
(1990) 04 DEL CK 0005

In the Delhi High Court

Case No : Interim Appeal No. 3945 of 1989 and Suit No. 1375A of 1989

Nangia Construction India (P) Ltd.

APPELLANT

Vs

National Buildings Construction Corporation Ltd. and Others

RESPONDENT

Date of Decision : 23-04-1990

Acts Referred:

Citation : (1990) 2 BC 51 : (1992) 73 CompCas 701 : (1990) 41 DLT 359 :
(1990) RLR 252

Hon'ble Judges : Mahinder Narain, J

Bench : Single Bench

Advocate : Shiv Dayal, D.K. Kapur, B.D. Sharma, P.P. Malhotra, Yogesh Malhotra
and A.K. Malhotra, for the Appellant;

Judgement

Mahinder Narain, J.

(1) By this order, I propose to deal with an interim application bearing I.A. No. 3945 of 1989, filed by the Nangia Construction (India) Private Ltd (hereinafter called the Petitioners) in Suit No. 1375-A of 1989.

(2) Suit No. 1375-A of 1989 has been filed u/s 20 of the Arbitration Act.

(3) The interim application I.A. No. 3945 of 1989 has been filed under action 41 read with Second Schedule of the Arbitration Act 1940, and section 151 of the Code Civil Procedure. By the said interim application, the. applicant/petitioner prays that respondent No. 1 National Buildings Construction Corporation Ltd., and respondent No. 2, the Chairman-cum-Managing Director of the National Buildings Construction Corporation Ltd., be restrained from terminating the contract which contains an arbitration clause, it is also prayed that the National Building Corporation Ltd. (hereinafter called "the NBCC"), be restrained from encashing to bank guarantees No. NP/G/16/136 and NP/G/16/137 dated 7.12.87/19.11.87, which are valid up to 30.4.90 and 30.6.92 respectively.

(4) Guarantee No. NP/G/16/136 dated 7.12.1987 is annexed as "Annexure-I" (at

page 46), and is a "security for compliance with his obligations in accordance with the Contract". This guarantee is called a performance guarantee, and guarantee No. NP/G/16/137 dated 19.11.87 is annexed as "annexure-J", and is relate to money advanced as "mobilization advance" the Petitioners.

(5) The Petitioners say that they are carrying on business as a private limited company at 58, Nehru Place, New Delhi, and that their Chairman- cum-Managing Director is Shri PC. Nangia. The Petitioners say that they are carrying on business of construction contracts with Government and Government Corporations, and is a company of repute.

(6) It is asserted in the petition that the State of Haryana had invited pre-qualification tenders for the work styled as "widening to four lanes including strengthening of existing pavements of Shershah Suri Marg, National Highway-1 from km 50 to km 74.8 (Murthal to Smalkha Contract-1", somewhere in October/ November, 1986.

(7) The Petitioners state that pursuant to said invitation, a number of parties had responded. Respondent No. 1, National Building Construction Corporation (hereinafter called the NBCC), were one of the tenderers who were pre-qualified by the State of Haryana, and tender documents were issued to them.

(8) The Petitioners state that in the second week of April, 1987, the Petitioners received a telephone call from the respondent No. 1, asking them as to whether the petitioner would be the associate contractor of the Nbcc for the entire work mentioned here above on a back to bank basis, taking into consideration that the Nbcc will have commission/ margin money of 5% on the value of the contract.

(9) The Petitioners further state that in response to the telephonic conversation they submitted their rates to respondents No. 1 on 15.4.1987. It is also asserted that the rates were submitted for the entirety of aforesaid work on back to back basis, and accepting that 5% of the amount will be payable to the Nbcc on account of their commission/margin money.

(10) The Nbcc have filed documents to show that a meeting had taken place between the representatives of the Nbcc and Mr. Madan Lal Nangia of the Petitioner company on 21.4.1987 for the purpose of finalising the agreement between the Petitioners and respondent No. 1 with respect to the the work of widening to four lanes including strengthening of existing pavements of Shershah Suri Marg. National Highway-1, from km 50 to km 74.8 (Murthal to Sannikha) Contract-1. The memorandum of this meeting indicates that some kind of arrangement had already come into existence between the parties. Mr. Madan Lal Nangia who had signed the said memorandum, had signed it" tentatively ..

(11) It is also by asserted that the Nbcc received the rates submitted by the Petitioners and, after checking the same, the Nbcc pointed out that the Petitioners have made a totalling mistake, i.e. the Petitioners had quoted Rs. 9,43,92,969.40 p. whereas the total as calculated by them was Rs.

9,67,14,107.90 p. On receiving this intimation vide letter dated 15.4.1987 from the Nbcc, the Petitioners informed the Nbcc that the difference be considered as a unconditional rebate of 2.4%.

(12) The Petitioners assert that the Nbcc then submitted their tender to the State of Haryana, respondent No. 3, on 17.4.1987, quoting the same rates for the aforesaid work, i.e. Rs. 9,67,14,107.90 p. Thereafter, on 22.4.1987, the Nbcc informed the Petitioners on 22.4.1987 that the rates given by the Petitioners for executing the works, were declared as the lowest rates, and that the Nbcc was likely to be awarded the contract, and directed the Petitioners to arrange for bank guarantees on behalf of the Nbcc to be submitted to respondent No. 3. This was communicated by the letter of the Nbcc to the Petitioners. In that letter it was stated that the guarantees to be submitted were for; (i) Earnest money deposit for Rs. 16.40 lacs valid up to 240 days from the date of tender opening i.e. 17th April 1987; (ii) Performance bond equivalent to 10% of the tendered amount valid up to 42 months (i.e. time of completion) plus 12 months (i.e. defect liability period) from the date of award of work; (iii) Mobilization advance equivalent to 10% of the contract value valid up to the completion of the job (i.e. up to 42 months) from the date of award of work. It was stated in that letter that the bank guarantees be submitted to the Nbcc for onward submission to the clients.

(13) The Petitioners assert that on receipt of the letter dated 22.4.1987 they wrote to their bankers. Bank of India, Industrial Finance Branch, New Delhi, that the bank guarantee sought, be issued directly in favor of respondent No. 3, the State of Haryana, if the bank had no objection to do so and in case of objection of the bank to do so, the petitioners say that they asked their- said bankers that the guarantees be given favoring the Nbcc respondent No. 1.

(14) The Petitioners assert that thereafter there were discussions with the Zonal Manager of Bank of India and the Finance Manager of the Nbcc and the Nbcc agreed that the guarantees be given in favor of respondent No. 3, the State of Haryana.

(15) The Petitioners give some detail of further negotiations, and assert that orally the Nbcc asked the petitioners to give guarantees in favor of the NBCC. The proforma bank guarantee was sent by the Petitioner under cover of their letter dated 22.7.1987. The Petitioners assert that the entirety of the work was to be done on back to back basis; that the entirety of the work was to be done by the Petitioner on that basis, subject to approval of the State of Haryana. This was so stated by the respondent Nbcc in their letter dated 1.7.1987.

(16) The Petitioners submit that by their letter dated 4.8.1987, the Nbcc directed the petitioners to submit two bank guarantees; one for mobilization advance for Rs. 89,67,332.00 , and the other a performance guarantee for the same amount. This demand was made vide annexure "I" to the petition. The Petitioners assert that in accordance with the demand of the Nbcc, they submitted two bank

guarantees, i.e. (i) No.NP/G/16/137 dated 19.11.1987 in connection with mobilization advance valid up to 30.4.1990, and (ii) performance guarantee No. NP/G/16/136 dated 19.11.1987 valid up to 31.5.1992. These guarantees were issued by Bank of India, Nehru place, and were in favor of the Nbcc, respondent No. 1.

(17) The Petitioners state that the bank guarantees required to be furnished for 10% of the amount for which tender for the work of "widening to four lanes including strengthening of existing pavements of Shersha Suri Marg, National Highway-1, from km 50 to km 74.8 (Murthal to Smalkha) Contract-1", was given, forked out to Rs. 94,39,296.90 p., and reducing margin money of 5% which was receivable by the Nbcc in terms of agreement between the Petitioners and the Nbcc, this 5% margin money was also reduced and the Petitioner were required to give two bank guarantees for Rs, 89,67,332.00 each.

(18) The said guarantees read as under :

"I.BANK Guarantee NO. NP/G/16/136 Bank Of India, Nehru Place Performance Bank Guarantee (Name of Employer M/s National Building Construction Corporation Ltd.) (Address of Employer N.B.C.C. House, Lodi Road New Delhi 110003). Whereas M/s. Nangia Construction (India) Pvt. Ltd. 204 Sahyog, 58, Nehru Place. New Delhi-110019 (hereinafter called "the Contractor") has undertaken, in pursuance of Contract accepted vide letter No. Engg/T/NZ/1/87/539 dated 20.7.87 to execute Widening to four lanes of N.H. 1 in Haryana (Km 50 to 74.80 Murthal to Samalkha) awarded by P.W.D. Haryana in favor of M/s. National Buildings Construction Corporation Ltd. vide their letter No. 34-NH-86/1239/WB .dated 01.07.87 called "the Contract".

And Whereas it has been stipulated by you in the said Contract that the contractor shall furnish you with a Bank Guarantee by a recognized Bank for the sum specified therein as security for compliance with his obligations in accordance with the Contract; And Whereas we have agreed to give the Contractor such a Bank Guarantee;- Now Therefore we hereby affirm that we are the Guarantor and responsible to you, on behalf of the Contractor, up to a total of Rs. 89,67,332.00 (Rupees eighty nine lacs sixty seven thousand three hundred thirty two only) such sum being payable in the types and proportions currencies in which the contract price is payable, and we undertake to pay you, upon your first written demand and without cavil or argument, any sum or sums within the limits of Rs. 89,67,332.00 (Rupees eighty nine lacs sixty seven thousand three hundred thirty two only) as aforesaid without your needing to prove or to show grounds or reasons or your demand for the sum specified therein. We hereby waive the necessity of your demanding the said debt from the Contractor before presenting us with the demand. We further agree that no change or addition to or other modification of the terms of the Contract or of the Works to be performed there under of any of the Contracts documents which may be made between you and the Contractor shall in any way release us from any liability under this guarantee, and we hereby waive notice of any such change, addition

or modification. This guarantee is valid until the date 31.05.1992 i.e. three months after the issuing of the Maintenance Certificate. This guarantee postulates the contingency upon what it will become operative. It will be operative only if the amount of Mobilization Advance which is due to M/s. Nangia Constructions (India) Pvt. Ltd. against our guarantee NP/G/16/137 dated 19.11.87 for Rs. 89,67,332.00 (Rupees eighty nine lacs sixty seven thousand three hundred thirty two only) is paid by way of a crossed account payee cheque/ demand draft favoring Bank of India A/C M/s Nangia Constructions (India) Pvt. Ltd. and the said cheque/demand draft is realised. Notwithstanding anything contained herein before our liability under this guarantee is restricted to Rs. 89,67,332.00 (Rupees eighty nine lacs sixty seven thousand three hundred thirty two only) and it will remain in force up to 31.05.1992 unless a demand or claim in writing under the guarantee is filed against us on or before 31.05.1992 all your rights under the said guarantee shall be forfeited and we shall be relieved and discharged from all liabilities there under. sd/- For Bank of India."

