(2012) 04 DEL CK 0108

In the Delhi High Court

Case No : CS (OS) 698 of 1995

M/s. Aravali International APPELLANT

Vs

Jammu and Kashmir Bank Ltd. and Others RESPONDENT

Date of Decision : 13-04-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 11 Rule 12, 151

Citation : (2012) 4 AD 331

Hon'ble Judges : Reva Khetrapal, J

Bench : Single Bench

Advocate : Janendra Lal and Ms. Yasmin Tarapore, for the Appellant; S.P. Singh and Mr. G.M. Kawoosa, for the Respondent

Judgement

Reva Khetrapal, J.—The aforementioned suit is filed by the plaintiff for the recovery of a sum of Rs. 23,73,364.38 (Rupees Twenty Three Lacs Seventy Three Thousand Three Hundred Sixty Four and Paise Thirty Eight Only) together with costs and interest thereon premised on a Bank Guarantee issued by the defendants, whereby the defendants unconditionally bound themselves to make the payment as mentioned in the Bank Guarantee to the plaintiff in the event of non-performance of export obligations by a third party. Briefly the facts may be delineated as follows.

2. On 19th April, 1994, M/s. Chittagong Cement Clinkers & Grinding Co. Ltd., South Halisher, Chittagong (hereinafter referred to as "M/s. Chittagong") entered into an agreement for the supply of 25,000 Metric Ton of cement clinkers with the plaintiff. On the same date, i.e., on 19th April, 1994, M/s. Chittagong entered into another agreement with M/s. Project & Equipment Corporation of India Ltd., Hansalaya, 15 Barakhamba Road, New Delhi (hereinafter referred to as "M/s. Project Equipment") for supply of another 25,000 Metric Ton of cement clinkers. On 25th April, 1994, M/s. Project Equipment further entered into an agreement with the plaintiff assigning the contract in favour of the plaintiff on the same terms and conditions as contained in the principal agreement entered into by it

with M/s. Chittagong. On the same day, i.e., on 25.04.1994, the plaintiff in turn entered into two contracts for the supply of 25,000 Metric Ton of cement clinkers each with M/s. Impression International India, 110-111 Pragati Tower, Rajindra Place, New Delhi (hereinafter referred to as "M/s. Impression") on the same terms and conditions as contained in the principal agreements, in consideration of commission to be paid by M/s. Impression to the plaintiff.

3. In terms of the principal contracts, i.e., the contracts with M/s. Chittagong, the plaintiff was required to furnish, within a period of five days from the signing of the said contracts, an unconditional performance guarantee of the value of 4% of the contract value entered into between the plaintiff and M/s. Chittagong, and of the value of 3% of the contract value entered into with M/s. Project Equipment and later assigned to the plaintiff. On 1/4-06-1994, the plaintiff in keeping with the above terms and conditions got two performance Bank Guarantees opened through their bankers, Bank of Baroda, Sansad Marg, New Delhi in favour of M/s. Chittagong, viz., Performance/Bank Guarantee No. FGN/BG/94/8 dated 1st/4th June, 1994 for contract No. Nil and Performance/Bank Guarantee No. FGN/BG/94/7 dated 1st/4th June, 1994 for contract No. RKG/4/94. In turn, the plaintiff in the contract with M/s. Impression also required the furnishing of performance Bank Guarantees by the said M/s. Impression, who caused to be issued a single performance guarantee in favour of the plaintiff through its bankers, M/s. Jammu & Kashmir Bank Ltd., Lajpat Nagar, New Delhi (the defendant No. 2 herein) bearing No. 18/94 dated 14th May, 1994 for the due performance of the export obligation cast on them. The said Bank Guarantee was forwarded by the defendants to the plaintiff on 14.05.1994 vide Ex.P-1 and on 19.05.1994, the defendants admitted issuance of guarantee vide Ex.P-2. Clause 2 of the said guarantee is significant, which, for the sake of facility, is reproduced hereunder:-

2. This GUARANTEE shall become effective and shall bind the BANK Provided the IRREVOKABLE LETTER OF CREDIT for sale of 50,000 mts of CEMENT CLINKER valuing US Dollars 22,95,750/- CONFIRMED by a PRIME BANK in Delhi and stipulating payment at SIGHT on presentation of documents expeditiously by transfer of funds in US Dollars from the Confirming Banks Accounts in New York, complete, valid and without any discrepancies is received by the BANK in original within FIFTEEN DAYS from the date of this Guarantee i.e. not later than _29_May 1994. The Date of receipt of the valid and discrepancy free Irrevocable Confirmed Letter of Credit shall be confirmed by the BANK to BUYERS AGENTS in writing. In the event of the non-receipt of the said Irrevocable and confirmed Letter of Credit by the day stipulated heretofore this Guarantee shall become inoperative and shall not be enforceable against the Bank in any manner.

