said stand referred to the rejoinder affidavit, specifically para 19 and 20. It is submitted that 51% share of the petitioner company is being held by the Nationalized Bank i.e. S.B.I. Not even 1% of the share hold by the petitioner company is common with M/s A.A.P.L. Petitioner company and M/s A.A.P.L are having separate income tax, permanent account numbers, separate sales tax registration both under Jharkhand Value Added Tax Act as well as Central Sales Tax Act and separate Excise Registration Number under Central Excise Act etc. The memorandum and articles of association of the petitioner company and that of M/s A.A.P.L are distinct and separate.

10. Learned counsel for the petitioner has relied upon the judgment rendered by the Apex Court in the case of M/s Gangotri Enterprises Ltd. v. Union of India, & others reported in 2016 SCC Online SC 415, para 43, 39 and 40, in the case of Hindustan Construction Co. Ltd. v. State of Bihar, & others reported in 1999(8) SCC 436, para 9,17,22 and also M/s Adani Agri Fresh Ltd. v. Mahaboob Sharif, & others reported in 2015 SSC Online 1302, para 8,9,14. He has submitted that invocation of the bank guarantees by the respondent C.C.L in such fashion has raised special equities in their favour. A mere perusal of the letter dated 29.7.2016, Annexure-5 to the respondent Bank would reveal that they have chosen to suppress even the basic factum that the bank guarantees being invoked are in respect of the petitioner company while the liabilities are in respect of another independent juristic entity, M/s A.A.P.L, a company registered

under the Companies Act. It is a case of egregious fraud on the part of the respondent C.C.L to invoke the bank guarantees furnished by the petitioner company. Petitioner is being made to suffer immensely. The interest being charged on its cash credit account by the Bank has resulted in the account itself becoming irregular.

11. Therefore, according to the petitioner, two basic issues have arisen for adjudication by this Court i.e., (i) whether the respondent C.C.L can invoke the bank guarantees of any company arising out of separate agreement to realize outstanding liabilities of another independent company;(ii) whether in the facts and circumstances of the case, the doctrine of lifting of corporate veil can be applied by the Respondent CCL to justify such action. Learned counsel for the petitioner has relied profusely on a judgment rendered by the Bombay High Court in the case of Oil and Natural Gas Corporation Ltd. v. M/s Jindal Drilling and Industries Limited reported in 2015-(ARI)-GJX-0034-BOM. He has also placed reliance on the judgment rendered by the Apex Court in the case of Balwant Rai Saluja and another v. Air India Limited and others reported in 2014(9) SCC 407 as also in the case of Indowind Energy Limited v. Wescare India Limited, and another reported in 2010(5) SCC 306 on the doctrine of lifting of corporate veil. Reliance has been placed on para 18,19,21,23,42,47 to 51 of the judgment rendered by the Bombay High Court where the opinion of the Apex Court in the case of Balwant Rai Saluja (supra) on the applicability of principles of lifting of corporate veil has been discussed. According to the petitioner, invocation of the bank guarantees is illegal and an act of egregious fraud on the part of the respondents. The entire amount furnished by way of bank guarantees should be refunded to the petitioner along with interest earned there upon to reconstitute the petitioner for the loss incurred in terms of money. It is contended that due to invocation of the bank guarantees higher rates is being charged by the respondent Bank.

12. Learned counsel for the respondent CCL has submitted that petitioner in its own pleadings at several paragraphs conceded that M/s A.A.P.L is the group company of the petitioner. Annexure-H dated 3.4.2013 being the lease deed executed by the M/s A.A.P.L with the petitioner company for an area of 168.93 acres, would show that both the lessor and lessee Companies are described as sister concern. The transactions undertaken is mere Rs.2 lakhs for a land executed for an area of 86.29 acres and that too with retrospective effect from 1.1.2008 which can easily raise eyebrows about the nature of transaction. Reference is also made to documents at page 114 and 115 to the counter affidavit which contain signature of the authorised representative of M/s A.A.P.L and letter of M/s A.P.N.R.L. Board where the same persons has been authorised to represent M/s A.P.N.R.L also on behalf of the Company. It is submitted by learned counsel for the CCL that the Bank guarantee is an independent and distinct contract between the bank and the beneficiary. If it is unconditional and irrevocable, any dispute between the beneficiary and the party at whose instance the Bank has given the guarantee is immaterial and of no consequence. Reliance

has been placed upon judgment rendered by the Apex Court in the case of Vinitec Electronics Private Ltd. v. HCL Infosystems Ltd., reported in 2008(1) SCC 544, para 12 and 13 thereof. Learned counsel for the respondents have also relied upon the judgment in the case of National Highways Authority of India v. Ganga Enterprises, and another reported in 2003(7) SCC 410, para 9 and 10 thereof. It is submitted that invocation of bank guarantee had already been effected before filing of the writ petition on 1.8.2016. The petitioner have not been able to show violation of any statutory right to invoke the jurisdiction of the Court under Article 226 of the Constitution of India. In line with the ratio rendered by the Apex Court in the case of National Highways Authority of India (supra), this Court should not interfere in invocation of the bank guarantee in the absence of statutory right of the petitioner being infringed. Petitioner, if aggrieved by such act may have any other remedy before appropriate forum of law. Reliance is also placed upon the judgment rendered in the case of Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corporation Ltd. reported in 1996(5)SCC 450 in support of the aforesaid submission. Judgment of the Apex Court in the case of Reliance Salt Ltd. v. Cosmos Enterprises, reported in 2006(13)SCC 599 and M/s Adani Agri Fresh Ltd. v. Mahaboob Sharif & others reported in 2015 SSC Online 1302, para 9, has been relied upon to support the proposition that the bank guarantee is an independent agreement between the bank and the beneficiary.

13. Learned Senior Counsel for the Respondents, Mr Jagdeep Dhankar has summarized his arguments in the following manner:-

(a) That the petitioner has not specifically prayed for refund of the bank guarantee which stood invoked and debited to the Respondents on 30.7.2016 before filing of the writ petition. No such relief is prayed for neither the writ petition has been amended to challenge the encashment of the bank guarantee and the action of the bank also. He has placed reliance upon judgments rendered in the case of State Of Orissa & Anr v. Mamata Mohanty, reported in (2011)3 SCC 436, para 35, Bharat Amratlal Kothari v. Dosukhan Samadkhan Sindhi, and Ors reported in AIR 2010 SC 475, para 14 and Krishna Priya Ganguly etc. v. University of Lucknow & Ors. etc. reported in AIR 1984 SC 186.

(b) That the writ petition is a proxy petition for M/s A.A.P.L. The writ petitioner itself has referred to M/s A.A.P.L. as its group company. Several paragraphs of the writ petition are common to those of the writ petition filed by M/s A.A.P.L i.e. W.P.C. No. 4178 of 2016 where M/s A.A.P.L has assailed the communication dated 10/12.11.2015 of the Respondent, C.C.L where under it has been directed to pay the outstanding amount of Rs.13,46,66,861.42/- against the supplementary bills raised on application of Tapering price. It has also sought declaration in terms that M/s A.A.P.L. is not liable to pay add on price over and above the base price of the coal supplied pursuant to the F.S.A. dated 23.7.2009.

(c) There is no bright and dividing line between the petitioner and M/s A.A.P.L. For all intent and purposes working of both companies in function and public

representation is intermixed.

(d) The lease dated 28.2.2013 and 15.3.2013 sent by the petitioner and M/s A.A.P.L to Respondent-C.C.L clearly refer to their commercial bondage as a "sister company". There is no dividing line in their commercial action.

