
(2011) 08 GUJ CK 0031

In the Gujarat High Court

Case No : Letters Patent Appeal No. 51 of 2010 in Spl. Civil Appli. No. 163 of 2008

M/s. Garg Casteels (P) Ltd., Bhavnagar

APPELLANT

Vs

State Trading Corporation of India Ltd. and Another

RESPONDENT

Date of Decision : 30-08-2011

Acts Referred:

Constitution of India, 1950 — Article 226
Contract Act, 1872 — Section 4, 5

Citation : (2012) 1 GLR 598

Hon'ble Judges : S.J. Mukhopadhaya, C.J.; J. B. Pardiwala, J

Bench : Division Bench

Advocate : B.T. Rao with P.S. Chaudhary, for the Appellant; R.K. Anand with Paritosh Calla for Respondent No. 1 and Tarak Damani, for the Respondent

Final Decision : Dismissed

Judgement

J.B. Pardiwala, J.—In this appeal, the appellant-original petitioner seeks to challenge judgment and order dated 17th July, 2009, passed by the learned Single Judge, whereby the learned Single Judge rejected the petition. The facts relevant for the purpose of deciding this appeal can be summarized as under :

1.1. Appellant-original petitioner preferred writ petition under Art. 226 of the Constitution of India and prayed for appropriate directions on respondent No. 1 to refund forthwith Rs. 300 lacs with interest thereon at the rate of 18% per annum from the date of invocation of the Bank Guarantees till receiving that amount from respondent No. 2. In the alternative, it was also prayed that respondent No. 2 be directed to reimburse and pay forthwith the amount of Rs. 300 lacs with interest at the rate of 18% per annum, to the appellant-petitioner. In substance, the petition was preferred for the recovery of an amount simpliciter.

1.2. It is evident from the nature of the relief as prayed for in the writ petition that the dispute between the parties relates to contractual matters. Furthermore, it also appears that the disputes are of such a nature which cannot be adequately

resolved on affidavits by this Court.

1.3. It appears that one M/s. Samraj Exim (India) Pvt. Ltd.(S.E.I.P.L. for short) of Bombay had entered into an export contract bearing No. GN/20050025 with M/s. Creatway Pte. Ltd., Singapore, a sister concern of S.E.I.P.L., for export of 60,000 metric tons of iron ore. The said S.E.I.P.L. had entered into a Memorandum of Understanding with respondent No. 1 i.e. State Trading Corporation of India Limited (S.T.C.) on 13-4-2005 whereby the aforesaid contract was assigned to respondent No. 1, who undertook to carry out the said transaction of export contract on behalf of S.E.I.P.L.

1.4. We have also noticed that though the entire writ petition talks about the agreements and correspondence between the appellant and one M/s. Samraj Exim (India) Pvt. Ltd., (S.E.I.P.L. for short) of Mumbai, strangely M/s. S.E.I.P.L. has not been impleaded as party-respondent in the main writ petition. Prima facie it appears from the record of the case that M/s. S.E.I.P.L. is a necessary party to the present petition as all the links of S.T.C. i.e. respondent No. 1 were with M/s. S.E.I.P.L. and not with the appellant.

1.5. It appears that as per the case of the appellant-petitioner, on 14-4-2005, M/s. Creatway Pte. Limited made an advance payment of 37,20,000 US \$ to respondent No. 1 and respondent No. 1 realized payment in advance to S.E.I.P.L. of Bombay against post dated cheques and accordingly, respondent No. 1 was secured and hence, at that time, there was no need for any Bank guarantee. Thereafter, about 44,000 metric tons of iron ore was shipped through M. V. Gangasagar and that too not to M/s. Creatway Pte. Ltd. but to M/s. Sinochem International Corporation at Beijing and another shipment was shipped through M. V. Gangasagar to M/s. Genera Nice Resources at Hong Kong.

1.6. It is also the case of the appellant-petitioner that the Chairman of S.E.I.P.L., namely, Mr. Somani approached the appellant-petitioner in February, 2006 with a deal that he had a standing order for export of iron ore to M/s. Creatway, China and for that purpose, he had already entered into an agreement with S.T.C.-respondent No. 1 and he misrepresented that contracted iron ore was yet to be shipped and for that purpose, Bank guarantee was required to be given as security for the said export and accordingly obtained on behalf of the appellant-petitioner the Bank guarantees dated 7-3-2006 and 21-3-2006 for Rs. 250 lacs and Rs. 50 lacs respectively on an assurance that there would be profit of Rs. 150 lacs in this deal and out of that profit, appellant-petitioner would be given Rs. 50 lacs towards profit share.

1.7. It appears that respondent No. 1 invoked the Bank guarantees and were prematurely encashed on 9-5-2006 by sending its officer personally from Bombay to Bhavnagar to get the things done from respondent No. 2 Bank. It is at this stage that the appellant-petitioner preferred Spl.C.A. No. 163 of 2008 redressing the grievance that the said two Bank guarantees were for margin money for export of iron ore and for proper execution of the M.O.U. implying that

they were for future exports and not for recovery of any dues of respondent No. 1-S.T.C. In view of the advance payment already made and in view of the shipment to Messrs Sinochem International Corporation, Baijing and to Messrs Genera Nice Resources at Hong Kong, who are other than Messrs Creatway Pte. Limited i.e. foreign buyer as per the contract dated 18-3-2005, the appellant's liability under the two subsequent Bank guarantees could not have been invoked, and therefore, there was no basis to invoke the said Bank guarantees.

2. The learned Single Judge while rejecting the writ petition i.e. Spl.C.A. No. 163 of 2008 focused itself mainly on the question as to whether Bank guarantees were invoked for the same contract or for different contract because the main contention of the appellant-petitioner was that the Bank guarantees were invoked for the alleged breach of altogether a different contract i.e. contract No. 34, whereas the Bank guarantees were given for due performance of contract No. 25, which was not permissible. Learned Single Judge, after looking into the record of the case and considering the rival submissions of the respective parties came to the conclusion that it cannot be said that the Bank guarantees were invoked in connection with different contract. Learned Single Judge also took the view that irrespective of the fact that the Bank guarantees were rightly invoked for the breach of M.O.U. dated 13-4-2005, a petition under Art. 226 of the Constitution would not be maintainable as it would be a disputed question of fact as to whether the Bank guarantees are invoked for the alleged breach of different contract i.e. contract No. 34 or not, more particularly when respondent No. 1 disputed this proposition and prima facie established by producing cogent and unequivocal evidence that there was no breach of a different contract, but the same contract as contemplated under M.O.U. dated 13-4-2005.