4. It is the case of the plaintiff that the defendants vide the said Performance Guarantee/Bank Guarantee unconditionally bound themselves to make the payment as mentioned in the Bank Guarantee to the plaintiff in the event of non-performance of the export obligation cast upon M/s. Impression and were obliged

to pay on demand and without any demur, a sum to the tune of Rs. 21,50,000/- (Rupees Twenty Lacs Fifty Thousand Only) to the plaintiff on the occurring of such an eventuality. It is further the case of the plaintiff that the original Bank Guarantee as issued by the defendants contained a stipulation that the said Bank Guarantee would take effect and would become effective and binding only upon the receipt from the plaintiff of the Letter of Credit by 29th May, 1994. As the said Letter of Credit had not been received, the plaintiff called upon M/s. Impression to extend the period for transmission of the Letter of Credit and by amendment dated 27.05.1994 (Ex.P-3), the period for receipt of the Letter of Credit was extended to 6th June, 1994, other terms and conditions remaining the same. Since the Letter of Credit could not be received even by the said extended date, by amendment dated 8th June, 1994 the period for receipt of the Letter of Credit was extended to 20th June, 1994 (Ex.P-4), other terms and conditions remaining the same. Thereafter, the period for transmission of the Letter of Credit was further extended till 7th July, 1994 vide amendment dated 30.06.1994 (Ex.P-5), by which date the Letters of Credit were duly provided to M/s. Impression and had been transmitted to the defendants.

5. Since the plaintiff had entered into two contracts with M/s. Chittagong, one directly and the other through M/s. Project Equipment, M/s. Chittagong had instructed their banker to open two separate Letters of Credit under each contract for the supply of 25,000 Metric Ton of cement clinkers under each Letter of Credit. Accordingly, Letters of Credit bearing Nos. C/11/0070 (hereinafter referred to as No. 70) and C/11/0071 (hereinafter referred to as No. 71) both dated 15th June, 1994 were issued by Bank Indo Suez on behalf of M/s. Chittagong in favour of the plaintiff. The said Letters of Credit were transmitted to the plaintiff''s bankers in India. The first Letter of Credit bearing No. 70 stipulated that the material was to be shipped latest by 3rd August, 1994 and date of negotiation as provided for therein was 17th August, 1994. This Letter of Credit was amended from time to time by various amendments and was last amended on 20th July, 1994 whereby the last date by which the material was to be shipped was extended till 30th August, 1994 and accordingly the date of negotiation stood extended till 13th September, 1994.

6. As regards the other Letter of Credit bearing No. 71 dated 15th June, 1994, the last date of shipment stipulated therein was originally 3rd July, 1994 and the date of negotiation was 17th July, 1994. By the very first amendment in the said Letter of Credit dated 20th June, 1994, the validity of shipment was extended till 30th August, 1994 and negotiation date stood extended till 13th September, 1994. By virtue of this amendment, both the Letters of Credit had the same validity of shipment and negotiation. But at a later date, besides other amendments, an amendment was incorporated by the issuing bank in the said Letter of Credit bearing No. 71 on 20th July, 1994, whereby the latest date by which the material was to be shipped was extended till 29th September, 1994 and the date of negotiation till 13th October, 1994.

7. Thus, after all the amendments for the Letter of Credit bearing No. 70, the ultimately extended date for shipment was 30th August, 1994 whereas as per the Letter of Credit bearing No. 71 after all the consequent amendments, the extended date of shipment was till 29th September, 1994.

8. It may be noted at this juncture that originally the said Letters of Credit were not transferable, and as such M/s. Impression as also the defendants sought the transfer of the said Letters of Credit, whereupon the plaintiff requested M/s. Chittagong to amend both the Letters of Credit and make them transferable. Thus, the Letter of Credit bearing No. 70 was made transferable vide amendment dated 22nd June, 1994 whereas the Letter of Credit bearing No. 71 was made transferable vide amendment dated 23rd June, 1994.

9. It is the case of the plaintiff that the said amended Letters of Credit were transferred in the name of M/s. Impression by the plaintiff''s bankers and were duly transmitted to M/s. Impression on 4th July, 1994, who forwarded the same to the defendants. On receipt of the duly transferred Letters of Credit in favour of M/s. Impression and on the request of M/s. Impression, the defendants extended the date of the Performance/Bank Guarantee and claim period vide amendment made by the defendants in the Bank Guarantee on 1st August, 1994. The said amendment extended the validity and claim period of the guarantee as per Clause 3 and Clause 6 of the Bank Guarantee No. 18/94 to 30th August, 1994 and 30th September, 1994 respectively. Thus, by virtue of these amendments, the validity of the guarantee stood extended till 30th August, 1994 and the claim period stood extended till 30th September, 1994. It would be apposite at this point of time to note that it is the contention of the plaintiff that the last amendment was necessitated only upon the receipt of the Letter of Credit by the defendants and the absence of any reference to the non-receipt of the Letter of Credit in the amendment clearly testifies to the fact of receipt of a valid Letter of Credit by the defendants, and further to the fact that the bank accepted the said Letters of Credit and only upon being satisfied about the validity of the same caused an amendment extending the validity period of the Bank Guarantee to 30th August, 1994 and claim period to 30th September, 1994.