(e) The writ petition suffers on the grounds of "suggestio falsi suppressio veri". Learned counsel for the Respondents submits that Exhibit M1 of the additional affidavit filed by the Respondents on 19.9.2016 renders the contention of the petitioner that 51% of its shareholding is held by Nationalized Bank as false. The said document is signed by the Company Secretary of the petitioner on 30.11.2015. The documents furnished by the petitioner at Annexure-17 in the reply to the additional affidavit, letter dated 29.9.2016 amounts to making false assertion. Petitioner has therefore forfeited the right to invoke discretionary remedy under equitable jurisdiction of this Court. The judgment rendered in the case of Dalip Singh v. State of U.P., reported in (2010) 2 SCC 114; Hari Narain v. Badri Das, reported in AIR 1963 SC 1558; Rajabhai Abdul Rehman Munshi v. Vasudev Dhanjibhai Mody reported in AIR 1964 SC 345 have been relied in support of his aforesaid contention.

(f) Respondents questioned the very sustainability of the writ petition now as it in effect survives only to seek refund of the amount of the bank guarantees already invoked. Such writ of mandamus for refund of money is inappropriate in view of the constitution Bench decision of the Apex Court in the case of Suganmal v. State of Madhya Pradesh, & others reported in AIR 1965 SC 1740 (Para 5 , 6,9 and 16 thereof)

(g) In the absence of any challenge to the action of the Respondent State Bank of India in encashment of the bank guarantees, petitioner is not entitled for any relief. It would be a paradox that on the one hand action of the S.B.I is legally tenable and on the other hand the Respondent C.C.L is visited with the consequence for the same. Reliance has also been placed upon the case of National Highways Authority of India(supra).

14. Learned Senior Counsel contends that the entire issue relates to a non statutory contract involving no public element. There can be no probe or scrutiny in respect of the factual background for invocation of unconditional bank guarantees. The bank guarantees being an "independent contract" between the bank and the beneficiary dehors the contract between the parties, no right in favour of the petitioner accrues to agitate any grievance as regard its invocation. It is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee is given. As the bank unconditionally and unequivocally promised to pay on demand, the liability of the bank was absolute and unconditional and could not be circumvented in any manner. Therefore petitioner has no legal or contractual right which can be vindicated herein. The manner of invocation of bank guarantees is of no relevance. The plea of "fraud" can only be taken by the bank

as per the circulars of the Reserve Bank of India. The mandatory compliance of such a Bank Guarantee is in the interests of the credibility of the banking sector and national economy and any disregard is visited with serious consequences for the bank concerned.

15. Learned Senior Counsel for the Respondents has strongly relied upon a judgment rendered in the case of *Air India v. Cochin International Airport Ltd.*, reported in (2000) 2 SCC 617 (para 7) and submitted that this Court under Article 226 of the Constitution of India can interfere only when larger public interest is involved and not merely on making of a legal point. He has further submitted that in such non-statutory contractual matters the first question to be answered is whether interference is called for; contract of bank guarantee being separate contract by itself. The opinion rendered in the case of *Nhai v. Ganga Enterprises (supra)* by the Apex Court at para 16 have also been referred to. It is also contended that in the case of *Reliance Salt Ltd. v. Cosmos Enterprises (supra)* the Apex Court has held that in such matters involving challenge to the invocation of the bank guarantees, this Court is required to look into the terms of the bank guarantees whether they are unconditional in nature. The judgment in the case of *Vinitec Electronics Private Ltd. (supra)* has also been relied in support of the submission that the Bank cannot object to invocation of an unconditional Bank Guarantee. Unless fraud or special equity is pleaded and prima facie established by strong evidence, the beneficiary cannot be restrained from encashment of bank guarantees even if a dispute between the beneficiary and the person at whose instance the bank guarantees was given by the Bank, had arisen in performance of the contract or execution of the work undertaken in furtherance thereof. Invocation of unconditional bank guarantee does not depend upon the result of the decision of the dispute between the parties in case of breach. The underlying object is that the irrevocable commitment in the bank guarantee solemnly given by the bank must be honoured. Learned senior counsel for the Respondent has also relied upon the judgment of the Apex Court in the case of *Syndicate Bank v. Vijay Kumar, and Others* reported in (1992) 2 SCC 330 in support of the said submission.

16. Learned Senior Counsel for the petitioner, Mr. Jitendra Singh in his reply submitted that petitioner has consciously sought declaration that the Respondent C.C.L cannot adjust and /or recover the alleged outstanding amount of Rs.13.46 crores and odd of M/s A.A.P.L from the bank guarantees of the petitioner lying with Respondent C.C.L pursuant to the F.S.A. and M.O.U for supply of coal. It is submitted that in the background facts and circumstances, if the entire edifice of impugned action is found to be illegal by this Court, this Court is well within its powers to grant consequential relief even though not prayed for. He profusely relied upon the proposition of law rendered in the case of *Sri Satya Narain Singh v. District Engineer, P.W.D.* And another reported in AIR 1962 SC 1161. He submits that this Court has passed interim orders on 4.8.2016 and 11.8.2016 being fully conscious of the action of the Respondent C.C.L in invocation of the bank guarantees even prior to the institution of the writ petition making it clear

that such invocation would be subject to the outcome of the writ petition. The Respondent C.C.L had also been directed to keep the encashed amount in a interest bearing account. If the petitioner has been able to establish that the impugned action suffered from vice of illegality and arbitrariness being an instrumentality of the State, this Court cannot be said to be toothless in granting the consequential relief to the suffering party. He refers to the judgment rendered by the Apex Court in the case of *State of Madhya Pradesh v. Bhailal Bhai & Ors* reported in AIR 1964 SC 1006 (para 15). Learned Senior counsel for the petitioner has sought to countenance the plea of the Respondents relying upon the case of *Suganmal* (supra) by referring to para 11 of the report. It is submitted that in the said case also the challenge was to the validity of the assessment and the consequential relief that follows upon its determination. The judgment on the point in fact is in support of the petitioner.

17. Learned Senior Counsel for the petitioner has strongly refuted the contention of the Respondents that interference in such non-statutory contracts is not maintainable under Article 226 of the Constitution of India. He submits that the Apex Court in the judgment rendered in the case of *Zonal Manager, Central Bank of India v. M/s Devi Ispat Ltd., & others* reported in (2010)11 SC 186 has also dealt with the precedence on the point and clearly gone on to hold that in an appropriate case the writ petition arising out of contractual obligation against the State or its instrumentality of State is maintainable. Merely because some disputed question of fact arises for consideration, same cannot be a ground to refuse to entertain the writ petition in all case as a matter of rule. The writ petition involving consequential relief of monetary claim is also maintainable. The opinion of the Apex Court in the case of *ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.*, reported in (2004) 3 SCC 553 para 27 and 28, also quoted in the instant case of *Central Bank* (supra), has been relied upon. He submits that petitioner had a legal right to protect the bank guarantees given by it. According to learned senior counsel for the petitioner the Apex Court in the case of *Common Cause, a Registered Society v. Union of India & others* reported in 1999(6) SCC 667 at para 39 to 43 has clearly upheld the jurisdiction of the High Court not only to grant relief for the enforcement of Fundamental Right but also for "any other purpose". With the expanding horizon of Article 14, every executive action of the Government or other public bodies, including Instrumentalities of the Government, or those which can be legally treated as "Authority" within the meaning of Article 12, if arbitrary, unreasonable or contrary to law, are now amenable to the writ jurisdiction of the Apex Court under Article 32 or the High Courts under Article 226 and can be validly scrutinized on the touchstone of the Constitutional mandates. The Apex Court has further held that those branches of law which deal with the rights/duties and privileges of the public authorities and their relationship with the individual citizens of the State, pertain to "public law", such as Constitutional and Administrative Law, in contradistinction to "private law" fields which are those branches of law which deal with the rights and liabilities of private individuals in

relation to one another. In demarcating the frontier between the public law domain and private law field though it is impossible to draw the line with precision , but such question must be decided in each case with reference to particular action, the activity in which State or the instrumentality of State is engaged when performing the action, the public law and private law character of the action and a host of other relevant circumstances. It is thus submitted that the impugned action of the Respondent C.C.L is not immune from judicial review by this Court, if it is found to be wholly arbitrary, unreasonable and unjust.