3. We have heard learned Advocate Mr. B. T. Rao, appearing with Mr. P.S. Chaudhary for the appellant, learned Senior Counsel Mr. R.K. Anand, appearing with Mr. Paritosh Calla for respondent No. 1 and Mr. Tarak Damani, learned Advocate appearing for respondent No. 2-Bank. Learned Counsel for the appellant put forward the following contentions :

3.1. Learned Counsel for the appellant would contend that Bank guarantee was given for the specific M.O.U. dated 13-4-2005. He submitted that S.E.I.P.L. had entered into contract with foreign buyer i.e. China International on 21-3-2005 for which Letter of Credit was opened on 8-4-2005 through Buangdong Development Bank, Beijing. For the said contract M.O.U. was executed on 12-4-2005 and the total contract price was U.S.D. 37,20,000. However, the contract was amended on account of reduction of rate from U.S.D. 62 to U.S.D. 60 per metric tonne on 29-4-2005, followed by a second amendment on 12-5-2005 to reduce the quantity from 60,000 M.T. to 50,000 M.T. and accordingly the contract price came to U.S.D. 30,00,000.

3.2. Learned Counsel submitted that Creatway Pte. Ltd. and M/s. Samraj Exim entered into contract on 18-3-2005 being Contract No. GN 20050025 for export of Iron Ore to General Nice Resources Ltd. for 60,000 M.T. at 60 U.S.D. per M.T.

and the M.O.U. dated 13-4-2005 was executed for this contract. Creatway Pte. Ltd., has further made arrangement with Genara Nice Resource Ltd. which is the ultimate purchaser of the material and managed to get L.C. dated 12-4-2005 which has been endorsed in favour of S.T.C. Clause 45 of the L.C. is price per unit. Total value of the goods is 36,00,000 U.S.D. The date is very material in the present matter as particular cargo was shipped in M. V. Taji Staror on 29-3-2005 by B/L Nos. 1 and 2. This has been admitted by S.T.C. in its affidavit filed by them. This transaction is complete and there is no dispute about this transaction. S.T.C. has produced necessary documents to show that L.C. was opened on 12-4-2005 for an amount of U.S.D. 36,00,000.

3.3. He submitted that on 21-3-2005, Creatway entered into contract for supply of 60,000 M.Ts. of iron ore at U.S.D. 62, totalling to 37,20,000 U.S.D. In the said contract, one of the conditions was that the material will be despatched against 100% amount on Irrevocable Letter of Credit. This contract dated 21-3-2005 has been converted into M.O.U. dated 12-4-2005. S.E.I.P.L. entered into M.O.U. with S.T.C. on 12-4-2005. Creatway Pte. Ltd., obtained Letter of Credit from Gong Dong Development Bank, Beijing dated 8-4-2005 and it has been issued by China International Telecommunication Construction Corporation Ltd. The unit price is 62 U.S.D. per M.T. which comes to 37,20,000 U.S.D. for 60,000 M.T. He submitted that the appellant has to co-relate the contract dated 21-3-2005, M.O.U. dated 12-4-2005 with the amount of L.C. established by China International Telecommunication Construction Corporation with whom Creatway has entered into contract. In fact that Creatway has sold the material to the Chinese party and Chinese party is not a party to the base contract between S.E.I.P.L. and Creatway.

3.4. He would further submit that respondent No. 1-S.T.C. is trying to take advantage of this situation. He further submitted that for this purpose and for taking undue advantage they need to show that the separate contract or an independent contract was entered into between the Creatway Pte. Ltd., and the Chinese party for the sale and purchase of Iron Ore which the respondent No. 1-S.T.C. has not produced but they have produced a letter by interpolating the contract number and thereby have tried to show Contract No. GN 20050034 instead of GN 20050025. He further submitted that in the present case the goods were dispatched on 14-6-2005 approximately 44000 Metric Tons, Bills of Lading No. 1 to China International Tele-communication Construction Corporation. He submitted that this was without a valid L.C. as L.C. expired on 30-5-2005. He submitted that having realized its mistake, respondent No. 1-S.T.C. wrote a letter to C.I.T.C.C. dated 17-6-2005 stating that they have not received the amendment in the L.C. and whether C.I.T.C.C. had sent any amendment of L.C. directly to the Bankers of S.T.C. He submitted that the contract dated 21-3-2005 has been endorsed in favour of S.T.C. then under such circumstances S.T.C. should have written to S.E.I.P.L. and Creatway Pte. Ltd. However, S.T.C. directly approached the C.I.T.C.C.

3.5. He further submitted that C.I.T.C.C. refused to take delivery of the cargo because it was shifted after last date of shipment i.e. 30-5-2005. He submitted that a false and fabricated amendment of L.C. was given by S.E.I.P.L. and Creatway Pte. Ltd. He alleged that it is a false and fabricated document obtained by S.E.I.P.L. and Creatway Pte. Ltd., wherein the Officers of S.T.C. connived,, and therefore, S.T.C. wrote letter directly to C.I.T.C.C. about the genuineness of the document which was not replied by C.I.T.C.C.

3.6. He further submitted that on perusal of letter dated 13-6-2005 it is evident that S.T.C. made additional payment to S.E.I.P.L. to the tune of Rs. 2,24,82,787/-, and therefore, S.T.C. called upon S.E.I.P.L. to arrange for 10% as margin money in the form of cash margin or Bank Guarantee along with Mate Certificate in proof of loading of 44000 M.Ts. of cargo so as to enable the S.T.C. to release the Ocean freight for 100% of value to Arya Shipping in terms of their letter dated 9-6-2005.

3.7. He further submitted that C.I.T.C.C. refused to take delivery giving rise to dispute between the owner of Vessel and Creatway Pte. Ltd., for Ocean freight. As a result of which the Shipping Company enforced with lean on the entire cargo and did not allow to discharge the cargo at the port of discharge. He further submitted that immediately the said contract was cancelled and Creatway Pte. Ltd. found a new buyer i.e. Sinochem International Corporation and Contract No. GN 20050034 dated 4-7-2005 was effected. This contract is signed by Mr. Rajiv Samani on behalf of Creatway Pte. Ltd. in his capacity as Director of Creatway Pte. Ltd. He submitted that Mr. Rajiv Samani is also Chairman & Managing Director of S.E.I.P.L. The learned Counsel requested the Court to peruse new provisional commercial invoice released by S.T.C. on 6-7-2005 with Contract No. GN 20050034 dated 4-7-2005 for 44000 M.Ts. of Iron Ore. Inviting attention of this Court to Pages 362 and 364 of the Paper Book, the Counsel submitted that thus, it can be seen that the material was at Port Lianyungang, China without L.C. He submitted that as there was dispute with regard to freight, Sinochem International Corporation retained US \$ 7,25,000/- with them and made it clear that the same would be released only on settlement of dispute between Creatway Pvt. Ltd. and Arya Shipping after necessary award from Singapore Arbitration.

3.8. It is further submitted that the respondent No. 1-S.T.C. wrongly gave consent for retention of US \$ 7,25,000/- because S.T.C. did not have any contract with Shipping Company or Creatway Pte. Ltd., or Sinochem International Corporation. This is how the Counsel wants to establish that the S.T.C.*s Officers are involved in the present case. He alleged that they have siphoned off public money and S.T.C. being a Government company, without protecting Government's interest favoured S.E.I.P.L. and Creatway Pte. Ltd.