10. The plaintiff alleges that M/s. Impression did not carry out the export obligation and as a result of the said default, the plaintiff suffered financial loss on account of the invocation of the Bank Guarantees provided by the plaintiff to M/s. Chittagong as also the loss of goodwill. Accordingly, in terms of the Bank Guarantee dated 14th May, 1994 issued by the defendants, the plaintiff on 24th September, 1994 invoked the said Bank Guarantee, calling upon the defendants to make payment of the said sum of Rs. 21,50,000/- (Rupees Twenty Lacs Fifty Thousand Only).

11. The plaintiff further alleges that although the defendants was in law bound to make payment under the aforesaid Bank Guarantee, the defendants illegally and with malafide intent by letter dated 3rd October, 1994 informed the plaintiff that the Bank Guarantee was issued conditionally upon the Letter of Credit being

delivered to the defendants within 15 days, i.e., not later than 29th May, 1994 and the defendants not having received the same within the aforesaid period, the said guarantee was not operative in law.

12. The aforesaid stand of the defendants is assailed by the plaintiff by institution of the present suit as false, malafide and contrary to their records as the defendants extended the validity and claim period of the aforesaid guarantee through various amendments and also acted upon and negotiated the Letter of Credit duly delivered to them.

13. The plaintiff alleges that a further ground for the defendants declining to make payment under the Bank Guarantee was that the Letter of Credit was not confirmed by a prime bank in Delhi, stipulating the payment of the amount in US Dollars by debiting their account in New York. The plaintiff further alleges that the defendants were fully aware that Bangladesh, being a member of the Asian Clearing Union, payment was to be made not in US Dollars but in Indian Rupees or the currency of the participating country, namely, Bangladesh. The defendants were also fully aware that the clause inserted in the guarantee was contrary to the Foreign Exchange Manual and Rules of the Reserve Bank of India and unenforceable in law.

14. The defendants having repudiated their liability to make payment, the plaintiff by a legal notice dated 18th October, 1994 informed the defendants that the stand taken by them was without any basis and that the defendants were bound to make payment under the Bank Guarantee issued by them. Notice was also given to the defendants under the provisions of the Interest Act contending that the plaintiff in the event of default in making payment would hold the defendants liable for interest @ 24% per annum with quarterly rests, being the prevalent commercial rate of interest. The said notice was duly served on the defendants but the defendants not having honoured its liability, the plaintiff on 24th November, 1994 caused a final notice to be sent to the defendants through its Advocate, calling upon them to make payment of Rs. 21,50,000/- (Rupees Twenty Lacs Fifty Thousand Only) together with interest @ 24% per annum with quarterly rests from 24th September, 1994 till payment, failing which the plaintiff would have no option but to file a suit for recovery of its dues.

15. On 5th December, 1994, the defendants sent a reply to the aforesaid notice again repudiating its liability and repeating the aforesaid grounds for non-payment. The defendants denied having received the irrevocable Letters of Credit and consequently its liability to make payment. The defendants having willfully neglected to make payment, which, according to the plaintiff, it was bound to make, the present suit was instituted by the plaintiff for recovery of the aforesaid sum of money with interest thereon from the defendants.

16. The defendants filed a written statement contending that the invocation of the Bank Guarantee was invalid and, therefore, the defendant Bank was justified in not making the payment in terms of the guarantee. The defence set up was

that the defendants had issued a conditional Bank Guarantee which was to become operative subject to the receipt of the irrevocable Letter of Credit for the sale of 50,000 Metric Ton of cement clinkers valuing US $ 22,95,750/- by the bank within the stipulated period by 29th May, 1994, which was later on amended to 30th August, 1994, duly confirmed by a prime bank in Delhi. No irrevocable Letter of Credit having been received by the bank by 30th August, 1994, the guarantee never became operative, and as such, no liability could be fastened upon the defendants and the entire suit was misconceived. In paragraph 18 of the written statement, however, the defendants submitted that one Letter of Credit for US $ 11,43,750/- was received by the defendants from M/s. Impression on 1st September, 1994. The said Letter of Credit not having been received by the defendants within the extended period of the guarantee and further not being confirmed by a prime bank in Delhi and being for a lesser amount than the stipulated amount, the guarantee never became operative and no cause of action, therefore, accrued to the plaintiff.

17. Replication to the aforesaid written statement was filed by the plaintiff categorically denying the contents of the written statement and reiterating the averments made in the plaint.