18. Learned counsel for the petitioner has also reiterated his submission on the plea of lifting of corporate veil taken by CCL by relying upon the judgment in the case of Oil and Natural Gas Corporation Ltd. v. M/s Jindal Drilling and Industries Limited (supra). He has referred to the stand of the Respondents as contained in para 43 to 48 of the counter affidavit which in direct terms referred to their grievance with M/s A.A.P.L on the question of application of tapering linkage policy and the price charged upon the said company. In such background, invocation of Bank guarantee of the petitioner in the light of the specific terms and conditions enumerated there under and as per Clause 3 and 7 of the M.O.U entered with it dated 22.07.2015, are not sustainable in law and on facts. Lastly learned senior counsel for the petitioner has sought to answer the allegation of suppression of fact related to shareholding pattern of the petitioner company by relying upon documents enclosed to its supplementary reply dated 18.1.2017. Learned counsel for the petitioner has also sought leave of this Court to file supplementary reply by way of I.A. no. 544 of 2017 stating that the averments and the documents in support thereof are necessary to rebut the allegation on facts made during course of the proceedings and have been filed after sufficient notice to the Respondents. He refers to the statements made at para 9 and 13 of the said reply and annexure 22 being the decision of the management of the petitioner company dated 22.6.2016 where under 51% shareholding has been transferred to the financial institution in accordance with the Strategic Debt Restructuring Scheme of the R.B.I. He has also pointed out to the statutory declaration made upon transfer of 51% of shareholding to the financial institution in terms of Section 39(4) and 42(9) of the Companies Act, 2013 and Rule 12 and 14 of the Companies (Prospectus and Allotment of Security) Rule, 2014, which shows the date of allotment of share as 22.6.2016 in Form No. PAS-3 (return of allotment). On these factual assertion and legal submission, learned senior counsel for the petitioner has prayed that the instant writ petition deserves to be allowed. It is prayed that the invocation of bank guarantee by the Respondent C.C.L be declared as illegal, arbitrary and unjust and they be directed to refund it along with interest and cost by way of restitution.

Discussion:

19. Petitioner approached this Court on 01.08.2016 with three fold prayers,

(i) a declaration that the Respondent CCL cannot adjust and / or recover the alleged outstanding amount of Rs. 13,46,66,861.42 of its group Company M/s

Adhunik Alloys and Power Limited from the Bank Guarantee furnished by the petitioner pursuant to the FSA and MoU dated 22.07.2015.

(ii) quashing of the Letter dated 29.07.2016 issued by CCL to the Respondent Bank for encashment of the Bank Guarantees and

(iii) restraint upon the CCL from adjusting and / or recovering the alleged outstanding amount of Rs. 13.46 crores and odd being the alleged dues of its group Company M/s AAPL.

20. However, the Bank Guarantees in question had already been invoked on 30.07.2016. While granting time to the Respondent CCL and Bank to file response on 01.08.2016, it was observed that invocation of the Bank Guarantees would be subject to the outcome of the writ petition. Subsequently, on 04.08.2016 when CCL prayed for further time to file response, it was also directed to file statement of accounts containing the credit of encashed Bank Guarantees and interest earned thereupon along with their affidavit. The Respondent Bank was also asked to file an affidavit enclosing the statement of accounts of the petitioner from which the Bank Guarantee has been realized and interest and other charges which have fallen on the petitioner because of withdrawal. By order dated 11.08.2016 it was further observed that if the Respondent CCL has kept the encashed Bank Guarantee in an account which does not bear interest, they would keep the amount debited in interest bearing account for the time being. The Respondent bank was also directed to file an affidavit in terms of the order dated 04.08.2016. Thereafter, the Respondent CCL has filed their counter affidavit and also stated that encashed Bank Guarantee has been kept in a Fixed Term Deposit. Bank has filed an affidavit enclosing the statement of accounts of the petitioner also and interest and charges that have fallen on encashment of the Bank Guarantee.

21. The factual matrix of the case and the contentions of the rival parties, noted in the foregoing paragraphs, indubitably show the following facts:- Petitioner has submitted four Bank Guarantees i.e. one each on 31.10.2011 and 10.10.2011 and two on 13.06.2012 for a total amount of Rs. 13,67,58,960/- under Fuel Supply Agreements valid upto 20.11.2015 and subsequently as security deposit, as per the Memorandum of Understanding dated 22.07.2015, initially valid up to 31.03.2016 and extended up to 30.06.2016 (Annexure-3 and 4). This was as a result of deallocation of coal bloc in respect of the petitioner pursuant to the judgment rendered by the Apex Court in the case of Manohar Lal Sharma (Supra) and consequential termination of the Fuel Supply Agreement by letter dated 15.07.2015 (Annexure-2). The MoU dated 22.07.2015 was entered into pursuant to the communication dated 30.06.2015 by the Ministry of Coal in order to prevent disruption of power generation system. Though, Clause 3 and 7 of the instant MoU have been relied upon by the petitioner, but it would be proper to quote the terms of the MoU in its entirety for better appreciation.

"1. The unit may be allocated 41654 for Unit I and 38588 tones for Unit II (G7 to

G12 GCV/WIV grade of coal) per month from the operative mines of Central Coalfields Limited through the sidings of CCL.

2. The Delivered Price of Coal supplied pursuant to this MoU shall be the sum of Base Price, Add-on-Price, Other charges and Statutory Charges, as applicable at the time of delivery of Coal. The basis price would be as per the level prevailing as on 30.06.2015 i.e. add on 20% of the Basic Price applicable for Power Houses (including IPPs) Fertilizer and Defence Sector.

3. The coal supplies effective from 01.07.2015 will be governed by this MoU and will be made upto 31.03.2016 or until policy is formulated for erst while Tapering Linkage cases, whichever comes earlier.

4. The provisions, terms and conditions regarding payment, order booking, transfer of titled good at CCL's loading point/siding, settlement of claims on quantity shall be as per the model Fuel Supply Agreement.

5. The price will charged as per the Declared grade of coal applicable for Power Houses (including IPPs), Fertilizer and Defence Sector.

6. The total quantity of coal supplied pursuant to this MoU is meant for use at M/s Adhunik Power & Natural Resources Limited, Unit I and II located at village Padampur & Srirampur in district Saraikela-Kharswan, Jharkhand-832 402. The seller shall not sell/divert and/or transfer the coal to any third party for any purpose whatsoever and the same shall be treated as material breach, for which the Purchaser shall be fully responsible.