3.9. He further submitted that a letter has been produced by S.T.C. which is written by S.T.C. to Sinochem International Corporation, wherein contract number has been interpolated. Creatway Pte. Ltd., entered into contract with

Sinochem being No. GN 20050034 and S.T.C. has tried to prove by interpolating the contract number from GN 20050034 to GN 20050025 to establish that the material of Contract No. GN 20050025 has been dispatched on 14-6-2005. He vociferously submitted, that therefore, S.T.C. is guilty of creating a forged document because the photo copy of the very document in original is produced by S.T.C. at Page 376 of the Paper Book. Both the letters have been produced by S.T.C. itself as per the say of the learned Counsel.

3.10. He submitted that S.T.C. has committed fraud by not taking action against the S.E.I.P.L. and Creatway Pte. Ltd. According to the learned Counsel S.T.C. was in possession of post-dated cheque issued by S.E.I.P.L. amounting to Rs. 3.00 crores, but S.T.C. did not deposit the cheque and kept with them. He alleges that S.T.C. was fully aware that this cheque will not be honoured, and therefore, S.T.C. has committed fraud.

3.11. He submitted that the appellant came into picture for the first time in the third week of February, 2006 to a common business friend being Chairman of S.E.I.P.L. Mr. Rajiv Samani who is also a Director of Creatway Pte. Ltd. He submitted that the appellant was shown one document being L.C. which is also forged and fabricated. There was no Contract Number in the said L.C. On the basis of the said document Bank Guarantee was given with the specific condition that the Bank Guarantee for margin money can be encashed only if there is breach of M.O.U. dated 14-3-2005 for Contract No. GN 20050025. He submitted that on 19-5-2006 S.T.C. enforced the Bank Guarantee. All these facts were brought to the notice of S.T.C. by way of representation but there was no response at the end of S.T.C., and therefore, petition had to be preferred being Special Civil Application No. 163 of 2008. Lastly he submitted that the Bank Guarantee was given by the appellant for M.O.U. dated 13-4-2005 with respect to the Contract No. GN 20050025 dated 18-3-2005 endorsed by S.E.I.P.L. in favour of the appellant and the said M.O.U. is with S.T.C. He submitted that any consequences flowing from the said M.O.U. would directly and adversely affect the appellant, and therefore, the appellant is having privity of contract. If that is the case then S.T.C. wrongly invoking the Bank Guarantee though there was no loss for the contract dated 18-3-2005 of M.O.U. dated 13-4-2005 as all the transactions were completed before 7-3-2006 i.e. the date of issuance of the Bank Guarantee.

3.12. Learned Counsel further submitted that S.T.C. could not have raised any objection with regard to maintainability of the petition on the ground that it pertains to refund of Bank guarantees.

4. Learned Counsel for the appellant relied on the following case-law :

- (1) Vinitec Electronics Private Limited Vs. HCL Infosystems Limited,
- (2) BSES Ltd. (Now Reliance Energy Ltd.) Vs. Fenner India Ltd. and Another,
- (3) AIR 1997 1644 (SC)

- (4) Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company,
- (5) ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others,
- (6) Karnataka State Forest Industries Corporation Vs. Indian Rocks,
- (7) Corporation Bank v. Saraswati Abharansala, 2009 (1) SCC 540
- (8) Godawari Sugar Mills Ltd. v. State of Maharashtra, 2011 (2) SCC 439 (9) Zonal Manager, Central Bank of India v. Devi Ispat Ltd., 2010 (11) SCC 386
- (10) M.D., H.S.I.D.C. and Others Vs. Hari Om Enterprises and Another,
- (11) Indian Bank v. Godhra Nagrik Co-op. Credit Society Ltd., 2008 (12) SCC 541
- (12) Everest Holding Ltd. v. Shyam Kumar Shrivastava, 2008 (16) SCC 774
- (13) M.P. Housing Board Vs. Progressive Writers and Publishers,
- (14) Shakti Bhog Foods Ltd. v. Kola Shipping Ltd., 2009 (2) SCC 135

5. Per contra, learned Senior Counsel for respondent No. 1-State Trading Corporation put forward the following contentions :

5.1. Learned Counsel for respondent No. 1 vehemently submitted that the writ petition under Art. 226 of the Constitution itself was not maintainable for the reason that the relief prayed for substantially is for refund of Bank guarantee amount which Bank guarantee was encashed by S.T.C. in accordance with law. Counsel would submit that if at all the relief prayed for is to be granted, the same has to be adjudicated in a civil suit and not in the form of a writ petition. He would submit that it is a settled position of law that such a relief cannot be granted while exercising writ jurisdiction, more particularly when there are highly disputed questions of fact for which oral evidence has to be led by all parties concerned before the competent Civil Court.

5.2. Learned Counsel would also contend that there was no privity of contract between S.T.C. and the appellant. He would submit that it is evident from the list of dates in the writ petition that the contract was between S.T.C. and Messrs S.E.I.P.L. Appellant entered into a contract agreement with Messrs S.E.I.P.L. and had furnished the Bank guarantee on behalf of Messrs S.E.I.P.L. He would submit that as a matter of fact, S.T.C. could not have even been impleaded in the petition as one of the respondents. Counsel would also submit that even on the ground of territorial jurisdiction, the writ petition could not have been entertained as no cause of action can be said to have arisen within the territorial jurisdiction of this Hon"ble High Court.

5.3. Counsel would further contend that the dispute, if any, raised by the appellant arises from a contract. In a catena of decisions, it has been settled that writ jurisdiction is not to be exercised in cases where contractual obligations are sought to be enforced. He would further contend that the petition itself raises

complicated issues and disputes which cannot be gone under writ jurisdiction.

5.4. Learned Counsel vociferously contended that though the entire writ petition talks about the agreements and correspondence between appellant and S.E.I.P.L., strangely Messrs S.E.I.P.L. has not been impleaded as party-respondent in the main writ petition. He would submit that Messrs S.E.I.P.L. is a necessary party to the present petition as all dealings of S.T.C. were with Messrs S.E.I.P.L. and not with the appellant.

6. Learned Counsel for respondent No. 1 relied upon the following case law :

- (1) Suganmal Vs. State of Madhya Pradesh and Others,
- (2) National Highway Authority of India Vs. Ganga Enterprises and Another,
- (3) Haryana Urban Development Authority and Another vs. Anupama Patnaik, (2000) 10 SCC 649
- (4) State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd.,
- (5) AIR 1997 1644 (SC)
- (6) Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company,

7. Having given our anxious thoughts and considerations to the rival contentions of the respective parties and having perused the record of the case and the judgment and order passed by the learned Single Judge rejecting the petition, we are of the view that considering the nature of the dispute and highly disputed questions of fact involved, learned Single Judge rightly rejected the petition and refused to grant any relief as prayed for by the appellant. Our prima facie examination of the matter reveals as under :

7.1. It is an undisputed fact that three Memorandum of Understandings (M.O.U.s.) were signed as under :

- (a) on 11-4-2005 - 45,000 M.Ts.
- (b) on 12-4-2005 - 60,000 M.Ts.
- (c) on 13-4-2005 - 60,000 M.Ts.