"2.BANK Of India, Nehru Place Bank Guarantee NO. NP/G/16/137. Bank Guarantee For Advance Mobilization Loan (Names of Employer M/s. National Buildings Construction Corporation Ltd.) (Address of Employer) N.B.C.C. House, Lodi Road, New Delhi-110003. Widening to four lanes of N.H. 1 in Haryana (Km 50 to 74.80 Murthal to Samalkha) awarded by Public Witness .D. Haryana in favor of M/s National Buildings Construction Corporation Ltd. Vide their letter No. 34-NH-86/1239/WB dated 01.07.87. Gentlemen : In accordance with the provisions of the Conditions of Contract of M/s National Buildings Construction Corporation Ltd. with Public Witness .D. Haryana sub-clause 60(7) ("Advance Mobilization Loan") of the above mentioned Contract, M/s. Nangia Constructions (India PVT. Ltd., 204, Sahyog, 58, Nehru Place, New Delhi-110019 (hereinafter called "the Contractor") shall deposit with M/s National Buildings Construction Corporation Ltd., a bank guarantee to guarantee his proper and faithful performance under the said Clause of the Contract in an amount of Rs. 89,67,332.00 Rupees eighty nine lacs sixty seven thousand three hundred thirty two only).

We, Bank of India, as instructed by the Contractor, agree unconditionally and irrevocably to guarantee as primary obligator and not as Surety merely, the payment to M/s National Buildings Construction Ltd. on his first demand without whatsoever right of objection on our part and without his first claim to the Contractor, in the amount not exceeding Rs. 89,67,332.00 (Rupees eighty nine lacs sixty seven thousand three hundred thirty two only) in the event that the obligations expressed in the said Clause of the above-mentioned Contract have not been fulfilled by the Contractor giving the right of claim to the Employer for recovery of the whole or part of the Advance Mobilization Loan from the Contractor under the Contract. We further agree that no change or addition to or other modification of the terms of the Contract or of Works to be performed there under or of any of the .Contract documents which may be made between M/s National Buildings Construction Corporation Ltd. and the Contractor, shall in any

way release us from any liability under this guarantee, and we hereby waive notice of any such change, addition or modification. This guarantee shall remain valid either or up to 30.04.90 and in full effect from the date of the advance payment Under the Contract till that time M/s National Buildings Construction Corporation Ltd. receives full repayment of the same amount from the Contractor. This guarantee will be operative only if the amount of Mobilization Advance which is due to M/s Nangia Constructions (India) Pvt. Ltd. against this guarantee is paid by way of a crossed account payee cheque/demand draft favoring Bank of India A/C M/s Nangia Constructions (India) Pvt. Ltd. and the said cheque /demand draft is realised. Notwithstanding anything contained herein before our liability under this guarantee is restricted to Rs. 89,67,332.00 (Rupees eighty nine lacs sixty seven thousand three hundred thirty two only) and it will remain in force up to 30.04.90. Unless a demand or claim in writing under the guarantee is filed against us on or before 30.04.90 all your rights under the said guarantee shall be forfeited and we shall be relieved and discharged from all liabilities there under. sd/- For Bank of India."

(19) The Petitioners assert that the contract with respect to the entire work was executed between the Petitioners and respondent on 26.10.1987.

(20) The Petitioners state that the work of widening to four lanes including strengthening of existing pavements of Shershah Suri Marg, National Highway-1 from km 50 to km 74.8 (Murthal to Smalka) Contract-1" was commenced by the Petitioners w.e.f. 2.11.1987. To establish this, the petitioners rely upon the letter dated 3.11.1987, copy of which was annexed as annexure "O" to the petition. The Petitioners assert that after the commencement of the work, running bills were submitted by the Petitioners from time to time to the Nbcc For payment. The Petitioners say that five running bills were submitted by them as per following details :-

S. No.	Particulars of Bill	Date	Amount
1.	First running bill	26.03.88	34,00,834.00
2.	Second running bill	07.08.88	2,22,709.34
3.	Third running bill	29.09.88	96,48,566.66
4.	Fourth running bill	12.09.88	1,11,14,4:-6.86
5.	Fifth running bill	28.02.89	1,51,00,000,00

(21) It is the case of the Petitioners that each subsequent running bill in operated the amounts of the earlier bills.

(22) It is the case of the Petitioners that the entirety of the amount of the running bill which was submitted to the respondents, have not been paid to the Petitioners.

(23) It is the case of the Petitioners that despite the fact that the running bills were verified by the Nbcc, . the entirety of the bills were not paid by the NBCC.

(24) It is the case of the Petitioners that it is clear from the annexure "R" to the petition dated 16.2.1989. that the mobilization amount advanced by the State of Haryana was fully utilised. This letter of 16.2.1989 is written by the NBCC.

(25) It is the case of the Petitioners that the respondents have adjusted the mobilization advance from out of the running bills amounts wrongfully and contrary to the terms of the contract.

(26) It is the case of the Petitioners that the mobilization advance was received by the Nbcc in the sum of Rs. 89 lacs on 23.11.87, was not disbursed to the Petitioners, lump sum amount. The disbursement of the mobilization amount was made by three Installments; the first Installment on 24.12.1987 of Rs. 35 lacs; the second Installment in March, 1988 of Rs. 32 lacs, and third Installment in April, 1988 of Rs. 22 lacs.

(27) It is the case of the Petitioners that according to the fifth running bill dated 28.2.1989, a sum of approximately Rs. 1,51,00,000.00 work has been done by the Petitioners, against, which they received a net payment of Rs. 89.11,808.00 out of the running bills, and in addition, they have received a sum of Rs. 89,00,000.00 as mobilization advance. Thus the total amount received comes to approximately Rs. 97 lacs.

(28) It is the case of the Petitioners that the problems between the parties commenced when the petitioners wrote letter dated 19.4.1989 to the State of Haryana, in which they had clearly brought it to the notice of the State of Haryana the existence of the back to back agreement between the Petitioners and the Nbcc for the full value of the contract. In response to this letter, the State of Haryana wrote to the Nbcc to clarify the position of the Nbcc and also called upon the Nbcc to terminate the arrangement with the Nangia. The reason of this given by the State of Haryana in their letter dated 18.5.1989, which is annexed as annexure "T" to the petition, is that in terms the contract between the State of Haryana and the Nbcc dated 1.7.1987, the said contract could not be sub-let to any other person without prior written consent of the State of Haryana. and the State of Haryana had only given permission of sub-contracting three items of work.

(29) It is contended by the Petitioners that the respondents are guilty of committing fraud and of making misrepresentations to the Petitioners. It is also contended by the Petitioners that the respondent Nbcc has withheld information from the Petitioners. It is stated it is clear from the letter dated 24.4.1988, written by the Nbcc to the State of Haryana that the Nbcc sought permission to sub-contract three items of works to the Petitioners, after nearly six months the contract had been entered into between the Petitioners and the Nbcc for performing the entirety of the work on a back to back basis, that the Nbcc were misrepresenting the facts to the State of Haryana when they asked for permission to sub-contract only three items of work.

(30) It is the Petitioners' case that the State of Haryana approved of the sub-letting only on 30.5.1988 for three items of work eight months after signing of a back to back agreement between the Nbcc and the Petitioners.

(31) It is contended by the Petitioners, that this is one of the circumstances

which goes to show that the Nbcc has misrepresented the realities for the purpose of obtaining the bank guarantee which was given on the understanding that the sub-contracting was with the approval of the State of Haryana. It is the further case of the Petitioners that it is only recently, almost immediately prior to the filing of the suit, that they became aware of the fact that the existence of the back to back agreement was withheld by the Nbcc from the State of Haryana.

(32) It is also the case the Petitioners, that in February, 1989 one of the officials of the State of Haryana had a heated discussions with the representatives of the petitioners, and it is during this discussion it was discovered by the Petitioners that the permission for sub-letting the contract which had been granted by the State of Haryana to the Nbcc was only to sub-let the contract up to the extent of rupees 2,49 crores, and only regarding three items, i.e. (i) general and site clearance, (ii) earth-work embankment and (iii) cross drainage work, and that the other items which were then being executed by the petitioners on behalf of respondent No. 1, were not approved by the State of Haryana, and unless approval is taken, the work executed by the petitioners would not be passed, and the Petitioners will not be paid.

(33) It is the case of the Petitioners that this limited permission which was granted, was not disclosed by the Nbcc to the petitioners, and it is in these circumstances that the petitioners wrote a letter dated 19.4.1989 to respondent No. 3, copy of which is annexed as annexure "S" to the petition. A copy of the letter dated 19.4.1989 was sent to the Chief Engineer, Haryana, P.W.D., with a request to approve the Petitioners as sub-contractor or assigned contractor. It is the nose of the Petitioners that this letter appears to have evoked, in response to letter dated 11.5.1989 from the Chief Engineer (National Highways), Haryana Public Witness .D., B & R Branch, Chandigarh, which is annexed as annexure ",T" the petition, and is reproduced below :-

"FROM Chief Engineer (National Highways), Haryana, Public Witness .D. B&R Branch ,To: National Buildings Construction Corporation Limited, (A Government of India Enterprise) Nbcc House, Lodi Road, New Delhi-110003 (India). Memo No. 34-NH-86/2011/WB. Dated Chandigarh, the 18.5.1989. Subject :-Widening to Four Lanes including strengthening of existing Pavement of S.S.S. Marg, N.H.I. From KM. 50 to KM. 74.80 (Murthal to Smalkha) Contract-1. The above work stands allotted to you vide this office memo No. 34-NH-86/1239 dated 1.7.87 at the contract value of Rs. 943.97 lacs. On your request made vide your letter No. PH/HRW/1-88-89/61 dated 24.4.88 (copy enclosed), approval to sub-let the following items of this work to Nangia Constn, (India) Pvt. Ltd., New Delhi was accorded vide this office Memo No. 1422 dated 30.5.88 (copy enclosed) :-

S.No.	Description of work	Amount of Work (Rs.)	Remarks
1.	General and site clearance item 1.01,1.02 of B.O.Q. of contract.	6,30,000.00	
2.	Earth work in Embankment as per item 2.01,2.02 of B.O.Q. of contract.	1,40,64,051.00	
3.	Cross drainage works as per clause 5.01 to 5.15 and 6.01 to 6.19 of B.O.Q. of		

contract. 1,02,80,742,00 2,49,74,793,00

M/s. Nangia Constructions (India) Pvt. Ltd. in their reference No. NCPL/454/89 dated April 19, 1989 which is addressed to you and copy stands endorsed to this office (copy enclosed), have informed this office that you have sub-let the entire work to them back to back basis at a commission (royalty of Corporation) of 5% of the amount of the executed by them. This action of your is quite contrary to the terms and conditions of the contract of this work and tantamounts to your breaching the contract and attracts action against you under clause 63 Vol. I Section Iii of the contract. Before any action is taken against you for breaching the contract, you are directed to clarify your position with respect to sub-letting of the entire work to Nangia Constructions (India) Pvt. Ltd., New Delhi in contravention of the contract and also terminate the contract, if any entered into by you with Nangia Constructions (India) Pvt. Ltd. New Delhi (except the items of the work for which approval stands accorded to you for sub-letting) and supply necessary documents of termination of the contract to this office by 31.5.89. In case you fail to send the reply and requisite documents to this office within the stipulated period, action will be taken against you as per terms and conditions of the contract agreement. Chief Engineer (National Highways) Haryana, Public Witness .D. B&R Branch, Chandigarh".