18. On the pleadings of the parties, the following issues were framed on 22nd August, 1997 for adjudication:-

1. Whether the plaint has been signed and suit instituted by a duly authorised person?

2. Whether the suit of the plaintiff is misconceived and not maintainable as alleged in the written statement?

3. Whether the guarantee No. 18/94 dated 14th May, 1994 was not conditional and as such could not be invoked without satisfying the terms stipulated therein?

4. Whether the guarantee could be enforced despite the fact that it was stipulated that the payment shall be made in U.S. Dollars and not in Indian rupees?

5. Whether the guarantee never became operative? If so, to what effect?

6. Whether the guarantee could be invoked without fulfilling the terms of the guarantee which were clearly stipulated in the guarantee itself? To what rate of interest, the plaintiff is entitled to?

7. Whether an irrevocable Letter of Credit in the sum of Rs. 22,95,750/- U.S. Dollars was received by the defendant within stipulated period? If not, to what effect?

8. Relief.

19. On or about 31st August, 2004, the plaintiff filed an application being IA No. 5700 of 2004 under Order XI Rule XII read with Section 151 of the CPC for

discovery and inspection alleging therein that the falsity of the claim of the defendants was apparent from the fact that if the irrevocable Letter of Credit had not been received by the defendants prior to 7th July, 1994, there would have been no occasion for the bank to issue another amendment on 1st August, 1994 as the Performance Guarantee would have automatically lapsed. The attention of the Court was also invited by the plaintiff in the said application to the earlier orders of the Court dated 20th September, 2000 and 17th January, 2001 directing the defendants to place on record the irrevocable Letter of Credit as received by it from M/s. Impression, and to the fact that the defendants ultimately instead of filing the said irrevocable Letter of Credit filed an affidavit dated 22nd April, 2002 stating, inter alia, that the defendants had received the irrevocable Letter of Credit dated 15th June, 1994 for US $ 11,43,750/- on 1st September, 1994 from M/s. Impression and that after negotiation, the same was returned to M/s. Impression in September, 1994. In paragraphs 7 and 8 of the aforesaid application, the plaintiff submitted as follows:-

7. That similarly in transactions pertaining to foreign exchange, all banks are required to inform the Reserve Bank of India by submitting GR-I forms with regard to documents sent under collection or otherwise and also the fate of the documents i.e. whether payment was received or not. At the time of such negotiation of documents, GR-I forms are submitted to the Reserve Bank of India and since payment has not been received the same would still be pending. The Defendants would be in possession of the said correspondence with the Reserve Bank of India including the GR-I forms and other connected documents and correspondence.

8. The Plaintiff states that the above documents are necessary for the adjudication of the matters in issue and it is a fit and proper case where this Hon''ble Court would be pleased to direct the Defendants to make discovery on oath of the documents which are or have been in the power and possession of the Defendants pertaining inter alia to the date on which the Irrevocable Letter of Credit was received by the Defendant No. 1, the date on which the documents were negotiated by Defendant No. 1 under the said Irrevocable Letter of Credit, the correspondence with M/s. Impression International India with regard to the said Irrevocable Letter of Credit and/or the consignment/documents negotiated thereunder, the correspondence with the Reserve Bank of India including the furnishing of the GR-I forms and all correspondence which would show that in fact the Irrevocable Letter of Credit was received by the Defendants much prior to 31st August, 1994.

20. In response to the aforesaid application, the defendants filed their reply stating that on 01.09.1994 one export documentary bill for US $ 3,04,416 against one Letter of Credit No. 70 for US $ 11,43,740 was received from M/s. Impression but the said Letter of Credit was discrepant. Against this, an amount of US $ 2,80,984 had been realized on 12.10.1994 and after applying the conversion rate of Rs. 31.37, a sum of Rs. 88,14,468/- was credited to the loan

account of M/s. Impression. This entry had been reported to the Reserve Bank of India under GR-I Form No. AG 211506 with relevant R-returns on realisation. It was further stated that copies of the said documents were now not available with the defendant Bank as it was not mandatory to preserve this record permanently.

21. By an order dated 11th July, 2005, the aforesaid application of the plaintiff was allowed by the Court and the defendants were directed to discover the documents regarding the receipt of the Letter of Credit by filing of an affidavit in accordance with the rules. Pursuant to the said order, the defendants filed the affidavit of their Assistant General Manager - Shri Ashok Kapoor. In paragraph 3 of the said affidavit, the defendants reiterated the stand taken by them with regard to LC No. 70 in response to the application for discovery being IA No. 5700/2004 that the same was not now in possession, power or custody of the documents. The defendants further stated that no export bill under LC No. 71 for US $ 11,43,750 was ever received by it from M/s. Impression and, therefore, no record of the same was available with them. It was further stated that the defendants were not in possession of any record pertaining to return of the Letter of Credit to M/s. Impression.