It is also clear that all the three M.O.U.s. were supported by orders and Letter of Credits. We have noticed that in the compilation filed along with the list of documents, all of these documents are on record. It is also undisputed that all the three M.O.U.s. were submitted to the State Trading Corporation, respondent No. 1 for approval on 13-4-2005. We have noticed that the approval by the Committee of Management of the S.T.C. was accorded on 19/20-4-2005, which is apparent from document at page 282. By the time the approval was given by the top management of respondent No. 1-S.T.C., the Letter of Credit covering M.O.U. dated 11-4-2005 had lapsed. In accordance with M.O.U. dated 12-4-2005, the goods were shipped under B/L 30,000 MTs. and 36,000 M.Ts. The documents

were negotiated in accordance with Letter of Credit and the payments were duly received. This is evident from the document at page 299 of the paper-book. The details of the payment in full satisfaction of the M.O.U. dated 12-4-2005 is also on record.

7.2. In pursuance to the M.O.U. dated 13-4-2005, Letter of Credit was given, which is on the record, as evident from the document at page 330. The date of expiry is shown as 5-6-2005. It appears that the Letter of Credit was further alleged to have been amended extending validity till 20th June, 2005, as it appears from the photocopy, which is placed on record at page 338. As the amendment by which the validity of Letter of Credit was extended, was given by Samraj personally and it was an unofficial copy, relying upon the said anticipated extension of Letter of Credit, the goods were shipped on 14-6-2005, by B/L dated 14-6-2005. In the said B/L, name of buyer has been shown as China International Telecommunication. The goods were shipped through vessel M.V. Gangasagar as per the instruction of Samraj issued vide letter dated 1-6-2005.

7.3. It also appears that by letter dated 17-6-2005, a request was made by respondent No. 1-S.T.C. to China International Telecommunication to send the said Letter of Credit through official channels and the photocopy of the Letter of Credit was annexed along with the said letter. By the time the goods landed at the port of destination, China International Telecommunication backed out of the contract and refused to lift the consignment in view of a dispute between shippers on the question of rate of freight. It also appears that in order to find and sell the goods, Samraj through their own company decided to sell the same shipment to Sinochem International Corporation. Prima facie it appears that for this sale and purchase contract by Sinochem International Corporation, the shipment details, Bill of Lading and name of vessel etc. were clearly indicated which would show that the same shipment which was sent under Contract No. 25 was sold to Sinochem under Contract No. 34. The original contract with China International Tele communication was vide Contract No. 25. It also appears prima facie that S.T.C. sent the shipment in terms of Contract No. 25 itself and in the name of and to China International Telecommunication. It is only because of not-lifting the goods by China International Telecommunication, there was no option left but to sell the consignment to Sinochem International Corporation. The dispute between shipper which was Arya Shipping Corporation in regard to the freight is clearly stated in terms of letter of Samraj dated 29-7-2005. It appears that S.T.C. was to receive an amount of Rs. 2,50,00,000 short for which the Bank Guarantee was asked for by S.T.C. from Samraj which ultimately came to Rs. 3 crores as per final calculation. This amount was retained by Sinochem International for payment to shipper.

7.4. The said Bank guarantee was asked for number of times which was duly given and submitted by Samraj to S.T.C. vide its letter dated 22-3-2006.

7.5. In our view, learned Counsel would be right in contending that there was no dishonest intention on the part of S.T.C., as S.T.C. had number of Bank

guarantees given to them by the appellant, which is not disputed.

7.6. It is well-settled that Letter of Credit is an independent contract between the Bank and the S.T.C. The Bank is not concerned with the dispute in relation to the contract in question. The Bank deals only with the documents. The moment the conditions of Bank guarantees are satisfied, the Bank is bound to honour the Bank guarantee and pay the money in case of invocation. It also appears that there is no privity of contract between S.T.C. and the appellant. Bank guarantees have been submitted by Samraj and if there is any dispute between appellant and Samraj, respondent No. 1-S.T.C. is not concerned. Learned Counsel for respondent No. 1 would contend, and to our mind very rightly that Bank has legally encashed the Bank guarantees. Therefore, the appellant may have remedy against Samraj and not against S.T.C.

8. We do not want to go further into other factual issues as we have observed earlier that there are highly disputed questions of fact. We are prima facie of the view that there is no case of fraud made out by the appellant and if at all fraud is to be alleged and proved, then a writ petition under Art. 226 of the Constitution would not be the right remedy.

9. In the case of State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd., , the Supreme Court while dealing with dispute as regards certain payments pursuant to a tender of contract, observed in Paragraphs 16, 18 and 21 as under :

16. Firstly, the contract between the parties is a contract in the realm of private law. It is governed by the provisions of the Contract Act or may be, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated, and could not have been agitated, in a writ petition. That is a matter either for arbitration as provided by the contract or for Civil Court as the case may be. whether any amount is due to the respondent from the appellant-Government under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not are all matters which cannot be agitated in or adjudicated upon in a writ petition. The prayer in the writ petition, viz., to restrain the Government from deducting particular amount from the writ petitioner's bill(s) was not a prayer which could be granted by the High Court under Art. 226. Indeed, the High Court has not granted the said prayer.

18. Accordingly, it must be held that the writ petition filed by the respondent for the issuance of a writ on mandamus restraining the Government from deducting or withholding a particular sum, which according to the respondent is payable to it under the contract, was wholly misconceived and was not maintainable in law [See the decision of this Court in Assistant Excise Commissioner and Others Vs. Issac Peter and Others, , where the law on the subject has been discussed fully.] The writ petition ought to have been dismissed on this ground alone.

21. There is yet another substantial reason for not entertaining the writ petition. The contract in question contains a clause providing inter alia for settlement of disputes by reference to arbitration (Clause 67 of the Contract). The Arbitrators can decide both questions of fact as well as questions of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Art. 226. The existence of an effective alternative remedy - in this case, provided in the contract itself - is a good ground for the Court to decline to exercise its extraordinary jurisdiction under Art. 226. The said Article was not meant to supplant the existing remedies at law but only to supplement them in certain well-recognised situations. As pointed out above, the prayer for issuance of a writ of mandamus was wholly misconceived in this case since the respondent was not seeking to enforce any statutory right of theirs nor was it seeking to enforce any statutory obligation cast upon the appellants. Indeed, the very resort to Art. 226 - whether for issuance of mandamus or any other writ, order or direction - was misconceived for the reasons mentioned supra.