7. The security deposit of Rs. 13,67,58,960/- earlier submitted will be considered as security deposit against present MoU. The seller can forfeit the security deposit in case of any breach of MoU after giving prior notice of 30 days.

8. Both the parties to this MoU have right to withdraw from this MoU after giving prior notice of 30 days.

9. Coal supply details under this MoU w.e.f 01.07.2015.

Name of the Unit

Quantity Entitled per month

Grade/Size

Basic Price applicable

Adhunik Power and Natural Resources Limited Unit I

41654 tones

G7-G12 GCV/WIV grade

120% of the declared price applicable for Power Utilities including IPPs

Adhunik Power and Natural Resources Limited Unit II

38588 tones

G7-G12 GCV/WIV grade

120% of the declared price applicable for Power Utilities including IPPs"

22. From the stand of the Respondents, reflected through their counter affidavit, it is evident that M/s AAPL had three separate Fuel Supply Agreements with the Respondent CCL. M/s AAPL started showing dissatisfaction on execution of the Tapering Supply Agreement with respect to the captive power plant on the plea that it is not end use plant for the coal bloc. In view of the direction of Coal India Ltd. through letter dated 18 / 19.08.2009, the Respondent CCL started treating the said FSA with respect to the captive power plant of M/s AAPL as a non-tapering linkage and through letter dated 02.09.2009, informed that the FSA relating to Tapering Linkage Policy has been withdrawn. M/s AAPL continued availing the coal supply under the normal FSA without paying the cost of coal, as per the terms and conditions of the Tapering Linkage Policy till the supply of coal to the said Company was suspended on 03.03.2014. Coal India Limited had by then clarified through letter dated 13.02.2014 that Captive Power Plant was also linked to the coal block as an end use plant and Tapering Linkage Policy was also applicable to it. CCL in its affidavit, has therefore taken a categorical stand that M/s AAPL became liable for payment of Rs. 16.23 crores as they lifted coal from CCL under normal FSA, though they were required to lift it at a higher price under the Tapering Linkage Policy. It accordingly raised Bills of differential amount upon M/s AAPL. It also invoked the Bank Guarantee of Rs. 2.96 crores by from the said Company and recovered the part of the outstanding dues. Since the said Company was not turning up, CCL chose to invoke the Bank Guarantees furnished by sister concern i.e. the petitioner Company to recover the remaining dues of M/s AAPL.

23. It is clear from the stand of the Respondent CCL that invocation of Bank Guarantee in question of petitioner has been undertaken to realize the outstanding dues of another Company M/s AAPL, treating it as a sister concern. Though, the Respondent CCL in its counter affidavit, has justified its action by applying the principles of lifting of corporate veil on the basis of materials available with it, but during course of argument, this plea has not been further pressed upon for the reasons best known to them. The Respondent CCL has alleged suppression of facts in relation to the contention of the petitioner relating to 51% of its share holding held by Nationalized Bank by relying upon the documents enclosed to the additional affidavit filed on 19.09.2016 and the reply furnished by the petitioner dated 29.09.2016.

24. This contention of the Respondent CCL has however been adequately explained by the petitioner's Company through its supplementary reply filed on 18.01.2017. It has brought on record the decision of the Management of the petitioner Company dated 22.06.2016 wherein 51% of share holding has been transferred to the Financial Institutions in accordance with the Strategic Debt

Restructuring Scheme of the RBI. Company has also made declaration in terms of section 39(4) and 42(9) of the Companies Act, 2013 and Rule 12 and 14 of the Company (Prospectus and Allotment of Security) Rule, 2014, which shows the date of allotment of shares as 22.06.2016 in Form No. PAS-3; Return of Allotment. The prayer made through I.A. No. 544/2017 to accept supplementary reply is accordingly allowed. Therefore, the submission of the Respondents that the writ petition suffers on the principles of "*suggestio falsi suppressio veri*", does not merit acceptance.

25. In the aforesaid factual matrix of the case and the legal points urged by the Learned counsel for the parties, the question posed for answer in this writ petition are (i) whether in such a non-statutory contractual matter with a State or its instrumentalities, interference under Article 226 of Constitution of India is called for or not?, (ii) whether in view of the principles laid down in matters relating to interference in invocation of Bank Guarantee by the Hon'ble Supreme Court, action of the Respondent CCL in invoking the Bank Guarantee of the petitioner Company to realize outstanding liability of M/s AAPL, are legally sustainable or not and (iii) whether the petitioner can seek refund of the encashed Bank Guarantee as consequential relief, even if no such payer has been made.

26. In order to address the first question, it is proper to discuss the proposition of law settled by the judgments rendered by the Hon'ble Supreme Court from time to time. In the case of ABL International Ltd. (Supra), the question that fell for consideration was, whether the writ petition under Article 226 of Constitution of India is maintainable to enforce the contractual obligation of the State or its instrumentality by an aggrieved party. In the opinion of the Hon'ble Supreme Court, this question was no more *res integra* and had been settled by a large number of judicial pronouncements. The Hon'ble Court referred to the judgment rendered in the case of K.N. Guruswamy v. state of Mysore, [AIR 1954 SC 592] and followed subsequently in the case of D.F.O. v. Ram Sanahi Singh, [(1973) 3 SCC 864] wherein it was observed that it was unable to hold that merely because source of the right which the Respondent claims was initially in a contract, for obtaining relief against any arbitrary and unlawful action on the part of a public authority, he must resort to a suit and not to a petition by way of a writ. It observed that in view of the judgment rendered in the case of K.N. Guruswamy (Supra), there can be no doubt that the petition was maintainable, even if the right to relief arose out of an alleged breach of contract, where the action challenged was of a public authority invested with statutory power. The Apex Court in ABL International Ltd. (Supra) also noted the observations made in the case of Gujarat State Financial Corporation v. Lotus Hotels (P) Ltd, (1983) 3 SCC 379, wherein following the earlier judgment rendered in the case of Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489, it was held at para-9 and 11 that instrumentality of the State being "other authority" under Article 12 cannot commit breach of a solemn undertaking to the prejudice of the other party which acted on that undertaking or promise and put

itself in a disadvantageous position.

27. Their Lordships drew support from the judgment rendered by the Apex Court in the case of *Gunwant Kaur v. Municipal Committee, Bhatinda*, (1969) 3 SCC 769 wherein disputed questions of fact were raised in a writ petition. It was held that the High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right to relief questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made or dispute sought to be agitated, or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the writ jurisdiction, or for analogous reasons.. In the case of *Century Spg. and Mfg. Co. Ltd. v. Ulhasnagar Municipal Council*, [(1970) 1 SCC 582], view observed in the case of *Gunwant Kaur* (Supra) found support. The Apex Court held that merely because a question of fact is raised, the High Court will not be justified in requiring the party to seek relief by somewhat lengthy, dilatory and expensive process by a civil suit against a public body. The observations of the Apex Court in the case of *Kumari Shrilekha Vidyarthi v. State of U.P.*, (1991) 1 SCC 212 were also approvingly relied upon at para-23 of the Report. The clear principle which emanate from the observations of the Apex Court are that once the State or its instrumentality is a party to the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of Constitution of India. In the background of the discussions made on the maintainability of the writ petition in contractual matters, the Apex Court at para-24 observed that it is futile to contend that the action of the first Respondent, impugned in the writ petition, do not have a touch of public function or discharge of a public duty. Further, the Hon"ble Court relying upon the judgment rendered in the case of *U.P. Pollution Control Board v. Kanoria Industrial Ltd.*, (2001) 2 SCC 549 while dealing with the question of refund of money in a writ petition and after discussing the earlier case law on the subject including that of *Suganmal v. State of M.P.*, [AIR 1965 SC 1740], came to the conclusion that the judgment cannot be read as laying down the law that no writ petition at all can be entertained where claim is made for only refund of money consequent upon declaration of law that levy and collection of tax / cess is unconstitutional or without the authority of law. It was further observed that it is one thing to say that the High Court has no power under Article 226 of the Constitution to issue a writ of mandamus for making refund of the money illegally collected. It is yet another

thing to say that such power can be exercised sparingly depending on facts and circumstances of each case. The entire discussions relating to maintainability of writ petition under Article 226 of Constitution of India to enforce the contractual obligation of the State or its Instrumentality, by an aggrieved party, have been summarized in the following legal principles at paragraphs 27 and 28 in the case of ABL International Ltd. (Supra), which is quoted hereunder.