(34) It is the further case of the Petitioners that on receiving of this letter from the Chief Engineer of the State of Haryana, the Nbcc immediately approached the bank who had furnished the performance guarantee and the mobilization advance guarantee for their encashment. The petitioners learnt of this when on 19.5.1989 at about 4.00 P.M., the Petitioners received a telephone from the bankers that respondent No. 1 had desired encashment of the performance and the mobilization advance guarantees of Rs. 89,67,332.00 and Rs. 67,25. 000.00 respectively. The Petitioners say that on receiving the telephone call, the Petitioners went to the bank and found that some officials of the respondent were sitting in the bank for encashing the bank guarantees, and it is these officers who revealed that the Chief Engineer Haryana, Public Witness .D. had directed them to terminate the Petitioners' contract as respondent No. 1 "had misrepresented and concealed the fact that it had awarded the entire work to the Petitioners on back to back basis at a commission of 5%.

(35) The Petitioners filed an application for amendment of the petition u/s 20 of the Arbitration Act, by adding para 33A to the petition. By my order dated 31.7.1989, on concession of the counsel for the NBCC, I allowed the application for amendment by adding para 33A. The learned counsel for the respondent Nbcc was very correct in making the said concession for the reason that the original petition u/s 20 was filed on 22.5.1989, and the application for amendment by adding para 33A was filed only 4 days later on 26.5.1989, at a very early stage of the proceedings.

(36) Para 33A of the amended petition reads as under :

"33A That the respondents 1 and 2 knew fully well that they were not authorised to sublet the entire work to the Petitioner, they placed the entire work of the value of Rs. 9,43,00,000.00 on the petitioner and took bank guarantees of the value of 10% of the full contract value, for the mobilization advance account as well as for performance of the contract, which they were not authorised to do, and they knew that they were not authorised to do so. This fact, though known to the respondents 1 & 2 was intentionally concealed from the petitioner and the respondents 1 & 2 misrepresented to the petitioner that they had the permission for sub-letting the entire work, and their action of immediately getting the bank guarantees encashed from the bank on the next day, i.e. on 19.5.1989, after the letter issued by the Chief Engineer, Haryana Public Works Dept. on 18.5.1989, clearly shows the deceitful and fraudulent action of the respondents 1 & 2 jointly and severally, who knew fully well that they were not authorised to sublet the contract but they did it and tried to make wrongful action to themselves by committing fraud on the petitioner. This fact was further confirmed from letter dated 19.5.1989, copy of which has been annexed as Annexure "A" with the application, which further shows the mala fide and fraudulent action of the respondents No. 1 and 2. The respondents No. 1 and 2 sensing the mischief they had played on account of their fraudulent acts, filed two caveats, one in this Hon'ble High Court and one in the court of Sonapat for any action the petitioner may take against them, which further proves that they were trying to in any way justify their illegal and fraudulent action. The facts stated above and para 3 of the petition are covered by the definition of word "Fraud", as defined u/s 17 of the Contract Act.

(37) From the facts and contentions set out above, it is clear that in this case the Petitioners contend that the contract of guarantee is vitiated by misrepresentation and/or fraud committed by the Nbcc upon the Petitioners and that they are not entitled to the benefit of the aforesaid two guarantees.

(38) The respondents filed their reply to the amended section 20 petition, and the reply to para 33A filed by the respondent reads as under :-

"33A. Para 33A is wrong as stated. It is wrong that the petitioner could not be associated as an associate contractor or any facts were concealed. The only question is whether the petitioner knew all the facts right from the beginning. It is totally wrong that the respondent made any misrepresentation. The allegations are totally wrong, vague, incomplete and lack in material particulars. The allegations are false to the knowledge of the petitioner. The invocation of Bank Guarantees was in terms of and in accordance with the guarantees. It is totally wrong that the respondent No. 1 tried to make any wrongful gain or was not authorised to associate with the petitioner or committed any fraud on the petitioner. It is submitted that the petitioner knew all the facts right from the beginning. The petitioner has given on particulars and details of the alleged fraud. The word fraud has been used by the petitioner by way of amendment after the hearing and the citation of the Supreme Court judgment reported as Jt

1987 (4) S.C.306 entitled U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd., as an after-thought in a vain bid to obtain injunction. Filing of caveats was certainly done as a prudent management to protect the rights of respondent No. 1 against any arbitrary and wrongful ex-parte order, which the petitioner might have obtained wrongly and illegally. It is denied that there is any fraud as alleged.

(39) The Petitioners have asserted misrepresentation by the respondents, and fraud by the respondents for the reason that the respondents tried to invoke bank guarantees. The petitioners had realised that the bank guarantees which have been given by the petitioners bankers on the respondents requiring the petitioners to give such bank guarantees are termed by the counsel for the respondent for lack of other appropriate words, unconditional bank guarantees". The Petitioners and their legal advisers are aware that in view of the counsel state of the law, the circumstances in which the court will restrain encashment of the bank guarantees, are fraud, misrepresentation and existence of special equities. It is for this reason that the petitioners had averred and alleged in their petition that they have acted upon various representations of the respondents which were untrue, that owing to the nature of the agreement between the parties and the amount of the value of the work which has been done pursuant to the contract between the parties, special equities have come into existence as huge amounts mentioned in the running bills which have been submitted to respondent No. 1 have not yet been paid mobilisation advance provided by Nbcc, from out of money received by them from the State of Harayana have been fully utilised for procuring of "motor grader" and "vibratory roller" and the "raw material" required for the purposes of execution of the contract, and they have pleaded fraud by giving partial particulars in the original petition, and fuller particulars by amending this petition by addition of para 33A, (which has been reproduced above).

(40) It is well settled with respect to bank guarantees, that the bankers are bound by the terms of their engagement contained in the bank guarantees. This was so declared by the Supreme Court in State of Maharashtra Vs. Dr. M.N. Kaul (Deceased by his Legal Representatives) and Another, . The Supreme Court had in that judgment also referred to the Judgments reported as Blest v. Brown (1862) 4 De Gf 367 ; and M.S. Anirudhan Vs. The Thomco's Bank Ltd., .

(41) One of the early cases which dealt with fraud in connection with bankers credits (Letters of Credit) was the case decided by Justice Sheintag of New York Supreme Court on 1.7.1941 Sztejn v. Henery Schroder Banking Corporation reported as 37 Nys (2d) 631. The facts of that case, as is apparent from the full text of the judgment which has been supplied by Mr. P.P. Malhotra, the counsel for the respondents, after he had procured it from New York, are that a seller in India, M/s. Transea Traders, Ltd having its place business in Lucknow (India), agreed on 7.1.1941 with Schwarz to supply a quantity of bristles, which is "any short hair of an animal or plant, such as any of the hairs on pig's back-Collin's

English Dictionary 1979 Edn.) and in order to pay for the bristles Stein and Schwarz contracted with J. Henry Schroder Banking Corporation, to issue an irrevocable letter of credit to the Indian supplier which provided that drafts by the Indian supplier for specified portion of purchase price of "bristles" would be paid by Schroder upon shipment of the described merchandise and presentation of an invoice and a bill of lading covering the shipment, made out to the order of Schroder.

(42) It is stated in that judgment, that although the documents which were sent by the Indian supplier described the "bristles" which were called for by the letter of credit, however, the Indian supplier filled 50 crates with cow hair, other worthless material and rubbish with intent to simulate genuine merchandise (bristles. Thus there were clear assertions by Szejn and Schroder that a fraud has been perpetrated by the Indian supplier to them.

(43) The fraud of the Indian supplier was brought to the notice of J. Henry Schroder Banking Corporation. It is stated in the judgment that the Indian supplier drew a draft and other letter of credit to the order of Chartered Bank, Kanpur (India), and delivered the draft and the fraudulent documents to the Chartered Bank for collection for the account of the Indian supplier.

(44) It is clear from the judgment that Szejn had obtained an injunction against J. Henry Schroder Banking Corporation, restraining it from making payment to the Chartered Bank on the ground that the primary transaction was tainted with fraud that instead of bristles, cow hair and other worthless material and rubbish had been supplied by the Indian supplier.

(45) The judgment of the New York Supreme Court was delivered upon a month made by the Chartered Bank of India for dismissing the complaint filed by Szejn, Mr. Justice Shientag refused the prayer of the Chartered Bank of India, and held that primary transaction was tainted with fraud. Mr. Justice Shientag denied the motion of the Chartered Bank of India for ordering J. Henry Schroder Banking Corporation to make payment on the basis of the aforesaid documents held by the Chartered Bank of India.

(46) It is not worthy that the letters of credit which are one of the forms of bankers commercial credits, are controlled by Uniform Customs and Practice for Documentary Credits.

(47) This was recognised by the Supreme Court in Tarapore and Co. Vs. V/O Tractoroexport and Another, . The Uniform Customs and Practice for Documentary Credits has been revised in 1963, 1974 and 1983, Article 1(c) of 1974 revision, as found in H.C. Gutteridge and Maurice Megrah Law of Bankers Commercial Credits, Seventh Edition, at page 253 says "credits, by their nature, are separate transactions from the sales or other contracts on which they may be based and banks are in no way concerned with or bound by such contracts". The same book also contains the Revision of 1983, Article 3 whereof states, "credits, by their nature, are separate transactions from the sales or other contract (s) or

which they may be based and banks are in no way concerned with or bound by such contract (s), even if any reference whatsoever to such contract(s) is included in the credit".

(48) On the basis of these Uniform Customs and Practice of documentary Credits, revised from time to time, it is accepted according to the International Banking Practices that letters of credit are transactions independent of the bargain/contract between the parties.

(49) It has to be noted that there is no statutory law in India which specifically governs the letter of credit. Whereas, there is statutory law in India which governs bank guarantees.

(50) This by itself is a sufficient distinction between the two. Statutory provisions regarding guarantees are to be found in sections 124 to 147 of the Indian Contract Act, 1872. Contract Act is law within the meaning of Article 13 of the Constitution of India. Specifically, section 126 of the Contract Act deals with guarantees. In terms, the said section makes all bank guarantees tri-partite contracts between guarantor, beneficiary and the person responsible for the issuance of the guarantee. The said section reads as under : -

"126. "Contract of guarantee", "surety", "principal debtor", and "creditor" :-A "contract of guarantee" is a contract to perform the promises or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety", the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written".

(51) I am setting out the provisions of section 126 of the Contract Act for the reason that it is essential to bear in mind that whereas in England there is no statutory law governing bank guarantees, in India it exists, and, Therefore to that extent the pronouncement of English courts which are based upon common law, would not apply, and the pronouncement of Indian courts perforce need to be based upon, and accord with the statutory law.

(52) Another important distinction to be borne in mind is that whereas the English Courts are content by stating that the banks should be left free to perform their obligations under the agreements of bank guarantees, the very same attitude as of English courts, ought not to be adopted in India, as the courts necessarily have to keep in view the provisions of the Contract Act applicable to the bank guarantees while dealing with the bank guarantees, and those provisions have to be read into each contract of bank guarantee.

(53) The effect of these two distinctions between English and Indian Law would be that whereas the English courts may be right in saying that the contract of bank guarantee is an "independent contract" between two bankers owing to banking practices; by operation of statutory law, it is not permissible to the

Courts in India to say that the contract of bank guarantee is an "independent contract" vis-a-vis a banker and a beneficiary.

(54) In Punjab National Bank Ltd. Vs. Shri Vikram Cotton Mills and Another, . Justice Shah and Justice Cover considered the provisions of sections 124 and 126 of the Contract Act, and observed as under :-

"SECTION 124 of the Indian Contract Act defines a "contract of indemnity". A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity", Section 126 defines a contract of guarantee. It states :

"A contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written.