22. Thereafter, the parties went to trial and adduced their respective evidence through affidavits. In the course of evidence, the plaintiff filed its affidavit by way of evidence of Shri Davinder K. Bhalla, Company Secretary of the plaintiff (PW1), who proved on record documents Ex.PW1/1 to Ex.PW1/25, besides documents P-1 to P-8, which were unconditionally admitted and documents A-1 to A-3, which were conditionally admitted by the defendants. The defendants filed the affidavits of DW1 Shri J.M. Rafiqui and DW2 Mohd. Shafi Bhatt but did not offer Mohd. Shafi Bhatt for cross-examination.

23. Detailed submissions were made by Mr. Janendra Lal, Advocate on behalf of the plaintiff and by Mr. S.P. Singh, Senior Advocate on behalf of the defendants. In order to avoid prolixity, it is proposed to deal with the respective submissions of parties issue-wise.

ISSUE No. 1

1. Whether the plaint has been signed and suit instituted by a duly authorised person?

24. On Issue No. 1, the plaintiff proved the Certificate of Incorporation of M/s. Aravali Traders and Investments Company Limited dated 11th June, 1980 (Ex.PW1/1); the Certificate of Amendment dated 4th May, 1994 certifying the change of name of M/s. Aravali Leasing Limited, which was originally incorporated on 11th June, 1980 under the name of M/s. Aravali Traders and Investments Limited to M/s. Aravali Securities and Finance Limited (Ex.PW1/2); Resolution of the Board of Directors of Aravali Leasing Limited dated 27.05.1993 resolving that a proprietorship firm in the name and style of M/s. Aravali International be opened under the proprietorship of the Company (Ex.PW1/3); Resolution of the Board of Directors of M/s. Aravali Securities and Finance

Limited dated 14th December, 1994 resolving that Shri Ranjan Kumar Poddar, Managing Director be authorised to execute a Power of Attorney in favour of any person as he may deem fit to represent on behalf of M/s. Aravali International in the case of recovery of Rs. 21,50,000/- from the Jammu & Kashmir Bank (Ex.PW1/4) and the Power of Attorney in favour of Shri D.K. Bhalla executed by Shri Ranjan Kumar Poddar (Ex.PW1/5).

25. All the aforesaid documents were proved in evidence by PW1 Shri Davinder K. Bhalla, whose testimony in this regard was not assailed by cross-examination of the witness.

26. Issue No. 1 is accordingly decided in favour of the plaintiff by holding that the plaint has been signed and the suit instituted and filed by a duly authorised person.

ISSUE NOS.2, 3, 4, 5, 6 AND 7

2. Whether the suit of the plaintiff is misconceived and not maintainable as alleged in the written statement?

3. Whether the guarantee No. 18/94 dated 14th May, 1994 was not conditional and as such could not be invoked without satisfying the terms stipulated therein?

4. Whether the guarantee could be enforced despite the fact that it was stipulated that the payment shall be made in U.S. Dollars and not in Indian rupees?

5. Whether the guarantee never became operative? If so, to what effect?

6. Whether the guarantee could be invoked without fulfilling the terms of the guarantee which were clearly stipulated in the guarantee itself? To what rate of interest, the plaintiff is entitled to?

7. Whether an irrevocable Letter of Credit in the sum of Rs. 22,95,750/- U.S. Dollars was received by the defendant within stipulated period? If not, to what effect?

27. Issue Nos.2, 3, 4, 5, 6 and 7 being interlinked and interconnected and the evidence thereon being substantially the same are being dealt with together.

28. On the aforesaid issues, the plaintiff has adduced evidence to show that as per the Reserve Bank of India restrictions as contained in the Guidelines and Foreign Exchange Manual placed on record and marked as "A" for the sake of identification, it is provided that in export transactions with member countries of the Asian Clearing Union which includes Bangladesh, payment could only be made in Indian rupees or in the currency of the participating country in which the other party to the transaction is resident and, therefore, not in US Dollars. The relevant part of the Foreign Exchange Manual is reproduced hereunder:-

Permitted Methods of Payments

2.6 Authorised dealers should make remittances from India or provide reimbursement to their overseas branches and correspondents in foreign countries (other than Nepal and Bhutan) against payments due for imports into India and other payments in a manner conforming to the methods of payment indicated below:-

Group Permitted methods

(i) All countries other than those listed under (ii) below (ii) Member countries in the Asian Clearing Union (except Nepal), Bangladesh , Myanmar , Islamic Republic of Iran, Pakistan , Sri Lanka (a) Payment in rupees to the account of a resident of any country in this Group. (b) Payment in any permitted currency. (a) Payment for all eligible current transactions in Indian rupees or Asian Monetary unit (AMU) or in the currency of the participating country in which the other party to the transaction is resident.

(b) Payment in any permitted currency in other cases.