10. In AIR 1997 1644 (SC) , once again dealing with a matter arising from dispute of the Bank guarantee, the Supreme Court took the view by observing in Paragraphs 12, 13, 15 and 16 as under :

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 co-exist in some cases. In the case of U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., , which was the case of works contract where the performance guarantee given under the contract was sought to be invoked, this Court, after referring extensively to English and Indian cases on the subject, said that the guarantee

must be honoured in accordance with its terms. The Bank which gives the guarantee is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not. The Bank must pay according to the tenor of its guarantee on demand without proof or condition. There are only two exceptions to this rule. The first exception is a case when there is a clear fraud of which the Bank has notice. The fraud must be of an egregious nature such as to vitiate the entire underlying transaction. Explaining the kind of fraud that may absolve a Bank from honouring its guarantee, this Court in the above case quoted with approval the observations of Sir John Donaldson, M.R. in *Bolivinter Oil S.A. v. Chase Manhattan Bank N.A.*, 1984 (1) All ER 351 at p. 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 charged". This Court set aside an injunction granted by the High Court to restrain the realisation of the Bank guarantee.

13. The same question came up for consideration before this Court in *Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others*, . The Court once again reiterated that a confirmed Bank guarantee/irrevocable letter of credit cannot be interfered with unless there is established fraud or irretrievable injury involved in the case. Irretrievable injury has to be of the nature noticed in the case of *Itek Corporation v. The First National Bank of Boston etc.*, (566 Fed Supp. 1210). On the question of fraud this Court confirmed the observations made in the case of *U.P. Co-operative Federation Ltd. (supra)* and stated that the fraud must be that of the beneficiary, and not the fraud of anyone else.

15. Our attention was invited to a number of decisions on this issue - among them, to *Hanmanta Daulappa Nimbale since deceased by his Heirs and LRs. Vs. Babasaheb Dajisaheb Londhe*, and *Hindustan Steel Workers Construction Ltd. Vs. G.S. Atwal and Co. (Engineers) Pvt. Ltd.*, as also to *Commissioner of Income Tax, Orissa Vs. Govinda Choudhury and Sons, Gosaniuagaon, Orissa*, . The latest decision is in the case of *State of Maharashtra and another Vs. M/s. National Construction Company, Bombay and another*, where this Court has summed up the position by stating, "The rule is well established that a Bank issuing a guarantee is not concerned with the underlying contract between the parties to the contract. The duty of the Bank under a performance guarantee is created by the document itself. Once the documents are in order the Bank giving the guarantee must honour the same and make payment ordinarily unless there is an allegation of fraud or the like. The Courts will not interfere directly or indirectly to withhold payment, otherwise trust in commerce internal and international would

be irreparably damaged. But that does not mean that the parties to the underlying contract cannot settle the disputes with respect to allegations of breach by resorting to litigation or arbitration as stipulated in the contract. The remedy arising ex-contractual is not barred and the cause of action for the same is independent of enforcement of the guarantee." The other recent decision is in *Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and another*, . Clearly, therefore, the existence of any dispute between the parties to the contract is not a ground for issuing an injunction to restrain the enforcement of Bank guarantees. There must be a fraud in connection with the Bank guarantee. In the present case, we fail to see any such fraud. The High Court seems to have come to the conclusion that the termination of the contract by the appellant and his claim that the time was of the essence of the contract, are not based on the terms of the contract and, therefore, there is a fraud in the invocation of the Bank guarantee. This is an erroneous view. The disputes between the parties relating to the termination of the contract cannot make invocation of the Bank guarantees fraudulent. The High Court has also referred to the conduct of the appellant in invoking the Bank guarantees on an earlier occasion on 12th April, 1992 and subsequently withdrawing such invocation. The Court has used this circumstance in aid of its view that the time was not of the essence of the contract. We fail to see how an earlier invocation of the Bank guarantees and subsequent withdrawal of this invocation make the Bank guarantees or their invocation tainted with fraud in any manner. Under the terms of the contract it is stipulated that the respondent is required to give unconditional Bank guarantees against advance payments as also a similar Bank guarantee for due delivery of the contracted plant within the stipulated period. In the absence of any fraud the appellant is entitled to realise the Bank guarantees.

11. In the case of *National Highway Authority of India Vs. Ganga Enterprises and Another*, , the Supreme Court observed in Paragraphs 6, 9 and 10 as under :

6. The respondent then filed a Writ petition in the High Court, for refund of the amount. On the pleadings before it, the High Court raised two questions viz. (a) whether the forfeiture of security deposit is without authority of law and without any binding contract between the parties and also contrary to Sec. 5 of the Contract Act and (b) whether the writ petition is maintainable in a claim arising out of a breach of contract. Question (b) should have been first answered as it would go to the root of the matter. The High Court instead considered question (a) and then chose not to answer question (b). In our view, the answer to question (b) is clear. It is settled law that disputes relating to contracts cannot be agitated under Art. 226 of the Constitution of India. It has been so held in the cases of *Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others*, , *State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd.*, and *Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others*, . This is settled law. The dispute in this case was regarding the terms of offer. They were thus contractual disputes in respect of which a Writ Court was not the proper forum. Mr. Dave, however, relied upon the cases of *Verigamto Naveen Vs.*

Government of Andhra Pradesh and Others, and Harminder Singh Arora Vs. Union of India (UOI) and Others, . These, however, are cases where the Writ Court was enforcing a statutory right or duty. These cases do not lay down that a Writ Court can interfere in a matter of contract only. Thus, on the ground of maintainability the petition should have been dismissed.

9. In our view, the High Court fell in error in so holding. By invoking the Bank guarantee and/or enforcing the bid security, there is no statutory right, exercise of which was being fettered. There is no term in the contract which is contrary to the provisions of the Contract Act. The Contract Act merely provides that a person can withdraw his offer before its acceptance. But withdrawal of an offer, before it is accepted, is a completely different aspect from forfeiture of earnest/security money which has been given for a particular purpose. A person may have a right to withdraw his offer but if he has made his offer on a condition that some earnest money will be forfeited for not entering into contract or if some act is not performed, then even though he may have a right to withdraw his offer, he has no right to claim that the earnest/security be returned to him. Forfeiture of such earnest/security, in no way, affects any statutory right under the Contract Act. Such earnest/security is given and taken to ensure that a contract comes into existence. It would be an anomalous situation that a person who, by his own conduct, precludes the coming into existence of the contract is then given advantage or benefit of his own wrong by not allowing forfeiture. It must be remembered that, particularly in Government contracts, such a term is always included in order to ensure that only a genuine party makes a bid. If such a term was not there even a person who does not have the capacity or a person who has no intention of entering into the contract will make a bid. The whole purpose of such a clause i.e. to see that only genuine bids are received would be lost if forfeiture was not permitted.