A promise to be primarily and independently liable for another persons conduct may amount to a contract of indemnity. A contract of guarantee requires concurrence of three persons-the principal debtor, the surety and the creditor-the surety undertaking an obligation at the request express or implied of the principal debtor. The obligation of the surety depends substantially on the principal debtor's default; under a contract of indemnity liability arises from loss caused to the promisee by conduct of the promisor himself or by the conduct of another person".

(55) In view of the aforesaid law declared by the Supreme Court in 1970 Supreme Court 1973, by virtue of Article 141 of the Constitution, it was not permissible for any person to hold otherwise. The Supreme Court had clearly stated that a contract of guarantee requires concurrence of three persons. This being the situation, a contract of guarantee because of section 126 of the Contract Act, has always to be considered as a tripartite document in India. The Supreme Court had further held that, "the-obligation of the surety (i.e. the guarantor) depends substantially on the principal debtor's default". In this view of the matter every guarantee executed in terms of section 126 of the Act becomes enforceable upon default. The above said propositions of law declared by the Supreme, Court cannot, and indeed could not be lost sight by any Court in India, until the Supreme Court itself chose to reconsider the said judgment after Constituting larger bench of the Supreme Court.

(56) By virtue of the provision of section 126 of the Indian Contract Act, 1872 every bank guarantee is a tri-partite contract between the banker, the beneficiary and the person at whose instance the bank issues the bank guarantee. Thus if a contract between two persons postulate that one of them shall furnish a bank guarantee, then the bank guarantee cannot be independent of the principal

contract on account of which the bank guarantee was issued by the banker in favor of the beneficiary. In my view, it would not be appropriate to lose sight of the difference between the bank guarantee executed under and in accordance with the provision of section 126 of the Contract Act, and bank guarantees which are issued by the bankers in England and elsewhere who are not controlled by any similar statutory provision :

(57) Mr. Shiv Dayal, appearing for the Petitioners, has referred to The Minerals and Metals Trading Corporation of India Ltd. Vs. Surajbaram Sethi and Another, , to point out the distinction made by the Division bench between an irrevocable letter of credit and a bank guarantee Calcutta High Court observed as follows :-

"THE more important point of distinction is the autonomy of an irrevocable letter of credit and the dependence of a bank guarantee on a contract between the beneficiary of the bank guarantee and a third party. Section 125 of the Contract Act defines a contract of guarantee as a contract to perform the promise or discharge the liability of third person in case of his default. The obligation is not an unqualified obligation. By an irrevocable letter of credit, on the other hand, the issuing bank gives an undertaking to the beneficiary that all bills drawn in compliance with the terms of the letter of credit will be honoured without qualification-The Law of Bankers Commercial Credits by Gutteridge and Megrah, First Edition, page 38, Payment under an irrevocable letter of credit, Therefore, does not depend on the performance of obligation on the part of the seller except those which the letter of credit expressly imposes. The obligation is not of the bank to the beneficiary. No third party comes into the picture. In the case of a bank guarantee, by definition, third party is always on the scene unless there is some act of commission or commission on the part of the third party, payment under a bank guarantee does not become due. In other words, a bank guarantee does not enjoy the autonomy of a letter of credit.

The guarantee may, however, provide that the decision of the beneficiary on the question of loss or damage suffered by him or on the question of default, or negligence by reason of which the guarantee becomes enforceable will be final. A bank guarantee like any other contract is no more or no less than what the parties make it. Payment under a bank guarantee is like payment under a letter of credit becomes due only on compliance with the terms on which the bank is to pay under the respective documents. Nobody has ever claimed that a letter of credit becomes payable until and unless the conditions of payment are satisfied ; likewise, conditions under a bank guarantee have to be satisfied before payment can be legitimately claimed".

(58) This judgment of the Calcutta High Court was reiterated in its entirety by another Division Bench of that Court (Sabyasachi Mukharji, J. as His Lordship then was, and A.L. Janah, J), which judgment is reported as State Bank of India Vs. The Economic Trading Co. S.A.A. and Others, .

(59) Apart from endorsing the distinction between a letter of credit and a bank guarantee pointed out by the Division Bench in the Minerals & Metals Trading Corporation case 1974 CWN 991, Sabyasachi Mukharji, J., made some significant observations at page 149 col. I of the reports. He observed that: "In case of a bank guarantee however, by definition the third party was always on the scene. Unless there was some act of omission or commission on the part of the third party, payment under the bank guarantee did not become due. In other words the bank guarantee did not enjoy the autonomy of an irrevocable letter of credit. In case of a guarantee there was always a question of a contingency on the occurrence of which the guarantee became enforceable".

(60) Mr. Shiv Dayal for the Petitioners says that these observations are because section 129 of the Contract Act postulates a "default", and this default has to be read into each guarantee executed, under the provisions of section 126. He, Therefore, urged, that the happening of "default" is the contingency which has to be read into each guarantee. As there is no estoppel against a statute, the terms of the guarantee have this statutory default built into it, in addition to its other terms.

(61) It is necessary to note the judgment of the Calcutta High Court, reported as 1979 Calcutta 44, decided by Sabyasachi Mukharji, J. (as His Lordship then was) on 12.5.1989. In that case (Texmaco Ltd. v. State Bank of India and others), the petitioners were seeking to restrain State Bank of India from making payment to the State Trading Corporation of India and the Project & Equipment Corporation Ltd. on a "performance guarantee" issued by the State Bank of India.

(62) Justice Mukharji noted both the above cited Division Bench judgments of the Calcutta High Court 1970 C W N 801, as also State Bank of India Vs. The Economic Trading Co. S.A.A. and Others, . Also noted was a decision of Justice Kerr in B.D. Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd. (1977) 3 WLR 752 ; and the judgment of the Court of Appeal in Edward Owen Engineering Ltd. v. Barclays Bank International Ltd. (1977) 3 WLR 764. Justice Mukharji expressed his view in para 10 of the judgment, which reads as follows :

"IN my opinion, the position of law is as follows, whether the bank is obliged to pay and pay on what terms must depend upon both in the case of bank guarantee and in the case of letter of credit on the terms of the documents. With respect to the Court of Appeal, it is not necessary for this Court to go to the extent of saying whether the performance guarantee stands on a similar footing of a letter of credit but so far as the Court of Appeal says the bank must pay according to the guarantee on demand, if so stipulated, without proof or conditions, I respectfully agree. The Court of Appeal has referred to the exception of a clear fraud, I venture to suggest there may be another exception in the form of special equities arising from a particular situation which might entitle the party to an injunction restraining the performance of bank guarantee. But in the absence of such special equities and in the absence of any clear fraud, the Bank must pay on demand, if so stipulated, and whether the terms are such

must have to be found out from the performance guarantee as such".

(63) Thus Justice Mukharji had not accepted the view of English Courts that performance guarantee stands on a similar footing of a letter of credit. He, however, reiterated the view of the Division Bench of the Calcutta High Court, in so far as they state "the bank must pay according to the terms of the guarantee and on demand, if so stipulated, without proof or condition".

(64) The exceptions carved out to this liability to pay on demand, by Justice Mukharji are important. He excepted "clear fraud" and suggested another exception of "special equities arising from a particular situation". Both "fraud" and "special equities" arising out from a particular situation, according to Justice Mukharji, entitled to a party to injunction restraining payment on the "performance guarantee". It was specifically noted by Justice Mukharji in the Texmaco's case that in that case "there is no question of any fraud or any equity entitling the plaintiff to an injunction", and held that the plaintiff, in the facts of that case, was not entitled to any injunction.

(65) Mr. Shiv Dayal relies upon this distinction, upon facts, between the Texmaco's case, and the instant case. He asserts that the plaintiff herein .has alleged both fraud and misrepresentation in the plaint.

(66) Counsel for the Petitioners has also brought to my notice a judgment reported as 1986 Calcutta 374 (M/s. Banerjee & Banerjee v. Hindustan Steel Works Construction Ltd.). In the judgment Justice Bonnerjea has noted the judgment of Justice Mukharjee in Texmaco's case 1977 Cal 44, the judgment of English Court Edward Owen Engineering Ltd. v. Barelays Bank International Ltd. 1978) 1 All Er 976 and other judgments on the subject as yo "when payment to be made out under bank guarantees". and said that in fact each case, the following as to be ascertained :-

" THEREFORE, in my opinion, the Court has to find out from the facts of each case :- (1) Whether demands for enforcing the Bank guarantees has been made strictly in accordance with the terms of the document concerned : or (2) Whether there is and allegation of fraud against the beneficiary of which the Bank has notice ; or (3) Whether there is any special equity arising out of the particular situation of the case giving rise to a strong prima facie arguable case against enforcement of the Bank guarantee or not ; Whether the enforcement of the Bank guarantee should be allowed or not in a particular case, will depend on the facts and circumstances of each case and the finding of the court on the aforesaid points".

(67) Justice Bonnerjea specifically noted the judgment of the Supreme Court in Union of India (UOI) Vs. Raman Iron Foundry, , in which the Supreme Court had observed as under :-

"NOW the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree

or order of a court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eo instant incur any pecuniary obligation nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right-to sue for damages".

(68) These observations of the Supreme Court are relevant in connection with the invocation of the bank guarantees.

(69) Mr. Malhotra has urged that the bank guarantees in the instant case, are "independent contracts", and have been declared to be so by the Supreme Court, and in this connection relies upon the observations of the Supreme Court made in U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., ; United Commercial Bank v. Bank of India and others. Air 1981 SC 1406 ; and Maharashtra State Electricity Board, Bombay Vs. Official Liquidator, High Court, Ernakulam and Another, .

(70) In U.P. Cooperative Federation Ltd." s case, both the Judges (Sabyasachi Mukharji & K. Jagannatha Shetty, JJ) who heard the matter, have given separate judgments. Mr. Malhotra says that reading of the judgment of Justice Sabyasachi Mukharji, leads to the conclusion that the bank guarantee is an independent contract, independent of the main contract. I do not find it stated by Justice Mukharji that the guarantee executed in India by banks in India are independent contracts. He has referred to a large number of English decisions and also Indian decisions. The English decisions which are referred to by Justice Mukharji are Hamzeh Melas & Sons v. British Imex Industries Ltd. 1958 2 Q.B.D. 127 (this case related to letters of credit); Elian and Rabbath (Trading as Elian & Rabbath v. Matsas and Matsas & Ors. 1966 2 LLLR 495 (this case related to a bank guarantee and on some peculiar facts; R.D. Harbottle (Mercantile) Ltd. and Another v. National Westminster Bank Ltd. and Others 1977 (2) All ELR 862 (this case related to a performance guarantee); Edward Owen Engineering Ltd. v. Barelays Bank International Ltd. 1978 (1) All ELR 976 (this case related to performance bond); United City Merchants (Investments) Ltd. and Others v. Royal Bank of Canada and Others, 1982 (2) All ELR 720 (this case related to irrevocable letter of credit). Among the Indian cases, referred to by him, were the Texmaco Ltd. Vs. State Bank of India and Others, , State Bank of India Vs. The Economic Trading Co. S.A.A. and Others, ; decided by himself; B.S. Aujla Company Pvt. Ltd. Vs. Kaluram Mahadeo Prosad and Others, ; Union of India and Others v. Meena Steel Ltd. and Another Air 1985 All 286; Arul Murugan Traders Vs. Rashtriya Chemicals and Fertilisers Ltd., Bombay and Another, ; Tarapore and Co. Vs. V/O Tractoroexport and Another, (THIS case related to a performance bond); and finally observed; "On the basis of these principles I reiterate that commitments of banks must be honoured free from interference by the courts. Otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice be done, the Court should interfere".