29. Predicated on the aforesaid Foreign Exchange Regulation, Mr. Janendra lal, the learned counsel for the plaintiff submitted that any condition/term requiring payment to be made otherwise would be unenforceable in law. He pointed out that PW1 in cross-examination had affirmed so, and stated that the plaintiff had informed M/s. Impression that the stipulation as contained in para 2 of the Performance Guarantee was contrary to the Reserve Bank of India Guidelines, who had, in turn, informed the defendants and thereafter confirmed to the plaintiff that the defendants were not going to rely upon the said clause. He further pointed out that significantly, in his cross-examination DW2, who at the relevant time was the Manager, Foreign Exchange of the defendants and signatory to the Guarantee, claimed not to remember the aforesaid restrictions of the Reserve Bank of India Regulations, but admitted that any such restriction in the guarantee contrary to Reserve Bank of India directions would not be enforceable. The learned counsel urged that, therefore, such a condition in the Guarantee issued by the defendants were unenforceable and the said term/ condition in the Guarantee was to be ignored as being contrary to the Regulations and the Guarantee operable and enforceable accordingly.

30. As regards Issue No. 7, regarding the delivery of the Letter of Credit to the defendants, Mr. Lal contended that there is ample evidence on record to suggest that the same was received by M/s. Impression on 4th July, 1994 and thereafter delivered to the defendants with a request to extend the period of validity of Guarantee and also the claim period. In this context, he placed reliance on document dated 4th July, 1994 from the plaintiff to M/s. Impression enclosing the Letter of Credit No. 70 dated 15th June, 1994 for supply of 25,000 Metric Ton clinkers as per the contract with the original amendment Nos.1 and 2 to the said Letter of Credit and requesting M/s Impression to extend the Performance Guarantee in reference (Ex.PW1/21); document dated 4th July, 1994 from the plaintiff to M/s. Impression enclosing the Letter of Credit No. 71 dated 15th June,

1994 for supply of 25,000 Metric Ton clinkers as per the contract with the original amendment Nos.1 and 2 to the said Letter of Credit and requesting M/s Impression to extend the Performance Guarantee in reference (Ex.PW1/22) and document dated 04.07.1994 from the plaintiff to M/s. Impression enclosing the carbon copy of Letter of Credit No. 70 dated 15th June, 1994 for supply of 25,000 Metric Ton clinkers as per the contract with the original amendment Nos.1 and 2 to the said Letter of Credit and requesting M/s Impression to extend the Performance Guarantee in reference (Ex.PW1/23). Significantly, this documents contains the following endorsement:-

CC: The Jammu & Kashmir Bank Ltd. in reference to your B.G. No. 18/94 - for information.

KIND ATTN: Branch Manager/The Jammu & Kashmir Bank Ltd., Lajpat Nagar Branch, New Delhi.

31. The learned counsel submitted that the factum of delivery of the Letter of Credit to the defendants on 4th July, 1994 is further bolstered by the amendment letters Ex.P-3, Ex.P-4, Ex.P-5 and Ex.P-6, all admitted documents. He submitted that the original Bank Guarantee as issued by the defendants stipulated that the Bank Guarantee would take effect on receipt of the Letter of Credit by 29th May, 1994. Since the Letter of Credit could not be received by the said date, by amendment the period for receipt of the Letter of Credit was extended to 6th June, 1994, other terms and conditions remaining the same (Ex.P-3). Since the Letter of Credit could not be received by the said extended date, by amendment the period for receipt of the Letter of Credit was extended to 20th June, 1994 other conditions remaining the same (Ex.P-4). The said amendment was forwarded by the defendants on 08.06.1994 (Ex.PW1/14). On 30th June, 1994, by amendment, the period for receipt of the Letter of Credit was again extended to 7th July, 1994, other terms remaining the same (Ex.P-5). On 4th July, 1994, as stated hereinabove, Letters of Credit in the name of M/s. Impression by the plaintiff''s bankers were transmitted to M/s. Impression who, in turn, forwarded the same to the defendants (Ex.PW1/22 and Ex.PW/23). He pointed out that on 01.08.1994 an amendment was necessitated on account of the furnishing of the Letter of Credit. On the said date, the defendants extended the validity and claim period of the guarantee as per Clause 3 and Clause 6 of the Bank Guarantee No. 18/94 to 30th August, 1994 and 30th September, 1994 respectively vide document Ex.P-6. Significantly, there was no extension of the period of furnishing the Letter of Credit or reference to the ''Letter of Credit to be received by the Bank'' as the same had already been furnished by M/s. Impression to the defendants.