"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.

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See Whirlpool Corpn. v. Registrar of Trade Marks. And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction."

28. The Apex Court in the facts of the said case was also of the clear opinion that repudiation of the claim of the appellant by the first Respondent an Instrumentality of the State was in contravention of the aforesaid requirement of Article 14 of Constitution of India. It was further held that the Writ Court can issue suitable direction to set right the arbitrary action of the first Respondent. This judgment has been relied by the Hon"ble Supreme Court in the case of Zonal Manager, Central Bank of India (Supra) wherein also, scope of judicial review / interference in contractual matters was in question. It was held that the appellant Bank discharging public function as a State under Article 12, was obliged to return the title deeds to the Respondents in view of settlement of dues on the date of filing of the writ petition by arrangement made by another Nationalized Bank namely State Bank of India. The Apex Court also followed the decision in the case of Karnataka State Forest Industries Corpn. v. Indian Rocks, [(2009) 1 SCC 150], wherein their Lordship Hon"ble Mr. Justice S.B. Sinha

reiterated the principle, quoted as under:

"38. Although ordinarily a superior court in exercise of its writ jurisdiction would not enforce the terms of a contract qua contract, it is trite that when an action of the State is arbitrary or discriminatory and, thus, violative of Article 14 of the Constitution of India, a writ petition would be maintainable. (see *ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.*)

39. There cannot be any doubt whatsoever that a writ of mandamus can be issued only when there exists a legal right in the writ petition and a corresponding legal duty on the part of the State, but then if any action on the part of the State is wholly unfair or arbitrary, the superior courts are not powerless. Reliance placed by Mr. Divan on *G.J. Fernandez v. State of Mysore* is not apposite. In that case, it was held (AIR p. 1757 para. 12].

"12. Thus under Article 162, the State Government can take executive action in all matters in which the Legislature of the State can pass laws. But Article 162 itself does not confer any rule-making power on the State Government in that behalf"

29. Now coming to the facts of the present case, there are no undisputed facts, so far as the foundational basis for invocation of Bank Guarantee by the Respondent CCL is concerned. The Respondent CCL is an instrumentality of the State which falls under the expression "Authority" under Article 12 of the Constitution of India. The impugned action of the Respondent CCL does not lie purely in private domain. It has entered into the Fuel Supply Agreement and Memorandum of Understanding in discharge of its public function with the petitioner Company under which, coal supplies have been made. As observed in the case of *Kumari Shrilekha Vidyarthi* (Supra) followed and reiterated in the case of *ABL International Ltd.* (Supra), the requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. Though, the power to issue prerogative writ which is plenary in nature under Article 226 of Constitution, is not normally to be exercised to the exclusion of other available remedies, however, when the action of the State or its instrumentality is arbitrary and unreasonable, so as to violate the Constitutional mandate of Article 14 or for other valid and legitimate reasons, the High Court can interfere. In the facts of the present case, as they have unfolded, this Court is therefore not inclined to sustain the objection to the maintainability of the writ petition on those grounds.

30. It is now proper to deal with the second question relating to the interference in the matter of invocation of the Bank Guarantees in question. The Respondent CCL being an instrumentality of the State, has chosen to invoke the Bank Guarantees of the petitioner Company admittedly without any express or implied breach of FSA and /or MoU entered into with it or for recovery of any outstanding dues of the petitioner Company. It has been done with the purpose of realization

of outstanding dues of another Company M/s AAPL. In the undisputed state of facts, when there are no allegations of any such breach on the part of the petitioner Company, neither the terms of the contract nor the terms of the Bank Guarantee are required to be scrutinized or interpreted to adjudicate the sustainability of the impugned action. In the case of M/s Gangotri Enterprises Ltd. (Supra), the Hon'ble Supreme Court while considering the forfeiture / recovery clause of General Conditions of contract, was of the opinion that when the sum claimed by the Respondent Union of India is neither admitted sum or the same which stood adjudicated by the Court of Law in any judicial proceeding, and it does not relate to the contract for which Bank Guarantee has been furnished, but relates to another contract between the same parties for which work have been completed to the satisfaction of the Respondent, there was no right to encash the Bank Guarantee by the Respondent Union of India of the same petitioner Company. Though, the said judgment revolves around the interpretation of particular clause 18 of the General Conditions of Contract, but the Apex Court was of the firm opinion that the Respondent Union of India would not invoke the Bank Guarantee furnished in respect of a separate contract by the same appellant for recovering the dues claimed in respect of another contract.

31. In the facts of the present case, there cannot be any valid justification on the part of the Respondent CCL to invoke the Bank Guarantees of the petitioner Company to realize the outstanding dues of M/s AAPL, even though it is of the view that it is a sister Company or part of group Company M/s Adhunik Group of Industries, as they are independent juristic entities. Though, the terms of the Bank Guarantee are unconditional and the guarantor Bank had honoured it on invocation by the Respondent CCL, but the impugned action of the CCL was wholly unreasonable and arbitrary. The Bank may be in complete ignorance of the act of the Respondent CCL that the Bank Guarantees were being invoked for realization of outstanding dues of M/s AAPL and not of the petitioner Company. It can be strikingly evident from the letters of invocation dated 29.07.2016, which is quoted hereunder:

"Enclosed pleas find herewith four nos. of Bgs as detailed below:-

Sl.No.

BG No.

BG Date

Valid upto

BG Amt.

1.

0999811BG0000943

31.10.2011

28.02.2017

5,93,82,180.00

2.

0999811BG0000661

10.08.2011

29.11.2016

5,93,82,180.00

3.

0999812BG0000500

13.06.2012

28.02.2017

89,97,300.00

4.

0999812BG0000501

13.06.2012

29.11.2016

89,97,300.00

All the Bgs are issued by your Branch in favour of Central Coalfields Limited on behalf of M/s Adhunik Power & Natural Resources Ltd.

In this connection we hereby lodge our claim against the above Bgs. Kindly credit the proceeds to our A/c No. 00000030316184408 held in your branch. This claim letter along with original Bgs is being carried by Sri S.N. Bhatia, Finance Manager, CCL, Ranchi.

Kindly ensure immediate encashment."