(71) Justice Shetty gave a separate judgment, agreeing with Justice Mukharji's views, but in addition also considered the judgment of the New York Supreme Court in *Satejn v. J. Henry Schroder Banking Corporation* 31 Nys 2d 631, (facts whereof have been set out in the earlier part of this judgment). He observed as follows :

" THE Court ,however, should not lightly interfere with the operation of irrevocable documentary credit. I agree with my learned brother that in order to restrain the operation of irrevocable letter of credit, performance bond or guarantee, there should be serious dispute to be tried and there should be a good prima facie acts of fraud".

(72) Neither of the two learned Judges however held that the bank guarantee is independent of the contract. Indeed, in the light of what is stated hereinbefore, in view of section 126 of the Contract Act) such a thing could not be stated, and in fact, has not been stated in this judgment.

(73) We need now turn to the judgment delivered by Justice E.S. Venkataramiah (as His Lordship then was) and Justice V. Balakrishna Eradi reported as *Maharashtra State Electricity Board v. The Official Liquidate*" of High Court, Ernakulam and Another), to find out whether in this judgment the Supreme Court has held that bank guarantee is an independent contract. Mr. Justice E.S.Venkataramiah, did not specifically refer to section 126 of the Contract Act, but referred to section 128 and section 134 of the said Act, and also considered the terms of the guarantee which was executed by the Cochin Malleables(P) Ltd. in favor of Maharashtra State Electricity Board. The appeal was filed with by the liquidator of the Cochin Malleables (P) Ltd. The Cochin Malleables (P) Ltd. had given a certain quantity of imported zinc ingots to the Canara Bank Ltd. to secure the bank in case the guarantee executed by the Canara Bank in favor of the Maharashtra State Electricity Board in the sum of Rs. 50,000.00 was enforced. The Court held that the contract between the Maharashtra State Electricity Board and the Bank constituted a guarantee, not an indemnity, and finally observed that:

"BUT the transactions viz. (1) the bank guarantee executed by the Bank in favor of the Electricity Board, (2) the contracts of supply entered into between the Electricity Board and the Company in liquidation and (3) the document under which the Company in liquidation had given a fixed deposit receipt and certain quantity of zinc ingots as security to the Bank for executing the letter of guarantee in favor of the Electricity Board are independent of each other in so far as their legal incidents are concerned."

(74) It is the contention of Mr. P.P. Malhotra that the words used by the Supreme Court, namely, ""independent of each other in so far as their legal incidents are concerned" necessarily leads to the conclusion that the bank guarantees are independent transactions independent of the other transactions, which led to the giving of the bank guarantee.

(75) The words used by the Supreme Court in Maharashtra State Electricity Board, Bombay Vs. Official Liquidator, High Court, Ernakulam and Another, in my view, cannot be construed as holding that the bank guarantees are independent transactions. What the Supreme Court has said is that the "legal incidents" of the contracts mentioned by it, are independent. This is not to say that the bank guarantee contract are independent of the contract that occasioned the issuance of the Bank Guarantees.

(76) A perusal of the judgment of the Supreme Court reported as United Commercial Bank Vs. Bank of India and Others, , shows that in no part of the judgment it has been asserted by the Hon"ble Judges of the Supreme Court (A.C. Gupta & A.P. Sen JJ), that the bank guarantees are independent contracts. In the said case. not only dealt with the letters of credit which were issued by the bankers, but also guarantees issued by the bankers.

(77) It is, Therefore, apparent that the Supreme Court has not stated in any of the three aforesaid judgments that the bank guarantees are independent contract. What the Supreme Court has said, is that the principles that govern issuance of injunction vis-a-vis letter credit and bank guarantee are similar, and that payment under letter of credit and payment under bank guarantee should not be restrained by Courts, excepting on special circumstances, like where fraud committed, and where special equities exists, which would make it appropriate to issue injunction.

(78) In other words, there is no absolute rule that in case of letter of credit and in case of bank guarantee injunction ought not to be issued. There may be circumstances which will justify the issuance of injunction. The circumstances being, as stated above, fraud and special equities ,which may exist vis-a-vis transactions between the parties. Injunction may also be issued ensure that no irretrievable injustice is caused to one of the parties (U.P. Cooperative Federation Ltd. v Singh Consultants & Engineers (P) Ltd.

(79) It is the further contended by Mr. P.P. Malhotra, counsel for the respondents that the observations of the Supreme Court that the bank guarantees are ""independent contracts" by virtue of the provisions of Article 141 of the Constitution, the said observations amount to "law declared" within the meaning of Article 141 of the Constitution, and this Court is bound by these observations.

(80) As noted above, none of the three judgments of the Supreme Court, mentioned heretofore, specifically do not say that the bank guarantees are independent contracts. In any case Mr. Malhotra has cited a large number of cases in which Article 141 of the Constitution had come up for consideration of the Supreme Court, namely, Tribhuvandas Purshottamdas Thakur Vs. Ratilal Motilal Patel, ; State of Maharashtra etc. Vs. Madhavrao Damodar Patilchand and Others etc., , Ballabhadas Mathurdas Lakhani and Others Vs. Municipal Committee, Malkapur, ; : [1980]3SCR1159 (Ambika Prasad Mishra v .State of U.P. & Others; Narinder Singh Vs. Surjit Singh, ; 1988 Sc 1353 (Anil Kumar

Neotia & Others v. Union of India & Others), Municipal Corporation of Delhi Vs. Gurnam Kaur, ; Union of India (UOI) and Another Vs. Raghubir Singh (Dead) by Lrs. Etc., and Kesho Ram and Co. and Others etc. Vs. Union of India (UOI) and Others, .

(81) Article 141 of the Constitution of India reads as under :-

"141.The law declared by the Supreme Court shall be binding on all courts within the territory of India."

What the said Article says, is that the law declared by the Supreme Court shall be binding on all the Courts. The emphasis is on "law declared". The Supreme Court, as it has been observed by itself, in the judgment in Ambika Prasad Mishra. : [1980]3SCR1159 ; that the Supreme Court has the power to declare the law, interpret laws, as also to declare them to be ultra virus of the Constitution. Interpretation of laws by the Supreme Court, and declarations of any law to be ultra vires, are converted by words "law declared" within the meaning of the provisions of Article 141 of the Constitution of India.

(82) It appears to me that there is a difference between the "law declared" and the "law made" Article 141 of the Constitution does not refer to any law made by the Supreme Court. In fact the provisions of the Constitution of India postulate that the laws shall be "made" by the Union Legislature or the State Legislatures. The power to interpret the said laws, and to give meaning to the sections of the statutes, to declare law to be ultra vires, certainly rests with the Supreme Court of India, and the High Courts in India, but in view of the written Constitution, which we have adopted for ourselves, we are bound by its terms. Article 141 of the Constitution does not speak of law made by the Supreme Court. The High Courts also do not make laws. They interpret, and also declare law to be ultra vires, the Constitution, as is permissible under the provisions of the Constitution.

(83) As stated above. Mr. P.P. Malhotra has brought to my attention a recent five Judges Judgment of the Supreme Court Union of India (UOI) and Another Vs. Raghubir Singh (Dead) by Lrs. Etc., . This was a reference made by a Division Bench of the Supreme Court for consideration of a larger bench, for determining which of the earlier judgments of the Supreme Court correctly represented the law.

(84) Chief Justice Pathak spoke for the Court (Himself, E.S. Venkataramiah. Sabyasachi Mukharji, Ranganath Misra an S. Natarajan, JJ.). What was stated by Mr. P.P. Malhotra during the course of arguments was that the Supreme Court had in that case accepted what had been observed by Lord Reid in the book Judge as Law Maker, "there was a time when it was thought almost indecent to suggest that Judges make law they only declare it. But we do not believe in fairy tales any more", has been adopted by the Supreme Court as correct position in India and that the law is made by Judges. In view of Article 141 of the Constitution such Judge made law has force of law.

(85) The contention of Mr. P.P. Malhotra does not take into account what has been stated by the court in that judgment, and he uses the words of Lord Reid as law laid down by the Supreme Court. In view of what is stated by the Supreme Court through Chief Justice Pathak, the contention of Mr. Malhotra is not correct. What has been stated by the Supreme Court, is as follows :

"THE position is substantially different under a written Constitution such as the one which governs us. The Constitution of India, which represents the Supreme Law of the land, envisages three distinct organs of the State, each with its own distinctive functions, each a pillar of the State. Broadly, while Parliament and the State Legislature in India enact the law and the Executive government implements it, the Judiciary sits in judgment not only on the implementation of the law by the Executive but also on the validity of the legislation sought to be implemented. One of the functions of the superior judiciary in India is to examine the competence and validity of legislation, both in point of legislative competence as well as its consistency with the Fundamental Rights. In this regard, the courts in India possess a power not known to the English Courts. Where a statute is declared invalid in India it cannot be reinstated unless constitutional sanction is obtained. Therefore by a constitutional amendment or an appropriately modified version of the statute is enacted which accords with constitutional prescription. The range of judicial review recognised in the superior judiciary of India perhaps the widest and the most extensive known to the world of law. The power extends to examining the validity of even an amendment to the Constitution, for now it has been repeatedly held that no constitutional amendment can be sustained which violates the basic structure of the Constitution (See *Kesavananda Bharti v. State of Kerala*, *Indira Nehru Gandhi v. Raj Narain*, *Minerva Mills Ltd. v. Union of India* and recently in *S.P. Sampath Kumar v. Union of India*). With this impressive expanse of judicial power, it is only right that the superior courts in India should be conscious of the enormous responsibility which rest on them. This is specially true of the Supreme Court, for as the highest Court in the entire judicial system the law declared by it is, by Article 141 of the Constitution. binding on all courts within the territory of India".

MR.P.P. Malhotra in order to support the proposition that a bank guarantee is a contract which is independent from the underlying contract between the parties, after referring to the aforesaid judgments of the Supreme Court, has referred to the judgments of the High Courts. He referred to a Division Bench of the Delhi High Court reported as (1981) 51 Comp Cas 316 *Premier Tyres v. State Trading Corporation of India Ltd.*

(86) A perusal of the facts of that case will go to show that in the said case the facts were materially different from the facts of the instant case.

(87) The facts of the *Premier Tyres* case were that the State Trading Corporation was a canalising agency for the import of natural rubber. In connection with the registration of the demand of the *Premier Tyres* for natural rubber by the State Trading Corporation, a "bank guarantee" was executed by the Bank of India, The

said "bank guarantee" in its terms, specifically stated that in consideration of the registration of the requirement of natural rubber of M/s. Premier Tyres by the State Trading Corporation, a "bank guarantee" was being given by the Bank of India, and the "bank guarantee" had, in its terms, stated that in case of violation of the terms of inter alia, the letter of allotment issued by the State Trading Corporation, specific amount should be paid by the Bank of India to the State Trading Corporation.

(88) M/S Premier Tyres sought an injunction against encashment of the bank guarantee by the State Trading Corporation. The Division Bench of this Court (Rajinder Sachar & O.N. Vohra, JJ.) on facts, rejected the contention of the petitioner that the said document was a bank guarantee within the meaning of section 126 of the Contract Act. The Division Bench held that the document in question executed by the bank of India was an indemnity and not a guarantee.