32. Mr. Lal, the learned counsel for the plaintiff further contended that the defendants have from time to time taken contradictory stands. In reply to the legal notice dated 05.12.1994 (Ex.P-8), there is a total denial of receipt of the Letters of Credit. In his written statement at paragraph 18, the defendants claimed not to have received the Letters of Credit and amendments by

30.08.1994. However, they claimed that one Letter of Credit for US $ 11,43,750 was received by them from M/s. Impression on 01.09.1994 but the same was defective. In the affidavit filed on 22.04.2002 pursuant to the orders of this Court, the defendants claimed to have received one Letter of Credit No. 0070 from M/s. Impression after the expiry of the guarantee, and stated that the same after negotiation was returned to M/s. Impression, but no records were available with the defendants to support its stand. In yet another affidavit dated 26.07.2005, it is stated by the defendants that after negotiation a certain sum had been credited to the account of M/s. Impression and that the said entry had been reported to the Reserve Bank of India under GR-I No. AG 211506, which had been sent to Reserve Bank of India with the relevant R-returns. The defendants were, however, not in possession of the copy of the GR-I form as it was not mandatory to preserve the record permanently.

33. Mr. S.P. Singh, the learned senior counsel for the defendants, on the other hand, contended that there is no direct evidence on the record to prove that the Letters of Credit were in fact received by the Bank and the plaintiff, in fact, had sought to establish the receipt thereof by a process of interpretation, relying upon the amendments to the Bank Guarantee and the fact that the last amendment did not make any reference to the Letter of Credit. He urged that the plaintiff''s contention that since they had sent the Letters of Credit to M/s. Impression, M/s. Impression must have conveyed it to the Bank is not supported by any evidence at all that M/s. Impression as a matter of fact had sent the Letters of Credit to the Bank and the Bank had received the said Letters of Credit. The Bank Guarantee was to become effective and enforceable only on the receipt of the Letters of Credit, which were to be received by 29.05.1994. As per Clause 3, the validity of the Bank Guarantee was for a period of 60 days and within that period 30 days was stipulated for making the claim. Referring to documents Ex.P-3, Ex.P-4, Ex.P-5 and Ex.P-6, the learned counsel contended that Ex.P-6 predicated a comprehensive amendment showing that the Bank Guarantee was to become effective on receipt of the Letter of Credit by 30th August and remain valid till 30th September and that claims were to be made by 30th September.

34. Mr. Singh submitted that the consistent stand of the defendant Bank has been that the irrevocable Letter of Credit was not received by the Bank till 30th August, 1994 and the Bank Guarantee thus became ineffective. He further submitted that the reliance placed by the plaintiff on document Ex.PW1/23 is of no avail to the plaintiff, inasmuch as this document does not establish receipt of the Letter of Credit by the Bank either by 07.07.1994 or till 30.08.1994. There were missing links in the chain of evidence, in that it was not clear whether M/s. Impression had received the Letters of Credit by letter dated 04.07.1994, if so on which date, whether M/s. Impression had sent it to the defendant Bank and in what manner.

35. Finally, it was contended by the learned senior counsel for the defendants

that the invocation was not in terms of Clause 1 of the Bank Guarantee in that it was not mentioned which condition of the irrevocable Letter of Credit was breached. Reliance was placed by him in this context upon the decision of the Supreme Court in Hindustan Construction Co. Ltd. Vs. State of Bihar and Others, , to contend that where the invocation is not in terms of the Letter of Credit, the Bank is not obliged to honour the guarantee.

36. In response to the aforesaid contentions raised by Mr. Singh on behalf of the defendant Bank, Mr. Lal on behalf of the plaintiff submitted that there were no pleadings to suggest that the invocation was not in terms of the Bank Guarantee. He pointed out that there was not even a whisper in the reply sent by the defendants to the notice of the plaintiff to suggest that the invocation of the Bank Guarantee was not in accordance with the guarantee nor any plea to that effect was contained in the written statement. He pointed out that the defendants for the first time in the course of hearing had taken up the aforesaid plea. Only two points of defence had been taken by the defendants in the written statement, viz., that the defendants did not receive the Letter of Credit and that payment was to be made in US Dollars. There is no assertion in the written statement of rejection of the Letter of Credit as defective. The assertion is that no Letter of Credit was received and that if it was received it was on 1st September and, therefore, being beyond 30th August, 1994 the defendants stood discharged.

37. After hearing the detailed submissions of the counsel for the parties, the Court is not inclined to consider the contention of the learned senior counsel for the defendants that the invocation of the Bank Guarantee was not in terms of the Bank Guarantee, the said contention being beyond pleadings. This leaves the Court with the two issues raised in the present suit based on the pleadings of the parties, viz., whether the guarantee could be enforced despite the fact that it was stipulated that payment was to be made in US Dollars and not in Indian rupees; and whether the Letter of Credit was received by the defendants within the stipulated period as envisaged by Clause 2 of the Guarantee. As regards the first, the plaintiff has conclusively proved that in export transactions pertaining to member countries of the Asian Clearing Union including Bangladesh, the Foreign Exchange Regulations mandate that payment can only be made in Indian Rupees or the currency of the participating country and, therefore, not in US Dollars. The stipulation as contained in Para 2 of the Performance Guarantee in the instant case being contrary to the Reserve Bank Guidelines and the defendants having been informed about the same by the plaintiff, in my opinion, it would not be open to the Court to uphold the plea taken by the defendants with regard to the mode of payment, more so, when in cross-examination DW2, who at the relevant time was the Manager, Foreign Exchange of the defendant-Bank and signatory to the Guarantee extended to the plaintiff, has admitted in cross-examination that any such restriction in the Guarantee contrary to the directions would not be enforceable.