10. There is another reason why the impugned judgment cannot be sustained. It is settled law that a contract of guarantee is a complete and separate contract by itself. The law regarding enforcement of an "on demand Bank guarantee" is very clear. If the enforcement is in terms of the guarantee, then Courts must not interfere with the enforcement of Bank guarantee. The Court can only interfere if the invocation is against terms of the guarantee or if there is any fraud. Courts cannot restrain invocation of an "on demand guarantee" in accordance with its terms by looking at terms of the underlying contract. The existence or non-existence of an underlying contract become irrelevant when the invocation is in terms of the Bank guarantee. The Bank guarantee stipulated that if the bid was withdrawn within 120 days or if the performance security was not given or if an Agreement was not signed, the guarantee could be enforced. The Bank guarantee was enforced because the bid was withdrawn within 120 days. Therefore, it could not be said that the invocation of the Bank guarantee was against the terms of the Bank guarantee. If it was in terms of the Bank guarantee, one fails to understand as to how the High Court could say that the guarantee could not have been invoked. If the guarantee was rightly invoked,

there was no question of directing refund as has been done by the High Court.

12. In the case of *Suganmal Vs. State of Madhya Pradesh and Others*, , while answering the question as to whether a petition under Art. 226 of the Constitution praying solely for the refund of money alleged to have been illegally collected by the State as tax, is maintainable under Art. 226 or not, the Supreme Court answered in Paragraphs 6, 8 and 9 as under :

6. On the first point, we are of the opinion that though the High Courts have power to pass any appropriate order in the exercise of the powers conferred under Art. 226 of the Constitution, such a petition solely praying for the issue of a writ of mandamus directing the State to refund the money is not ordinarily maintainable for the simple reason that a claim for such a refund can always be made in a suit against the authority which had illegally collected the money as a tax. We have been referred to cases in which orders had been issued directing the State to refund taxes illegally collected, but all such cases had been those in which the petitioners challenged the validity of the assessment and for consequential relief for the return of the tax illegally collected. We have not been referred to any case in which the Courts were moved by a petition under Art. 226 simply for the purpose of obtaining refund of money due from the State on account of its having made illegal exactions. We do not consider it proper to extend the principle justifying the consequential order directing the refund of amounts illegally realised, when the order under which the amounts had been collected has been set aside, to cases in which only order for the refund of money are sought. The parties had the right to question the illegal assessment orders on the ground of their illegality or unconstitutionality, and therefore, could take action under Art. 226 for the protection of their fundamental right, and the Courts, on setting aside the assessment orders, exercised their jurisdiction in proper circumstances to order the consequential relief for the refund of the tax illegally realised. We do not find any good reason to extend this principle, and therefore, hold that no petition for the issue of a writ of mandamus will be normally entertained for the purpose of merely ordering a refund of money to the return of which the petitioner claims a right.

8. We may also refer to *Burmah Construction Co. Vs. The State of Orissa and Others*, , where it was prayed that an appropriate writ directing the State of Orissa to refund the amount of sales tax and penalty realised from the appellant be issued. Shah, J. speaking for the Court, -

The High Court normally does not entertain a petition under Art. 226 of the Constitution to enforce a civil liability arising out of a breach of contract or a tort to pay an amount of money due to the claimant and leaves it to the aggrieved party to agitate the question in a civil suit filed for that purpose. But an order for payment of money may sometimes be made in petition under Art. 226 of the Constitution against the State or against an officer of the State to enforce a statutory obligation.

9. We, therefore, hold that normally petitions solely praying for the refund of money against the State by a writ of mandamus are not to be entertained. The aggrieved party has the right of going to the Civil Court for claiming the amount and it is open to the State to raise all possible defences to the claim, defences which cannot, in most cases, be appropriately raised and considered in the exercise of writ jurisdiction.

13. In the case of Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company, , the Supreme Court while dealing with the issue of grant of injunction in the course of commercial dealings and unconditional Bank guarantee or Letter of Credit, observed in Paragraphs 10, 11 and 12 as under :

10. The law relating to grant or refusal to grant injunction in the matter of invocation of a Bank Guarantee or a Letter of Credit is now well settled by a plethora of decisions not only of this Court but also of the different High Courts in India. In AIR 1997 1644 (SC) , this Court considered its various earlier decisions. In this decision, the principle that has been laid down clearly on the enforcement of a Bank guarantee or a Letter of Credit is that in respect of a Bank guarantee or a Letter of Credit which is sought to be encashed by a beneficiary, the Bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. Accordingly this Court held that the Courts should be slow in granting an order of injunction to restrain the realization of such a Bank guarantee. It has also been held by this Court in that decision that the existence of any dispute between the parties to the contract is not a ground to restrain the enforcement of Bank guarantees or Letters of Credit. However, this Court made two exceptions for grant of an order of injunction to restrain the enforcement of a Bank guarantee or a Letter of Credit - (i) Fraud committed in the notice of the Bank which would vitiate the very foundation of guarantee; (ii) injustice of the kind which would make it impossible for the guarantor to reimburse himself.

11. Except under these circumstances, the Courts should not readily issue injunction to restrain the realization of a Bank guarantee or a Letter of Credit. So far as the first exception is concerned, i.e. of fraud, one has to satisfy the Court that the fraud in connection with the Bank guarantee or Letter of Credit would vitiate the very foundation of such a Bank guarantee or Letter of Credit. So far as the second exception is concerned, this Court has held in that decision that it relates to cases where allowing encashment of an unconditional Bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. While dealing with the case of fraud, this Court in the case of U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., held as follows :

The fraud must be of an egregious nature such as to vitiate the entire underlying transaction. While coming to a conclusion as to what constitutes fraud, this Court in the above case quoted with approval the observations of Sir John Donaldson, M.R. in *Bolivinter Oil SA v. Chase Manhattan Bank*, 1984 (1) ALLER 351 at page 352 which is as follows :

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 charged.

(Emphasis supplied)

12. In *Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others*, , it has also been held that a confirmed Bank Guarantee/irrevocable Letter of Credit cannot be interfered with unless there is established fraud or irretrievable injustice involved in the case. In fact, on the question of fraud, this decision approved the observations made by this Court in the case of *U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd.*, .

14. This judgment of the Supreme Court makes it very abundantly clear that fraud must be of an egregious nature to vitiate the underlying transaction. If fraud is at all alleged, then the evidence in that regard must be clear both as to the fact of fraud and as to the Bank's knowledge.

15. In the case of *Haryana Urban Development Authority and Another vs. Anupama Patnaik*, (2000) 10 SCC 649 , the Supreme Court while dismissing the Civil Appeal, observed as under :

It is rather strange that a simple claim for money was made in a writ petition and was entertained by the High Court and allowed. There are several disputed questions of fact. Each party is alleging that the other party is guilty of violation of the terms of the allotment. The matter is not covered by any statutory provisions. The writ petition itself was misconceived and not ought to have been entertained. Accordingly, this appeal is allowed and the judgment of the High Court is set aside. No costs.