(89) It appears to be clear from what is stated by the Supreme Court in Punjab National Bank Ltd. Vs. Shri Vikram Cotton Mills and Another, that sections 124, which relates to an indemnity, and 126 of the Contract Act, which relates to a guarantee, are different in their terms, content and effect.

(90) The Division Bench having held that the "bank guarantee" executed by the Bank of India, was an indemnity, and not a bank guarantee any observations that the bank guarantee is an independent contract is obiter, and the observations in the said case have no application to the present one, inasmuch it is not the case of either of the parties that the documents in question in the instant case, guarantee No. NP/G/16/136 dated 7.12.1987, given for "security for compliance with his obligations in accordance with the Contract", and NJ. NP/G/16/137 dated 19.11.1987 in connection with mobilization advance, are indemnities. In the instant case, we are admittedly concerned with Bank Guarantees.

(91) From this judgment, proposition cannot emerge that all bank guarantees are independent transactions. In my view whether a bank guarantee is, or is not an independent transaction, will necessarily depend upon its terms.

(92) There is no case cited before me by either of the parties to the instant proceedings, which is to the effect that the terms of guarantees do not determine its nature and scope. In fact, it is law settled by the Supreme Court in the State of Maharashtra v. Dr. M. N. Kaul (supra) that a guarantor is bound by the terms of his engagement.

(93) All the cases cited at the bar before us, require the Court to look at the terms of the guarantee to determine the nature of the liability thereunder. In view of the cases which have been cited before me. I think it is necessary to also make it clear that the terms of the guarantee have to be looked at to determine whether it is independent of any contract or not. If upon reading the terms of the guarantee, the conclusion is that the guarantee is not controlled by the underlying contract, then the obligations under the guarantee have to be taken to be independent of the obligations under the contract. If however, upon

reading the terms of the guarantee it appears that the guarantee is to be controlled by the terms of the contract which had occasioned issuance of the guarantee, then it cannot be said that the guarantee is independent of the main contract.

(94) Mr. P.P. Malhotra also refers to the case of Harprashad and Co. Ltd. Vs. Sudarshan Steel Rolling Mills and Others, in connection with bank guarantee. This case has had a chequered history" inasmuch as it came up before the Delhi High Court on number of occasions" In the first instance, it first came up before D.K. Kapur, 1., who had granted the injunction sought by M/s. Harprasad and Co. Ltd., restraining the encashment of the bank guarantee. An appeal was preferred against order of Kapur, J. which came up for hearing before a Division Bench of this Court (V.S. Deshpande and Hari'sh Chandra. JJ. who by their judgment reported as Harparshad and Co. Ltd. Vs. Sudarshan Steel Mills, Punjab National Bank, , confirmed the order injunction granted by Justice D.K. Kapur.

(95) Thereafter, an application was made under Order 39 Rule 4 of the CPC for vacating the order of injunction that had been passed. This application come to be dealt with by R.N. Aggarwal J. who refused to vary the order. The matter then went up in appeal before a Division Bench of this Court, comprising of Chief Justice Prakash Narain and B.N. Kirpal, J" who by their order varied the injunction. This judgment is reported as 1983 Delhi 128.

(96) It will thus be seen that in the Harprasad & Co.'s case four of Judges of this Court, had held that injunction can be granted in connection with bank guarantee. This case led to two conflicting judgments of coordinate benches. It is noteworthy that Chief Justice Prakash Narain & Kirpal, J., in the judgment state as a general principle that bank guarantees "are "bilateral" in character. A perusal of the bank guarantee in the said case however, shows that only one person executed it, i.e. the bank, i.e. it was unilateral. As observed earlier, it has been held in Raghubir Singh's case (decided many years later) by the Supreme Court, reported as Union of India (UOI) and Another Vs. Raghubir Singh (Dead) by Lrs. Etc., , that "application of general principles must yield to limiting terms of statutory provisions itself". The statutory provisions in connection with bank guarantee is section 126 of the Contract Act, which section speaks of three parties in connection with bank guarantees. In view of the said decision of the Supreme Court the general principle of bilateralism must yield to the terms of the statute, i.e. Bank Guarantees are tripartite documents. This mandate of the Contract Act has to be thus read into each bank guarantee executed in India. This statement also accords with the view of the Supreme Court in 1970 Sc 1973- the matter in issue in that case. In any case, the Division Bench decision goes contrary to what is stated by the Supreme Court in the aforesaid judgment. Harprashad and Co. Ltd. Vs. Sudarshan Steel Rolling Mills and Others, is based upon the observations made by the Division Bench of this Court in 1982 Rlr 138, wherein Sachar, J. speaking for the Court, specifically held that the document in question was an indemnity arid not a bank guarantee. Being indemnity, the

document could be bi-partite document. The observations of the Division Bench based on the said judgment By a second Division Bench of this Court, not being in accord with the Supreme Court judgment in Punjab National Bank Ltd. Vs. Shri Vikram Cotton Mills and Another, , could not be stated to represent the correct legal proposition.

(97) In view of the statutory provision, as explained by the Supreme Court in Punjab National Bank Ltd. Vs. Shri Vikram Cotton Mills and Another, , Mr.Malhotra is not right in his contention that the bank guarantee is an independent contract.

(98) This will now take us to the next proposition which has been advanced by Mr. Shiv Dayal. Mr. Shiv Dayal refers to paragraphs 33 and 33A of the application, and states that the Petitioner contend that the respondent Nbcc is guilty of committing fraud on the Petitioner, and on that account, the bank guarantee issued at the instance of the Petitioner for the benefit of the Nbcc are inoperative and void. In any case, it is also submitted that the Nbcc is guilty of suppression of material facts and misrepresentation, and, Therefore, the aforesaid guarantees are not enforceable at the instance of the NBCC.

(99) In connection with the contention of the alleged fraud committed by the Nbcc, it is said by Mr. Shiv Dayal that the letter dated 15.4.1987 from the Petitioners to the Nbcc, (which is annexed to the petition as annexure "A") shows that.

(100) The other judgments of the Division Bench, which have been cited at the bar by Mr. P.P. Malhotra, are G.S. Atwal and Co. (Engineers) Pvt. Ltd. Vs. National Projects Construction Corporation Ltd., ; 1983 Delhi 128 (Harprashad & Co. Ltd. v. Sudarshan Steel Mills & Ors. Prakash Narain, Cj & B.N. Kirpal, J) ; 1981 Rlr 138 (Premier Tyre Ltd. v. State Trading Corporation- Rajindar Sachar & O.N. Vohra, JJ) ; Air 1988 Cal 374 (Ms. Banerjee & Banerjee v. Hindusthan Steel Works Construction Ltd. and others Pratibha Bonnerjea, J.); National Project Construction Corporation Ltd. Vs. G. Ranjan, ; Centax (India) Ltd. Vs. Vinmar Impex Inc. and Others, ; and 1983 CWN807 (Texmaco Ltd. v. Stale Bank of India & Ors.).

(101) The reason for Mr. P.P. Malhotra citing these judgments is to show that bank guarantee is an independent contract.

(102) I have already referred to the judgment of the Supreme Court reported as Punjab National Bank Ltd. Vs. Shri Vikram Cotton Mills and Another, , wherein Justice Shah and Justice Grover have held that a bank guarantee is between three parties. None of these judgments of the High Court referred to the declaration of law by the Supreme Court in 1970 Sc 1973, and as such, in the face of the Supreme Court judgment, in view of the provisions of Article 141 of the Constitution, it cannot be said that the aforesaid judgments represent binding precedents.

(103) It is to be noted that in G.S. Atwal and Co. (Engineers) Pvt. Ltd. Vs.

National Projects Construction Corporation Ltd., , the Division Bench of this Court, did not refer to the aforesaid judgment of the Supreme Court in Punjab National Bank Ltd. Vs. Shri Vikram Cotton Mills and Another, , and further the observations of the Division Bench regarding independence of the bank guarantee were not needed to decide the NBCC's offer has been accepted by the Petitioners by which the Nbcc desired the Petitioners to become a sub-contractor for the entirety of the contract, Annexure "A" reads as under :

Ref. No. NCPL/6522/87 April 15, 1987. From : M/s. Nangia Construction (1) Pvt. Ltd., 204, Sahyog, 58, Nehru Place, New Delhi. To : Shri A.K. Kaul, Manager (Home Projects) Nbcc Ltd., Integrated Office Complex, New Delhi-11003. Sub : Strengthening of roads km 50 to 74. 8 on G.T. Road in Haryana, Murthal-Samalkha-Sonepat Rates thereof. Dear Sir, We are pleased to give the enclosed rates on the above work which are based on the assumption that we would be using our own machinery in the work. We will be executing the work on back to back basis taking into consideration your 5% on the payments which will be released to us.

We are to request you to make a provision of Rs. 20 lacs in foreign exchange for purchase of desired Electronic Paver. Further whatever facility i.e. Mobilization Advance or any other advance is taken by Nbcc, the same shall have to be passed on to us. In regard to quality of work, it would be our responsibility to satisfy the client department. Thanking you, Yours faithfully, for Nangia CONST. (INDIA) PVT. LTD. sd..00 Director Attorney .

(104) Mr. Shiv Dayal submits that the offer that was made by the petitioner was to execute the work on back to back basis, and that 5% of the amount released to the Petitioners would belong to the NBCC.

(105) Mr. Shiv Dayal further contends that the respondent made the Petitioners believe that the Petitioner would be associate contractor for the whole of the work. It is his contention that the Nbcc concealed from the State of Haryana till April, 1988, that the petitioner was a contractor on the basis of back to back contract. Instead, they represented to the State of Haryana that the Petitioner was a contractor with respect to only three items. It is his contention that the fraud committed by the Nbcc is inducing the belief in the Petitioners that the contract would be back to back with respect to whole of the contract, and relying upon this fraudulent representation of the Nbcc that the Petitioners gave a guarantee for 10% of the full amount of the contract (reduced by 5% in terms of the contract between the Petitioners and the NBCC). Mr. Shiv Dayal says that the guarantees given pursuant to the contract dated 26.10.1987 between the Nbcc and the Petitioners, are based upon fraud, of the beneficiary Nbcc, and that a guarantee obtained by fraud of the beneficiary should not be permitted to be invoked, Mr. Shiv Dayal also says that although the mobilization advance was received by the Nbcc, it was not made over to the Petitioners till the guarantees were executed on 7.12.1987, that this was a fraudulent act also.

(106) Mr. Shiv Dayal also says that the contract document which was executed between the Nbcc and the State of Haryana, was given to the Petitioner on 18.11.1987, although the work on back to back basis had already commenced by the Petitioner on 1.11.1987.

(107) Mr. Shiv Dayal says that the fraud comprised in obtaining the bank guarantee with respect to the entirety of the work, whereas the Nbcc were later permitted by the State of Haryana to sub-let only three items of work. It is further contended that as there was no permission given by the State of Haryana in December, 1988 to sub-let any part of the contract, asking for guarantee for the whole of the amount, and obtaining the guarantee for whole of the amount in December, 1988 is fraud.

(108) Mr. Shiv Dayal also contends that there is fraud committed by the Nbcc also in the matter of invocation of the bank guarantee. The fraud comprises in stating in the letter dated 19.5.1988 to the bankers of the Petitioners, that, the Petitioners-contractor, have committed a breach in the term of the contract, and that the contractor had failed to perform its obligations. It is contended that the fraud lies in not revealing in the letter of invocation the real reason for invocation, which was letter dated 18.5.1989 received by the Nbcc from the State of Haryana, threatening to terminate the contract between State of Haryana and the Nbcc, and before such a thing happened, Nbcc wanted to encash the bank guarantees.