38. As regards the plea that the Letter of Credit was not received by the defendant-Bank within the stipulated period of time and, therefore, the Bank Guarantee never became operative in law, notwithstanding the various amendments issued, PW1 Shri Davinder K. Bhall categorically stated in the witness box that both Letters of Credit with amendments were delivered to M/s. Impression on 04.07.1994, and that M/s. Impression had delivered the same by hand to the defendants soon thereafter. In the cross-examination of DW1 - Mr. J.M. Rafique, it has been admitted by him that all extensions of the Bank Guarantee (Ex.P-3, Ex.P-4, Ex.P-5 and Ex.P-6) bear his signatures. On a query put to DW1, he could not explain why Ex.P-6 did not mention extension of the period for receipt of Letter of Credit. He stated that the Letter of Credit was received on 01.09.1994, which information was as per the case file of defendant-Bank. However, in his cross-examination, he stated that the Letter of Credit, received from M/s. Impression did not pertain to the Guarantee in suit, and that the Letter of Credit received from M/s. Impression on 01.09.1994 and negotiated by the Bank did not pertain to any Bank Guarantee.

39. From the aforesaid, in my view, it is clear that the defendants have all along been adopting oscillating stands. The initial stand of the defendants, as noted above, was that they had not received any Letter of Credit which is falsified by their own subsequent affidavits and statement on oath of their witness. Their subsequent stand that only one of the Letters of Credit was received on 01.09.1994 also is not supported by any documentary evidence, which documentary evidence the Bank is required to maintain in the normal course of its business, such as Receipt and Despatch Registers, entries in relevant records and correspondence with the Reserve Bank of India. The bald plea of the defendants that no records are available with them as it is not mandatory to preserve the record permanently is altogether unsustainable, more so, as the Guarantee in the instant was invoked in the year 1994. The invocation received by the defendant-Bank was in fact dated 24.09.1994 (Ex.A-1). Admittedly, the defendant-Bank had communicated with the Reserve Bank of India and had sent to the Reserve Bank of India the relevant R-returns in the same month, i.e., in September, 1994. When the defendant-Bank was well aware that the Bank Guarantee had been invoked by the plaintiff, what justification did it have for destroying its records which ought to have been preserved by it for the purpose of production by it in Court?

40. Thus, in my view, the defendants, who admit receipt of the Letter of Credit are bound to make payment under the Guarantee. It is also abundantly clear that the defendant-Bank is evading payment of the amount due to the plaintiff under the Bank Guarantee issued by it by raising pleas which are clearly unsustainable and unsubstantiated by its own records, apart from being contradictory to each other. The Court, therefore, feels impelled to hold that the defendants are not entitled to repudiate their liability to make payment on the grounds raised by it. In view of the abovesaid, issue Nos.2, 3, 4, 5 and 6 are answered in favour of the plaintiff and against the defendants.

41. On the aspect of interest, the plaintiff by its legal notice dated 18.10.1994 had notified the defendants that under the Interest Act it was claiming interest at the rate of 24% per annum with quarterly rests being the prevalent commercial and market rate of interest. Before the Court, the plaintiff has claimed the same rate of interest and deposed to the same in its evidence. The plaintiff''s counsel accordingly prays that the issue of interest be also decided in favour of the plaintiff and the plaintiff be held entitled to a decree in the sum of Rs. 23,73,364.38 (being the amount of Rs. 21,50,000/- under the Guarantee with interest @ 24% per annum with quarterly rests from 24.09.1994 till the filing of the suit on 15.03.1995) and pendente lite and future interest @ 24% per annum with quarterly rests till payment, with costs.

42. On the totality of fact and circumstances, the Court is of the view that the plaintiff having proved its case is entitled to a decree in the sum of Rs. 23,73,364.38 (Twenty three lacs seventy three thousands three hundred sixty four and thirty eight paisa). This amount is inclusive of interest @ 24% per annum with quarterly rests from 24.09.1994 till the filing of the suit on 15.03.1995. Insofar as pendente lite and future is concerned the plaintiff is entitled to the same at the uniform rate of 9% per annum with quarterly rests till payment. The plaintiff shall also be entitled to costs in the suit. CS(OS) 698/1995 is disposed of in the above terms.