32. In such circumstances, this Court is not required to go into the specific terms and conditions of the Bank Guarantee which definitely are irrevocable and unconditional in nature. Had the petitioner Company been liable to pay any outstanding demand of the Respondent CCL, on failure to do so, the Respondent CCL would have been perfectly right in invoking the Bank Guarantees furnished by it. However, the Bank Guarantee furnished by an independent juristic entity could not have been invoked for realization of the outstanding dues of a separate juristic entity. The judgments relied upon by the learned counsel for the Respondent CCL and the petitioner as well on the scope of interference in the matters of irrevocable and unconditional Bank Guarantee, do not leave any scope

of doubt, so far as the principles relating to interference in invocation of Bank Guarantee are concerned. Learned Senior counsel for the Respondent CCL has relied upon the judgments rendered by the Hon'ble Supreme Court in the case of Vinitec Electronics Private Ltd. v. HCL Infosystems Ltd., reported in 2008(1) SCC 544, National Highways Authority of India v. Ganga Enterprises, and another reported in 2003(7) SCC 410, Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corporation Ltd., reported in 1996(5)SCC 450, Reliance Salt Ltd. v. Cosmos Enterprises, reported in 2006(13)SCC 599 and M/s Adani Agri Fresh Ltd. v. Mahaboob Sharif, & others reported in 2015 SSC Online 1302 to substantiate his submission that interference in the invocation of Bank Guarantee is not warranted in the absence of statutory right of the petitioner being infringed and unless a case of fraud or special equity is pleaded and prima facie established by strong evidence as a triable issue. The settled principle of law in the matter of interference in invocation of unconditional and irrevocable Bank Guarantee as reiterated in the case of M/s Adani Agri Fresh Ltd. v. Mahaboob Sharif, & others [2015 SCC OnLine SC 1302]. para-8 and 9 of the Report is quoted hereunder, which also deals with the precedents on the subject including some of the judgments cited by the petitioner as above. This Court therefore does not consider it necessary to multiply the authority on the point.:

54. The Court, however, should not lightly interfere with the operation of irrevocable documentary credit. I agree with my learned brother that in order to restrain the operation of the irrevocable letter of credit, performance bond or guarantee, there should be serious dispute to be tried and there should be a good prima facie acts of fraud. As Sir John Donaldson M.R. said in *Bolivinter oil SA v. Chase Manhattan Bank*, (1984) 1 All E.R. 351 at 352:

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

55. From the above discussion, what appears to me is this: The sound banking system may, however require more caution in the issuance of irrevocable documentary credits. It would be for the banks to safeguard themselves by other means and generally not for the court to come to their rescue with injunctions unless there is established fraud. In the result, this appeal must be allowed. The judgment and order of the Allahabad High Court dated February 20, 1987 must be set aside and the order of learned Civil Judge, Lucknow dated August 8, 1986 restored.

9. Reliance was also placed on *Vinitec Electronics Private Ltd. v. HCL Infosystems Ltd.*, (2008) 1 SCC 544. The following observations have been

recorded in the above judgment:

11. The law relating to invocation of bank guarantees is by now well settled by a catena of decisions of this Court. The bank guarantees which provided that they are payable by the guarantor on demand is considered to be an un-conditional bank guarantee. When in the course of commercial dealings, unconditional guarantees have been given or accepted the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. In *U.P. State Sugar Corporation v. Sumac International Ltd.*, this Court observed that :

12. The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases.

12. It is equally well settled in law that bank guarantee is an independent contract between bank and the beneficiary thereof. The bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and of no consequence. In *BSES Limited v. Fenner India Ltd.* this 1 Court held :

10. There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the Bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non-intervention is when there are "special equities" in favour of injunction, such as when "irretrievable injury" or "irretrievable injustice" would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this Court, that in *U.P. State Sugar Corpn. v. Sumac International Ltd.* (1997) 1 SCC 568 (hereinafter "*U.P. State Sugar*

Corpn") this Court, correctly declare that the law was "settled".

13. In Himadri Chemicals Industries Ltd. v. Coal Tar Refining Company, this court summarized the principles for grant of refusal to grant of injunction to restrain the enforcement of a bank guarantee or a letter of credit in the following manner :

"14...(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the Beneficiary is entitled to realize such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realization of a bank guarantee or a letter of credit.

(iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional bank Guarantee or a Letter of Credit would result in irretrievable harm or injustice to one of the parties concerned.

14. In Mahatama Gandhi Sahakra Sakkare Karkhane v. National Heavy Engg. Coop. Ltd., this Court observed :

"If the bank guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction from enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered into between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury."

33. The principle of law, quoted herein-above, however do not even countenance a situation like this where an instrumentality of the State expected to act fairly, justly and reasonably even in contractual matters, would invoke the Bank Guarantee of another Company for realization of outstanding dues of a separate juristic Company like M/s AAPL. The law relating to invocation of such bank

guarantees is by now well settled. The bank guarantee is an independent contract between the bank and beneficiary thereof. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The first exceptions that have been carved out by the courts are fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee. When the beneficiary seeks to take advantage of such fraud, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. The harm or injustice contemplated must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee, is immaterial and of no consequence.

34. What flows from the aforesaid proposition of law is that irrespective of a dispute between the beneficiary and the party at whose instance the bank has given the guarantee, bank is obliged to honour its guarantee as long as it is an unconditional and irrevocable one. But but what about a case, where on the face of the admitted facts, there is no dispute between the beneficiary and the party at whose instance the bank guarantee has been issued. In such a scenario and in the absence of knowledge of a fraud, action of the bank to honour its guarantee may not be susceptible to question, as it is obliged to honour the unconditional and irrevocable guarantee being an independent contract between the bank and the beneficiary. But can the beneficiary be permitted to indulge in such an act, more so when it is a State and an instrumentality like the respondent - CCL where the dispute is definitely not with the party at whose instance the bank has given the guarantee but with another independent juristic entity i.e. M/s AAPL. It is therefore of vital significance to discern the subtle distinction in the action of the respondent CCL when tested on the touchstone of the settled principles of law in the matter of interference in the invocation of a bank guarantee which is unconditional and irrevocable in nature.

35. Although, the Respondent had pleaded the doctrine of lifting of corporate veil in their counter affidavit in the background facts narrated thereunder, but for the reasons best known to them, such a plea has not been pressed during course of argument on their behalf. However, it is relevant to refer to the principles of law in the matters of application of doctrine of lifting of corporate veil as laid down in the case of Balwant Rai Saluja (supra) and also in the case of Indowind Energy Limited (Supra). In the case of Balwant Rai Saluja (supra), it was held as under:

"70. The doctrine of "piercing the corporate veil" stands as an exception to the principle that a company is a legal entity separate and distinct from its

shareholders with its own legal rights and obligations. It seeks to disregard the separate personality of the company and attribute the acts of the company to those who are allegedly in direct control of its operation. The starting point of this doctrine was discussed in the celebrated case of *Salomon v. Salomon & Co. Ltd.* Lord Halsbury LC, negating the applicability of this doctrine to the facts of the case, stated that: (AC pp. 30 & 31)

"[a company] must be treated like any other independent person with its rights and liabilities [legally] appropriate to itself ... whatever may have been the ideas or schemes of those who brought it into existence."

Most of the cases subsequent to *Salomon* case, attributed the doctrine of piercing the veil to the fact that the company was a "sham" or a "façade". However, there was yet to be any clarity on applicability of the said doctrine.