(109) Prima facie, an examination of letters annexure "A" reproduced above, being the first communication between the parties, and annexure "H" with regard to the contract in question, establishes that the offer made by the Petitioners in its letter dated 15.4.1987, and replied to by the respondent in their reply dated 20.7.1987 (annexure "H"), reproduced here below that the parties had entered into the agreement on back to back basis. Annexure "H" reads as under :

National buildings Construction Corporation LTD. (A Government of India Enterprise) Nbcc House, Lodi Road, New Delhi-110003 (India). No : Engg/1019/87/539 20th July 87. M/s Nangia Construction (India) Pvt. Ltd., 204, Sahyog, 58, Nehru Place, New Delhi-110019. Sub :-Widening to four lanes including strengthening of existing pavement between Km 50 and 130 of Nh No. 1 in Haryana (KM 50 to 74,80 Murthal to Samalakha) Dear Sir, Please refer to your letter No. NCPL/6522/87 dt 15th April 1987. We are pleased to inform you that Haryana Pwd has approved our offer for the above work. The copy of letter of award is enclosed for your information. In this connection, kindly refer to your letter No. NCPL/6522/87 dt. 15th July, 1987 vide which you had submitted offer to us on back to back basis. We are pleased to place letter of intent with you for the above work on back to back basis on terms and conditions already settled. The above letter of intent is subject to the approval of our clients. Meanwhile kindly arrange bank guarantees for security and mobilization advance on the proforma as enclosed. Detailed letter of award will follow. You are also requested to make it convenient to sign the agreement within 10 days of receipt of this

letter. Thanking you, Yours faithfully, sd/- (A.K. KAUL) Project Manager (HP)"

(110) In none of the cases relating to bank guarantees which have been cited by the parties, fraud was either alleged or proved. Notwithstanding that all the courts held that in the event of fraud being committed in connection with the bank guarantees, then injunction could be issued restraining encashment of the same.

(111) It is necessary to set out certain provisions of the Contract Act which have a bearing on the matter of fraud and misrepresentation. These are sections 17, 18 and 23 of the Contract Act. It will also be necessary to advert to the provisions of section 126 of the Contract Act, which has already been reproduced above. The aforesaid provisions of the Contract read as under:-

"17."Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract : (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true ; (2) the active concealment of a fact by one having knowledge or belief of the fact ; (3) a promise made without any intention of performing it ; (4) any other act fitted to deceive ; (5) any such act or omission as the law specially declares to be fraudulent. Explanation .Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

18."Misrepresentation" means and includes. (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; (2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; (3) Causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement. 23. The consideration or object of an agreement is lawful unless. it is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent-, or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every of which the object or consideration is unlawful, is void."

(112) Provisions of section 23 of the Contract Act makes it clear that every agreement of which object or consideration is unlawful, is void. That contract is void, the consideration of which would defeat the provision of any law. To agree to do what is forbidden by any law makes the agreement void.

(113) The bank guarantee in the instant case, (which has been reproduced

above), is a unilateral documents, having been executed only by the bank. It is in the nature of a deed poll, and its terms indicate that it is in accord with the provisions of section 126 of the Contract Act.

(114) When judgment of the Supreme Court in Union of India (UOI) and Another Vs. Raghubir Singh (Dead) by Lrs. Etc., , to the effect that application of general principles of law must yield to the limiting terms of the statutory provisions itself, is read with the observations of the Supreme Court in the case reported as Punjab National Bank Ltd. Vs. Shri Vikram Cotton Mills and Another, that bank guarantee requires concurrence of three persons the principal debtor, the surety and the creditor-the surety undertaking an obligation at the request, express or implied of the principal debtor, and the further observations of the Supreme Court in the judgment in Air 1973 Supreme Court 1973, that, "the obligation of the surety depends substantially on the principal debtor's default" indicates that the liability of the guarantor comes into operation only upon default. In other words, liability under the bank guarantee issued by a bank is contingent upon occurrence of default of the principal debtor. The principal debtor being the person at whose instance the bank guarantee has been obtained, and unless default by him takes place, no liability under the bank guarantee could arise.

(115) It seems to me that any bank guarantee which eliminates the default contingency statutorily built into section 126 of the Contract Act, would be hit by the provisions of section 23 of the Contract Act, which says that the consideration or the object of an agreement would not be lawful if the consideration is intended to defeat the provisions of law, Section 126 is statute law, and if any document is executed in such a manner that its provisions are defeated, then such an agreement and the consideration Therefore would be unlawful, and the agreement void by the force of section 23 of the Contract Act.

(116) In other words, if a guarantee, which according to the terms of section 126 has to have provisions regarding default built into it, does not have a term therein regarding the default contingency, then one shall have to be read into it, if the guarantee is to be enforceable.

(117) A guarantee which is sought to be made enforceable can without any default by the principal debtor, would be a guarantee obtained with the intention to defeat the provisions of the law contained in section 126 of the Act, would be void. For this reason, an unconditional bank guarantee as the non-default bank guarantee have come to be known) executed in India would not be enforceable at law at all, for the reason that the unconditional bank guarantee goes against the provisions of section 126 of the Contract Act. Section 126 of the Contract Act makes a guarantor liable only upon the happening of a default, and not merely upon a demand by the beneficiary. If the bank guarantees in question in this case, are unconditional bank guarantees, the aforesaid reasons are sufficient reasons for restraining the encashment of the bank guarantees in the instant case. Mr. Shiv Dayal, however, unlike Mr. Malhotra, contends that the guarantees referred to clause 60(3) of the Contract Act, are contingent, and will become

enforceable when the events postulated by section 67 of the Contract Act happen.

(118) It is the contention of Mr. Shiv Dayal that the bank guarantees in the instant case, ought not to be permitted to be encased for three reasons, namely, (i) frauds of the NBCC; (ii) right to encash bank guarantees has not accrued; and (iii) special equities exist in favor of the Petitioners that justify non-encashment of the bank guarantees.

(119) As regards fraud of the Nbcc, it is asserted by Mr. Shiv Dayal that letter dated 15.4.1987 written by the Petitioners to the Nbcc, Annexure "A" the petition, accepts the offer of the NBCC. By that letter the Nbcc has desired that the Petitioner becomes a sub-contractor of the NBCC. Mr. Shiv Dayal asserts that a perusal of the said letter is sufficient to establish that the entire contract in connection with the widening to four lanes including strengthening of existing pavements of Shershah Suri Marg, National Highway-1 from km 50 to km 74.8 (Murthal to Samalka) Contract-1, was given on back to back basis to the Petitioner. What the Nbcc retained for itself was right to receive 5% commission on the value of the entire works. Mr. Shiv Dayal asserts that from April, 1987 to April, 1989, the respondent made the Petitioner believe that the Petitioner was an associate contractor for the whole of the work, and that the Nbcc concealed from the Government of Haryana till April, 1988, that the Petitioner was given the entire contract on back to back basis, and they kept on representing to the Government of Haryana that only three items of works had been given to the Petitioner, and all these actions were fraudulent, and, Therefore, the resultant bank guarantees and agreements are void. As bank guarantees are void the same are not enforceable, and the bank should be restrained by an injunction ,restraining the bank from making payments under the guarantees.

(120) Mr. Shiv Dayal further contends that the Petitioners did not come to know of the prohibition against the sub contracting of the whole of the contract till after the Petitioners started the execution of the work, for the reason that the copy of the agreement between the Nbcc and the State of Haryana was given by the Nbcc to the Petitioner only on 8.11.1987, whereas the work had been commenced by the Petitioners on back to back basis w.e.f. 1.11.1987, that this amounted to concealment by the Nbcc within the meaning of section 17 of the Contract Act. Such concealment makes the consideration for guarantee contract (to which the Petitioner is a party by virtue of section 126 of the Contract Act) unlawful, and the guarantee contract void.

(121) MR.SHIV Dayal has crystalised his assertion vis-a-vis the fraud which is alleged to have committed by the Nbcc in connection with the performance guarantee as follows :- 122. The Nbcc concealed from the State of Haryana till 19.4.1988, that the Petitioner is a sub-contractor for the whole work. He says that, "cat was out of bag" by the letter dated 19.4.1988, written by the petitioners to the Nbcc, copy whereof was sent to the Chief Engineer, Haryana Public Witness .D." The said letter is annexed as annexure "S" to the petition, which reads as under"-

"NANGIA CONSTRUCTIONS (INDIA) PVT. LTD. Engineers Builders DEVELOPERS. 24, Sahyog, 58 Nehru Place, New DELHI. REF. No. NPCL/454/89 April 19, 1989 1. C.G.M. (Works) N.B.C.C. LTD., Lodhi Road, New Delhi. 2. Chief Engineer (VI) Works, N.B.C.C. LTD., Lodhi Road, New Delhi, 3. Project Manager (Works), N.B.C.C. LTD., Sonapat. Sub : Widening to four lanes including strengthening of existing pavements between Km. 50&130 of NH-1 in Haryana Km. 50 to 74.80 Murthal-Samalkha). works, though for all practical purpose, they know that we are executing works at site, but do not consider our entity of any significance. You will appreciate our contract is based on back to back basis. Whether such contracts are entered. Associate contractors have inherent right to directly deal with Client Department. The Margin Money, in other words, royalty of Corporation is 5% of the amount of the work executed by us and total cost of the work awarded to Corporation by the Haryana Govt. is Rs. 9,43,92,969.45, which, in turn, has been awarded to us by the Corporation. You will concede various problems arise and crop up in the execution of Engineering Contracts and day to day discussions thereon are invariably to be held at site and decisions given. Whenever these are held, the Client Department refuses to recognise our entity and it is after the Client Department's officials leave site, only then we are allowed to discuss with the Corporation officials who subsequently do not find convenient to get these resolved as Corporation being Government Organisation finds it difficult to exert its weight on another Govt. Organisation. This non-coordination has started showing impacts on the progress of work.

In the meetings, we had apprised the officials of above problems. We are also Class is Contractors of Govt. of India and would desire to be behaved respectfully. We had specifically raised above issues in our letters dt. 10.12.88 and 5.4.89, but there seems to be no solution coming out and almost good period has been lost. Even the payments have been held and are not released proportionate to the actual work executed at site. As per Clauses 3 & 4 of the Printed Conditions of Contract on page 98, assignment and subletting is provided. This is permissible. If sub-letting or assignment, as found proper, is done with the approval of the Client Department, we as Associate Contractors get all right to directly deal with the Client Department, though the liability of the Corporation does not cease, in which eventuality, we will be in a position to use our available resources to get certain things done from the Client Department. The proper co-ordination, discussions, clarifications, release of payments for the actual work executed at site etc, are must between the Associate Contractor and the Client Department as the Corporation is merely involved for 5% margin or royalty charges. Till date no official meeting has been held with us by the Client Department and on one occasion when our Sh. Madan Lal Nangia specially went to Chandigarh in Aug./Sept-1988 to discuss important issues, the Se of the Client Department refused to recognise him said he would deal with Corporation Officials only. .Sh Bahl, RE/DY, Pm was present at that time. We have reliably learnt that Corporation took up this issue with the Client Department to recognise us as sub-contractors but while doing so, perhaps it was not brought to

the notice of the Client Department that the entire work has been sublet or awarded to us. Now we request to please get us recognised with the Client Department as your assigned/sub-contractor within 10 days of the receipt of this letter, so that we get the right of directly dealing with Client Department. In that eventuality, we will impress upon them with regard to execution of various items, payments etc. and progress would be achieved rapidly, failing which state of affairs will continue to be same, leaving us for mercies. Thanking you, Yours faithfully, for Nangia Constructions (INDIA) P. LTD." Director Copy to: Chief Engineer, Haryana Pwd, Building & Roads, Sector 19, Chandigarh with a request to approve us as sub-contractor or assigned/contractor on the basis of facts stated in the body of letter, so that we become legally entitled to communicate and discuss the affair of this contract with your respective officials. We hope to get reply within 10 days. for Nangia Constructions (INDIA) P. LTD."