16. We may now look into the case-law, which has been relied upon by the appellant in support of the above referred contentions. It is not necessary to discuss all the judgments which have been relied upon but some of them as regards "fraud" needs to be discussed.

17. In the case of *Vintec Electronics Pvt. Ltd. v. H.C.L. Infosystems Ltd.* (supra), while dealing with the dispute between the parties relating to invocation of the Bank guarantee furnished by the appellant in favour of respondent, the Supreme Court in Paras 11 and 12 held as under :

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 unconditional 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 AIR 1997 1644 (SC) , this Court observed that :

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 co-exist 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 Ltd. (Now Reliance Energy Ltd.) Vs. Fenner India Ltd. and Another, , this 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 AIR 1997 1644 (SC) (hereinafter "U.P. State Sugar Corpn.") this Court, correctly declared that the law was "settled".

18. This judgment has been relied upon to canvass two propositions of law - (1) a fraud in connection with a Bank guarantee would vitiate the very foundation of such a Bank guarantee and if there is a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so; (2) that if the Bank

guarantee is not unconditional or unequivocal in terms, then the party cannot claim any unfettered right to invoke Bank guarantee and cannot demand immediate payment from Bank.

19. In the case of U.P. State Sugar Corporation (supra), same principle has been reiterated that fraud in connection with a Bank guarantee would vitiate the very foundation of such a Bank guarantee.

20. In the case of Zonal Manager, Central Bank of India v. Devi Ispat Ltd. (supra), the Supreme Court while dealing with a matter arising out of contract, observed in Paragraph 24 as under :

24. After advertng to certain factual details, the Court framed the following question : ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others,

8. As could be seen from the arguments addressed in this appeal and as also from the divergent views of the two Courts below, one of the questions that falls for our consideration is whether a writ petition under Art. 226 of the Constitution of India is maintainable to enforce a contractual obligation of the State or its instrumentality, by an aggrieved party.

21. This judgment has been relied upon to canvass the proposition of law that merely because respondent No. 1-S.T.C. has raised a dispute in regard to the facts of the case, the Court entertaining such petition under Art. 226 of the Constitution is not always bound to relegate the parties to a suit and in an appropriate case, the writ Court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and or involve some disputed questions of fact.

22. In the case of A.B.L. International Ltd, v. E.C.G.C. (supra), the Supreme Court held in Paragraphs 16, 19, 27 and 51 as under :

16. A perusal of this judgment though shows that a writ petition involving serious disputed questions of facts which requires consideration of evidence which is not on record, will not normally be entertained by a Court in the exercise of its jurisdiction under Art. 226 of the Constitution of India. This decision again, in our opinion, does not lay down an absolute rule that in all cases involving disputed questions of fact the parties should be relegated to a civil suit. In this view of ours, we are supported by a judgment of this Court in the case of Smt. Gunwant Kaur and Others Vs. Municipal Committee, Bhatinda and Others, where dealing with such a situation of disputed questions of fact in a writ petition this Court held :

The High Court observed that they will not determine disputed question of fact in a writ petition. But what facts were in dispute and what were admitted could only be determined after an affidavit-in-reply was filed by the State. The High Court, however, proceeded to dismiss the petition in limine. The High Court is not

deprived of its jurisdiction to entertain a petition under Art. 226 merely because in considering the petitioner's right to relief questions of fact may fall to be determined. In a petition under Art. 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 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.

From the averments made in the petition filed by the appellants it is clear that in proof of a large number of allegations the appellants relied upon documentary evidence and the only matter in respect of which conflict of facts may possibly arise related to the due publication of the notification under Sec. 4 by the Collector.

In the present case, in our judgment, the High Court was not justified in dismissing the petition on the ground that it will not determine disputed question of fact. The High Court has jurisdiction to determine questions of fact, even if they are in dispute and the present, in our judgment, is a case in which in the interests of both the parties the High Court should have entertained the petition and called for an affidavit-in-reply from the respondents, and should have proceeded to try the petition instead of relegating the appellants to a separate suit.

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

27. From the above discussion of ours, 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 facts 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.

51. From the terms of the contract, we have noticed in Clause (6) as amended by the Addendum, consideration by way of barter of goods is not the sole consideration. The said clause contemplates alternate modes of payment of consideration one of them being by barter of goods and the other by cash payment in US \$. The terms of the insurance contract which was agreed between the parties were after the terms of the contract between the exporter and the importer were executed which included the Addendum, therefore, without hesitation we must proceed on the basis that the first respondent issued the insurance policy knowing very well that there was more than one mode of payment of consideration and it had insured failure of all the modes of payment of consideration. From the correspondence as well as from the terms of the policy, it is noticed that existence of only two conditions have been made as a condition precedent for making the first respondent-Corporation liable to pay for the insured risk, that is, (i) there should be a default on the part of the Kazak Corporation to pay for the goods received; and (ii) there should be a failure on the part of the Kazakhstan Government to fulfil their guarantee. This is clear from the terms of the insurance contract read with the letter of the first respondent dated 8th September, 1993 wherein at Clause 3A, it is stated : "Our liability will arise only after default has been established on the guarantee of the Ministry." From the above, it is clear both the grounds as put forth by the learned Counsel for the respondent before us as well as in the two letters of repudiation issued by the first respondent are unsustainable. In our opinion, the first respondent insured the export risk of the appellants in regard to the non-payment of the consideration for the tea exported whether it arose from the non-fulfilment of the barter clause or for the non-fulfilment of the cash payment clause. The argument advanced on behalf of the respondent that the appellants refused to accept the barter by goods offered by the first respondent which amounted to a default under the contract on the part of the appellants has no legs to stand in view of the clear language of the amended Clause (6) of the agreement which as noted above states that the obligation of the buyer, namely, Kazak Corporation to pay for the goods received by it in US \$ arises when payment by barter fails for "any reason whatever". The use of the words "any reason whatever" in the said amended clause includes the reasons of refusal by the appellants to accept the goods offered in barter. On the face of the said language of amended clause, there could be no room for two opinions at all in regard to the liability of the first respondent to pay for the loss suffered by the appellants even in cases where payment by barter fails at the instance of the appellant. The learned Counsel for the respondent contended for a correct interpretation of this amended clause and the other clauses of the contracts i.e. the contract of export and the contract of insurance between the parties there is

need for oral evidence being led without which a proper interpretation of this clause is not possible, therefore, it is fit case in which the appellants should be directed to approach the Civil Court to establish its claim. We find no force in this argument. We have come to the conclusion that the amended Clause (6) of the agreement between the exporter and the importer on the face of it does not give room for a second or another construction than the one already accepted by us. We have also noted that reliance placed on subclause (d) of the proviso to the insurance contract by the Appellate Bench is also misplaced which is clear from the language of the said clause itself. Therefore, in our opinion, it does not require any external aid much less any oral evidence to interpret the above clause. Merely because the first respondent wants to dispute this fact, in our opinion, it does not become a disputed fact. If such objection as to disputed questions or interpretations are raised in a writ petition, in our opinion, the Courts can very well go into the same and decide that objection if facts permit the same as in this case. We have already noted the decisions of this Court which in clear terms have laid down that mere existence of disputed questions of fact ipso facto does not prevent a writ Court from determining the disputed questions of fact. [See : Gunwant Kaur (supra)].