71. In recent times, the law has been crystallised around the six principles formulated by Munby, J. in *Ben Hashem v. Ali Shayif*. The six principles, as found at paras 159-64 of the case are as follows: (i) Ownership and control of a company were not enough to justify piercing the corporate veil;

(ii) The court cannot pierce the corporate veil, even in the absence of third-party interests in the company, merely because it is thought to be necessary in the interests of justice;

(iii) The corporate veil can be pierced only if there is some impropriety;

(iv) The impropriety in question must be linked to the use of the company structure to avoid or conceal liability;

(v) To justify piercing the corporate veil, there must be both control of the company by the wrongdoer(s) and impropriety, that is use or misuse of the company by them as a device or facade to conceal their wrongdoing; and

(vi) The company may be a "façade" even though it was not originally incorporated with any deceptive intent, provided that it is being used for the purpose of deception at the time of the relevant transactions. The court would, however, pierce the corporate veil only so far as it was necessary in order to provide a remedy for the particular wrong which those controlling the company had done.

73. The position of law regarding this principle in India has been enumerated in various decisions. A Constitution Bench of this Court in *LIC v. Escorts Ltd.*, while discussing the doctrine of corporate veil, held that: (SCC pp. 335-36, para 90)

"90. ... Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that

must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected, etc."

74. Thus, on relying upon the aforesaid decisions, the doctrine of piercing the veil allows the court to disregard the separate legal personality of a company and impose liability upon the persons exercising real control over the said company. However, this principle has been and should be applied in a restrictive manner, that is, only in scenarios wherein it is evident that the company was a mere camouflage or sham deliberately created by the persons exercising control over the said company for the purpose of avoiding liability. The intent of piercing the veil must be such that would seek to remedy a wrong done by the persons controlling the company. The application would thus depend upon the peculiar facts and circumstances of each case."

36. It therefore flows from the aforesaid principles laid down by the Apex Court that the doctrine of piercing the corporate veil is allowed by the courts to disregard the separate legal personality of a company and impose liability upon the persons exercising real control of the said Company. The evolution of the doctrine from the celebrated case of *Salomon v. Salomon & Co. Ltd.* (Supra) has now crystallized around six principles as formulated by the Munby, J. in *Ben Hashem v. Ali Shayif.*, quoted above, in order to justify the piercing of the corporate veil. Ownership and control of Company are not enough, there must be both control of the Company by the wrong doer and impropriety that is use or misuse of the Company as a device or facade to conceal their wrong doings. Courts have pierced the corporate veil, so far as it was necessary in order to provide remedy for the particular wrong which those controlling the Company had done. Since the Respondents have not pressed upon the aforesaid plea, this Court is not required to render any finding thereupon.

37. In case of interference in a matter relating to invocation of Bank Guarantee, the plea of fraud must be of egregious nature, so as to vitiate the underlying transaction of the Bank Guarantee. The word "egregious" has been defined in the Chambers Dictionary 10th Edition as "outrageous, notorious, prominent and distinguished". As per Black's Law Dictionary 8th Edition, egregious means "extremely or remarkably bad; flagrant". In Collins Co-build Advanced Learner's English Dictionary New Edition, egregious means "very bad indeed". In the case of *State Trading Corporation of India Ltd. v. Jainsons Clothing Corporation and another* [(1994) 6 SCC 597] at para-7, their Lordships while elaborating the plea of fraud, quoted the observations of Sir John Donaldson, M.R. in *Inbolivinter Oil SA v. Chas Manhattan Bank*, (1984) 1 All ER 351, 352], which reads as under:

"The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated

statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged."

In the case of *Venture Global Engineering v. Satyam Computer Services Limited, & another* [(2010) 8 SCC 660], the Hon'ble Supreme Court has also referred to celebrated treatise on fraud i.e. *Kerr on Fraud and Mistake* and observed as under:

"37. The aforesaid elucidation by the learned Law Lord has also been accepted in the celebrated treatise on fraud (see *Kerr on Fraud and Mistake*, 7th Edn. P1). *Kerr* has also referred to *Story's Equity Jurisprudence* and defined "Fraud" as:

"Fraud, in the contemplation of a civil court of justice, may be said to include properly all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another."

38. In Indian law namely, the Contract Act, the said common law doctrine of fraud has been assimilated in Section 17 of the said Act. A very wide definition of "fraud" has been given, which is as under:

"17. "Fraud" defined.--"Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract-

- (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
- (2) the active concealment of a fact by one having knowledge or belief of the fact;
- (3) a promise made without any intention of performing it;
- (4) any other act fitted to deceive;
- (5) any such act or omission as the law specially declares to be fraudulent.

Explanation.-- Mere silence as to the facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech."

39. The impugned action of the CCL being the beneficiary of the Bank Guarantees could well be meant as an intention to deceive. It involves breach of trust or confidence justly reposed under the solemn transaction between the parties. It was definitely injurious to the other. Such an act may not have been in the Bank's knowledge which, as per the terms and conditions of irrevocable and unconditional Bank Guarantee, it is obliged to honour. But it definitely had the intent to deceive as admittedly, there were no pending disputes between the beneficiary CCL and the petitioner i.e. party at whose instance Bank Guarantee

was issued. The action of the Respondent Bank therefore may not be culpable or blameworthy.

The rule is well established that a Bank issuing a Bank Guarantee is not concerned with the underlying contract between the parties. The duty of the Bank under a Bank Guarantee is created by the document itself. The Courts will not interfere to withhold payments unless there is case of "fraud" pleaded and established otherwise trust in commerce, national and international would be irreparably damaged. But that does not mean that the parties to the underlying contract cannot raise their cause of action in relation to the breach by resorting to litigation or arbitration. The remedy arising ex contractu is not barred and the cause of action is independent of the enforcement of the guarantee. In the facts of the present case, the request by the beneficiary CCL for payment can be considered as a fraudulent act because there was no right to payment. According to the dictionary meaning of "rightful", a payment in order to be rightful payment must be one in conformity with what is right or just or equitable.

40. In the ultimate analysis, the action of the Respondent CCL to invoke the Bank Guarantees furnished by the petitioner for realization of the outstanding dues of M/s AAPL cannot be said to be fair, just and reasonable in the eye of law. The impugned actions are therefore held as arbitrary, illegal and amounting to fraudulent act which would cause irretrievable injuries to the petitioner, If interference is not made, it may also embolden the Respondent authorities in improperly resorting to such action de hors the authority of law.

41. Having answered the first two questions posed earlier, the third question which remains to be answered is, whether the petitioner can seek refund of the encashed Bank Guarantees as a consequential relief, if no such prayer has been made. This issue however, in the opinion of this Court, is not difficult to answer once the impugned action of the Respondent CCL has been held to be unreasonable and arbitrary causing irretrievable injury or irretrievable injustice upon the petitioner. Petitioner had sought a declaration from this Court to the effect that the Respondent CCL cannot adjust and / or recover the alleged outstanding amount of Rs. 13,46,66,861.42 of its group Company M/s Adhunik Alloys and Power Limited from the Bank Guarantees of the petitioner Company pursuant to the Fuel Supply Agreement and / or Memorandum of Understanding for supply of coal dated 22.07.2015. It had questioned the decision of the Respondent CCL contained in letter dated 29.07.2016 as being wholly arbitrary, illegal and an act of egregious fraud. Since invocation of the Bank Guarantees had already been undertaken on 30.07.2016 before filing of the writ petition, the question of restraint on invocation of the Bank Guarantees did not arise. However, the first two prayers of the writ petitioner did survive.

42. It would be pertinent to repeat here that when the matter was taken up on 01.08.2016, this Court had clearly observed that invocation of the Bank Guarantees would be subject to the outcome of the writ petition. By the subsequent order dated 04.08.2016, again the Respondent CCL was directed to

file Statement of Accounts containing the credit of encashed Bank Guarantees and interest earned thereupon. The Respondent Bank was also directed to file an affidavit enclosing the Statement of Accounts of the petitioner from which Bank Guarantees have been realized and interest and other charges that had fallen on the petitioner because of its withdrawal. On 11.08.2016 the Respondent CCL was directed to keep the amount encashed on invocation of the Bank Guarantees in an interest bearing account. It is therefore clear that merely on account of invocation of the Bank Guarantees, two days prior to the writ petition being taken up, cause of action raised herein had neither been rendered infructuous, nor was treated as such. Once the impugned action itself has been held to be illegal, arbitrary and unreasonable, this Court cannot shut its eyes and relegate the petitioner to pursue a remedy before a competent Court of law of civil jurisdiction only for the purposes of refund of the amount, instead of ordering the consequences which arise on such declaration.

43. In the case of Satya Narain Singh v. District Engineer, P.W.D. Ballia, and another [AIR 1962 SC 1161] (Supra), the Hon''ble Supreme Court observed that if petition contains a prayer for grant of "other relief" which had not been amended, there could be no difficulty in granting appropriate relief to the appellant.

In para-4(i) of the present petition also, petitioner has sought "issuance of appropriate writ (s)/order (s)/direction (s) as this Court may deem fit and proper in the facts and circumstances of the case". It would also be pertinent to rely upon the observations made by the Hon''ble Supreme Court in the case of State of Madhya Pradesh v. Bhailal Bhai, & Ors [AIR 1964 SC 1006] (Supra). It has been held that when there has been a threat only and the right has not been actually infringed, the application under Article 226 would lie and the courts would give necessary relief by making an order in the nature of injunction. It would hardly be reasonable to say that when the right has been actually infringed, the Court would refuse to grant consequential relief and content itself with merely a declaration that the right exist and has been invaded, by merely quashing the illegal order. Opinion of the Hon''ble Supreme Court contained at para-15 to 17 are quoted hereunder:

15. We see no reason to think that the High Courts have not got this power. If a right has been infringed - whether a fundamental right or a statutory right - and the aggrieved party comes to the court for enforcement of the right it will not be giving complete relief if the court merely declares the existence of such right or the fact that existing right has been infringed. Where there has been only a threat to infringe the right, an order commanding the Government or other statutory authority not to take the action contemplated would be sufficient. It has been held by this Court that where there has been a threat only and the right has not been actually infringed an application under Article 226 would lie and the courts would give necessary relief by making an order in the nature of injunction. It will hardly be reasonable to say that while the court will grant relief

by such command in the nature of an order, of injunction where the invasion of a right has been merely threatened the court must still refuse, where the right has been actually invaded, to give the consequential relief and content itself with merely a declaration that the right exists and has been invaded or with merely quashing the illegal order made.

16. For the reasons given above, we are clearly of opinion that the High Courts have power for the purpose of enforcement of fundamental rights and statutory rights to give consequential relief by ordering repayment of money realized by the Government without the authority of law.

17. At the same time we cannot lose sight of the fact that the special remedy provided in Article 226 is not intended to supersede completely the modes of obtaining relief by an action in a Civil Court or to deny defences legitimately open in such actions. It has been made clear more than once that the power to give relief under Article 226 is a discretionary power. This is specially true in the case of power to issue writs in the nature of mandamus. Among the several matters which the High Courts rightly take into consideration in the exercise of that discretion is the delay made by the aggrieved party in seeking this special remedy and what excuse there is for it. Another is the nature of controversy of facts and law that may have to be decided as regards the availability of consequential relief. Thus, where, as in these cases, a person comes to the court for relief under Article 226 on the allegation that he has been assessed to tax, under a void legislation and having paid it under a mistake is entitled to get it back, the court, if it finds that the assessment was void, being made under a void provision of law, and the payment was made by mistake, is still not bound to exercise its discretion directing repayment. Whether repayment should be ordered in the exercise of this discretion will depend in each case on its own facts and circumstances."

44. The Hon'ble Supreme Court in the case of M/s ABL International Ltd. (Supra) has also dealt with the opinion rendered in the case of Suganmal (Supra) relied upon by the Learned Senior counsel for the Respondent CCL in his support. It has come to the conclusion that the judgment cannot be read as laying down the law that no writ petition at all can be entertained where claim is made for only refund of money consequent upon declaration of law that levy and collection of taxes / cess is unconstitutional or without any authority of law. As per the principles summarized at paragraph-27 (c) in the case of M/s ABL International Ltd. (Supra), a writ petition involving a consequential relief of monetary claim is also maintainable. This Court therefore does not consider itself constrained to grant consequential relief to the petitioner once the action of the Respondent CCL to recover the outstanding dues of another Company M/s AAPL, by invocation of the Bank Guarantees furnished by the petitioner, has been held to be unreasonable, arbitrary and an fraudulent act which has caused "irretrievable injustice" to the petitioner. The submission to the contrary advanced by the Learned Senior Counsel for the Respondents therefore does not appeal to this

Court.

45. Respondent CCL has, through its affidavit dated 19.08.2016 indicated that the encashed Bank Guarantee has been kept in a fixed deposit with UCO Bank, Ranchi since 17.08.2016 for a term of 12 months at the rate of interest of 7.28%. Statement of Account of term deposit of an amount of Rs. 13,67,58,960/- since 17.08.2016 and the interest amount of Rs. 43,29,010.17 earned up-to 13.02.2017, totalling Rs. 14,11,12,523.75 has been submitted by the learned counsel for the Respondent CCL after conclusion of the argument.

46. The Respondent State Bank of India on 17.08.2016 had stated on affidavit that due to encashment of the Bank Guarantee, petitioner is liable to pay interest on the amount of Rs. 55,453/- (approximately) per day over his cash credit account. Learned counsel for the petitioner, after conclusion of the argument, has furnished a written submission enclosing a letter of State Bank of India dated 13.02.2017. State Bank of India has through the instant letter, indicated that due to encashment of the Bank Guarantee of the petitioner, interest on such invocation of Bank Guarantee for the period 30.07.2016 to 31.01.2017 is Rs. 91,61,332/- i.e. @12.80% per annum for 180 days.

47. From the statement of Account of Fixed Term Deposit submitted by the Respondent CCL, it is evident that the total interest amount for the aforesaid period comes to Rs. 43,29,010.17. The encashed amount of Bank Guarantee together with the interest accrued thereupon as a Fixed Term Deposit at the rates applicable thereto, is therefore liable to be refunded to the petitioner within a period of one week from today from the date of its encashment i.e. 30.07.2016 failing which, it would carry a penal interest of 5% per annum on the total outstanding amount as on the date of this order. Petitioner has contended that invocation of the Bank Guarantee has entailed the liability to pay interest of Rs. 55,453/- @12.80% per annum on its cash credit account and sought refund of the encashed Bank Guarantee along with interest at the same rates for being fully restituted for the loss incurred as such. In the facts and circumstances of the case, noted above, and specially in view of the order dated 11.08.2016 where under encashed Bank Guarantee has been kept in a fixed term deposit, obviously bearing interest at a higher rate than ordinary interest bearing account, this Court is satisfied that no further claim of interest deserves to be granted. Refund is ordered not by way of an award of damage as claimed on the peculiar facts of the cash credit accounts maintained by the petitioner from which the Bank Guarantees in question stood encashed.

48. Writ petition is allowed in the aforesaid manner, however with a cost of Rs. 1.00 lakh upon the Respondent CCL to be paid to the petitioner within a period of four weeks from the date of receipt of a copy of this order.