23. In the case of Federal Bank Limited v. V. M. Jog Engineering Ltd., 2001 (1) SCC 663, the Supreme Court in Paragraphs 56 and 57 observed as under :

56. Decided cases hold that in order to obtain an injunction against the issuing Bank, it is necessary to prove that the Bank had knowledge of the fraud.

57. Kerr, J. said in R.D. Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd., 1978 QB 146 (QB at p. 155) that irrevocable Letters of Credit are "the lifeblood of international commerce". He said :

Except possibly in clear cases of fraud of which the Banks have notice, the Courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration.... Otherwise, trust in international commerce could be irreparably damaged.

Denning M.R. stated in Edward and Owen Engg. Ltd. v. Barclays Bank International Ltd., 1978 (1) AllER 976 that "the only exception is where there is a clear fraud of which the Bank had notice". Browne, L.J. said in the same case "but it is certainly not enough to allege fraud, it must be established and in such circumstances. I should say, very clearly established". In Bolivinter Oil S.A. v. Chase Manhattan Bank, AllER at p. 352, it was said :

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 "before the injunction is vacated.

Thus, not only must "fraud" be clearly proved but so far as the Bank is concerned, it must prove that it had knowledge of the fraud. In *United Trading Corpn. S.A. v. Allied Arab Bank*, 1985 (2) Lloyd's Rep. 554, it was stated that there must be proof of knowledge of fraud on the part of the Bank at any time before payment. It was also observed that it :

would be sufficient if the corroborated evidence of the plaintiff usually in the form of contemporary documents and the unexplained failure of a beneficiary to respond to the attack, lead to the conclusion that the only realistic inference to draw was "fraud".

In *Guaranty Trust Co. of New York v. Hannay*, 1918 (2) QB 623 the Banker accepted the documents without any knowledge of fraud or falsification and it was held that the defendants could not counterclaim from the Bank. However, it would be the Banker's duty to refuse the documents which on their face bear signs of having been altered (See *Salomon and Naudus, Re.*) That was a CLE. contract. This Court in *I.T.C. Limited Vs. Debts Recovery Appellate Tribunal and Others*, also held that knowledge of the Bank as to the fraud or forgery had to be *prima facie* established.

24. In *United Commercial Bank Vs. Bank of India and Others*, , the Supreme Court has held in Paras 53 and 54 as under :

53. It is only in exceptional cases that the Courts will interfere with the machinery of irrevocable obligations assumed by Banks. They are the life-blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the Banking chain. Except possibly in clear cases of fraud of which the Banks have notice, the Courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The Courts are not concerned with their difficulties to enforce such claims; these are risks which the merchants take. In this case the plaintiffs took the risk of the unconditional wording of the guarantees. The machinery and commitments of Banks are on a different level. They must be allowed to be honoured, free from interference by the Courts. Otherwise trust in international commerce could be irreparably damaged.

54. Recently, again the Supreme Court in *The State Trading Corporation of India Ltd. Vs. Jainsons Clothing Corporation and another*, , clearly held that in a case of unequivocal and unconditional contract of Bank guarantee by supplier or his failure for shipment of goods; no injunction should be granted against the Corporation from invoking the Bank guarantee except in a clear case of fraud.

25. Thus, the right which the appellant wants to enforce by means of a writ is founded purely on a contract. It is a well recognized rule of law that the Court would not issue a writ of as order of mandamus in cases where contractual obligations are in dispute. Ferris in his "Extraordinary Legal Remedies" says on page 229 :

The duties enforceable by mandamus, although not necessarily public duties, are those imposed by law. Mandamus will not lie, therefore, to enforce a right founded purely on private contract, however clear that right may be.

26. It is well settled that duties imposed on Corporations, not by virtue of express provision of law or charter, or necessarily arising from the nature of the privileges or obligations conferred, but arising out of private contractual relations involving no question of public trust or duty, will not be enforced by mandamus, either against the trustees or the Corporation. The aggrieved party is left to as ordinary remedies, either at law or equity.

27. It is thus, obvious that in a case in appeal, the dispute relates to contractual matters between the parties, which cannot be properly resolved on the allegations of fraud made on the affidavits presented before us. Therefore, in such a matter the appellants have no right to seek a writ of mandamus from this Court since the matter pertains to contractual dispute between the parties. Furthermore, the disputes are of such a nature which cannot be adequately resolved on affidavits by this Court. Under these circumstances, we are clearly of the opinion that the appellant has no right to seek a writ of mandamus from this Court. Thus, the power conferred upon the High Courts under Art. 226 of the Constitution of India are discretionary in nature, which can be invoked for enforcement of any fundamental right and legal right and not for mere contractual rights arising out of an agreement particularly in view of the existence of an efficacious alternative remedy. The constitutional Court should insist upon the party to avail of the same instead of invoking the extraordinary writ jurisdiction of the Court. However, we do not propose to say that the Court is absolutely debarred from granting the appropriate relief to a citizen under peculiar and special facts notwithstanding the existence of an alternative efficacious remedy, provided such special circumstances are pleaded and established in the given case. In the absence of any constitutional or statutory rights being involved, a writ proceeding would not lie to enforce contractual obligations even if it is sought to be enforced against the State or to avoid contractual liability arising thereto. In the absence of any statutory right, Art. 226 of the Constitution cannot be availed to claim any money in respect of breach of contract or tort or otherwise.

28. In the conspectus of the ratio decidendi of the decisions referred to above as well as other decisions on the point, our understanding of the legal position is that ordinarily a petition under Art. 226 of the Constitution is not maintainable for enforcement of contractual rights. A Court of Writ may be loath to exercise discretion in contractual disputes where interference would not be in furtherance of public interest. It is settled law that discretionary powers are exercised not merely on the making out of a legal point but only when overwhelming public interest requires interference. Even if the action is challenged on the ground of arbitrariness and alleged fraud and the Court considers that disputed questions of fact have surfaced which cannot be effectively resolved on the basis of

affidavit evidence, it may in its wisdom refuse to exercise discretion. It is only in appropriate cases that the extraordinary jurisdiction ought to be exercised. What would be an appropriate case necessarily has to be decided on the basis of the facts presented and it would not be prudent to even attempt to lay down any guidelines in this behalf except where fraud is writ large on the face of the record and egregious in nature to vitiate the underlying transaction. In view of the aforesaid discussion, we hold that there is no merit in this appeal and the same deserves to be dismissed. Accordingly, the appeal is dismissed with no order as to costs.