(123) It is further contended by Mr. Shiv Dayal that the Nbcc kept on holding out to the State of Haryana that it is planning to let out only three items of works to the Petitioner, and the Nbcc kept the State of Haryana in dark, that as a matter of fact, since April, 1987 the Nbcc intended to, and ultimately did enter into back to back contract with the Petitioner for the whole of the works. Mr. Shiv Dayal says what was done actually by the Nbcc is reflected in the letter dated 24.4.1988 from the Nbcc, to Chief Engineer which reads as under :-

"COPY of letter No. W/P&W/88-89/62 dated 24th April 1988 from the Project Manager, N.B.C.C. Sector-14, Sonapat, to the Chief Engineer (NH) Haryana, Chandigarh. Subject : Dear Sir, With reference to your letter No. NH-86/618/WB Dt. 9.3.1988 it was intimated to us that the work cannot be associated with any Agency to execute the same per contract. Our Director (Home Projects) had a meeting with you on 28.3.88 at Chandigarh, and this matter was discussed in details, Accordingly, as per clause 4 of the General Condition of vol. I Section-IXX of the Contract, we, hereby, submit that we are sub-letting the above work to M/s. Nangia Constructions (India) Pvt. Ltd.,:04,Sahyog, 58 Nehru Place, New Delhi-110019 for the following items of works.

S. No. Description of work Amount of work 1. General & site clearance as per item 1.01,1.02 of Nbcc contract. Rs. 6,30,000,00 2. Earth Work in as per item 2.01, 2.02 of contract. Rs. 1,40,64,051.50 3. Gross drainage works as per clause 5.01, to 5.15 and 6.19 of R.C.C. contract. Rs. 1,02,80,752.00 Total. Rs. 2,49,74,793.50

You are requested to accord your permission for sub-letting the above works to the firm as all particulars of the firm was sent to you along with our letter No. PM/NPCL/1/87-88/97 dated 24.2.88. We assure you that even after sub-letting the above work to the firm we would be supervising all operations with the help of our team of Engineers and will be firmly responsible for the quality and timely completion. Thanking you and assuring you for highest consideration for all times. Copy to:-

1:The Executive Engineer, Haryana Pwd B & R Branch, World Bank Division, Munher for favor of kind information and further action at your end please.

2.The Chief Engineer, NH-1.NBCC Limited, Nbcc House. Lodhi Road, New Delhi, for favor of kind information please. sd/- Project MANAGER"

(124) Mr. Shiv Dayal states that reading this letter indicates that the Nbcc wants to convey to the State of Haryana that sub-letting, is yet to be done by use of the words "We are sub-letting", whereas back to back contract had already been entered into between Nbcc and the Petitioners as evidence by Annexure "A" and Annexure "H" etc.

(125) Mr. Shiv Dayal says that another act of fraud committed by the Nbcc in connection with this contract vis-a-vis the Petitioner is that in spite of receiving the mobilisation advance from the State of Haryana, the mobilisation advance amounts was not released to the Petitioners until the guarantees were executed by the Petitioners.

(126) Mr. Shiv Dayal says that the mobilisation advance amount was received by the Nbcc on 23.1 1.1987 from the State of Haryana. Instead of releasing the whole of the said amount for execution of the contract forthwith, only that part of the mobilisation advance received, was released by the Nbcc to the Petitioner, the first Installment being released on 24.12.1989, on which date Rs. 35 lacs were disbursed; thereafter in March, 1988 Rs. 32 lacs were disbursed; and in April, 1988 Rs. 28 lacs were disbursed. Total Mobilisation advance paid to the Petitioners by Nbcc was thus Rs. 89 lacs.

(127) Mr. Shiv Dayal says that another fraud, by concealment of truth, committed by Nbcc, was withholding of the terms of the contract between the State of Haryana and the NBCC. He says that copy of the contract between Nbcc and State of Haryana was supplied only on 8.11.1987, whereas the work had been started by Petitioners on 1.11.1987. (Mr. P.P. Malhotra objects to this contention, as according to him, there was no plea raised to this effect in the pleadings).

(128) Mr. Shiv Dayal says that another act of fraud committed by the Nbcc vis-a-vis the Petitioner and the State of Haryana, was that the running bills which were submitted by the Petitioner, were not sent on that very form, on the forms which were typed by the Petitioner. The Nbcc re-typed those bills on its own forms, and sent the bills to the State of Haryana Mr. Shiv Dayal says that this was done to keep the State of Haryana in dark regarding the sub-contract of the entirety of the contract on back to back basis to the Petitioner, Mr. Shiv Dayal adds that the re-typing was done by the Nbcc to give the impression to the State of Haryana that the Nbcc was executing the work, and not the Petitioners.

(129) It is contended by Mr. Shiv Dayal that the Petitioners acted on the representations of the Nbcc as contained in the letter dated 20.7.1987 (annexure "H"), written by the Nbcc to the Petitioner, and contract between the parties

dated 20.7.1987, believing that the Petitioner was executing the contract on back to back basis, whereas in reality it was within the knowledge of the Nbcc that the contract could not be sub-let on back to back basis to the Petitioner in view of the provisions of the contract between the Nbcc and the State of Haryana. It was for the first time that contract between the State of Haryana and the Nbcc was furnished to the Petitioner on 18.11.1987, and it was only thereafter that they could have become aware of the prohibitions against sub-letting, and by the time they became aware of the prohibitions etc., it was too late as the guarantees had already been furnished mobilisation done by the Petitioners, and the work commenced by the Petitioners on 1.11.1987.

(130) It is contended by Mr. Shiv Dayal that the belief of the Petitioner that the work has been sub-contracted on back to back basis was confirmed when in accordance with the agreement between the Nbcc and the Petitioner, the Nbcc after retaining 5% from out of the mobilisation advance, received by it from the State of Haryana, gave 95% of the mobilisation advance by Installments to the Petitioner. Thereby these acts, the Petitioner was kept into dark regarding the real terms of contract between Nbcc and State of Haryana.

(131) It is contended by Mr. Shiv Dayal that the bills of the Petitioner were not paid, and the representatives of the State of Haryana at the site, did not pay heed to anything which was stated by the representatives of the Petitioner at the site. For the first time the real facts were brought to the notice of the State of Haryana in copy of letter dated 19.4.1989 (annexure "S").

(132) Mr. Shiv Dayal refers to annexure "N" annexed to the petition in connection with "special equities" in favor of the Petitioners. This is letter written by the Nbcc to the State of Haryana on 10.10.1988 and read as under:-

National buildings Construction Corporation LTD. (A Govt. of India Enterprise)
Haryana Road Works 1293, Sector, 14, Sonapat Haryana No. PM/HRW/1/88-89
Dated 10th Oct. 1988 The Chief Engineer (National Highway) Haryana Pwd (B&R Branch) Chandigarh Sub : Four Lining Of Sher Shah Suri Marg From Km 50 To Km 74.8 Dear Sir, The above work was awarded to the Corporation vide your Memo No. 34-NH-86/1293/WB dated 1.7.87 valuing Rs. 9,43,92,963.46. The letter of commencement of work was issued by your office on 1.10.87 as per Clause 41 of General Condition of Contract and fixing the date of commencement as 1.11.1987. You were kind enough to release us 10% Mobilisation advance as per terms of Contract on 23.11.1987. We were very much interested to take up the work in right earnestness from the very beginning but could not do so due to various hindrances which were beyond our control as enumerated below:

(A) There was difference in actual RL's taken at site and that shown in the working drawings issued to us on 25.11.87, which requires "L" Section and alignment of the New Road to be modified based on the fresh level taken at site. This process took considerable time for approval of Sections by your Department.

(B) Approval of "L" Section and Alignment for the first 5 Km i.e. 50 Km to 55 Km

was given to us on 9.3.88 & 6.4.88 and approval of Km 60 to Km 65 was given on 24.8.88.

(C) No. clearance of Borrow area was given by department though requisite soil test report was submitted by us on 2.8.88 as per the intervention of C.R.R.L whose requirement of C.B.R. value was 4% to 7% whereas as per Contract C.B.R. value of 8% minimum was indicated. This issue could be resolved in M.O.T. & Cirri as late as on 28.4.88. In absence of this decision earth work could not be commenced.

(D) Borrow area clearance was given to us on 28.4.88 for earth work in Km 50 to Km 55 only and that too for under layers. We could commence our earth work only after getting this partial clearance.

(E) Clearance for laying Top layer of earth work was given to us on 16.6.88 for Km 50 to Km 53.690 and for under layers given beyond Km 53.690. Top layer clearance beyond Km 53.690 was recently verbally.

(F) There have been unprecedented heavy monsoon this year which has resulted in interruption of work due to collection of water in borrow pit area, approaches and also at work-site. The mobilisation advance paid to us has been fully utilised on this project for plant and machinery, setting up of site camp office, Arrangement of Borrow Areas, setting up of field laboratory with all necessary equipments procurement of materials, payment of advances for materials, labour and field overheads for last 11 months. As per the terms of para 60-7(b) of the Agreement the repayment of Mobilisation Advance shall commence 6 months after the commencement of the work i.e. 1.11.1987 However, on account of the various hindrances mentioned above we could not generate the funds as planned and thus cash flow could not be maintained. The recovery of mobilisation advance as such adversely effected our financial position of this project.

Under these circumstances, we request you to defer the payment of recovery of mobilisation advance for another six months to start the first recovery w.e.f. 1.10.88 and rephrase the balance recovery in a manner so that entire recovery is effected in 18 equal Installments which will be within the overall parameter stipulated in the contract. We will be extremely thankful to you for considering our above request as the same will help us in progress of work. We assure you that all our efforts will be made to complete the project as per stipulated date of completion i.e. 31st March, 1991. Thanking you and assuring you of our best services at all times. Yours faithfully (A.C. MATHUR) Project Manager Copy To : 1. C.G.M. 2. CE-IV".

(133) Mr. Shiv Dayal contends that the tenor of the letter bears out the conduct of the Nbcc, and it becomes clear that the Nbcc wants to convey to the State of Haryana that the work is actually being done by Nbcc, and not by the sub-contractor, the Petitioners. That this letter establishes that the mobilisation advance received by the Petitioners was only utilised for the purpose of the contract. Further, whereas the Nbcc asked the State of Haryana to postpone

recovery of Mobilisation advance from the running bills till 1.10.1988, the Nbcc had started recovering the mobilisation advance from the running bills presented by the Petitioner w.e.f. April, 1988, and thereby retaining the monetary advantage to itself from out of the payments of the running bills, which have been received from the State of Haryana.

(134) Mr. Shiv Dayal, Therefore contends that the Nbcc is fraudulently seeking to invoke the guarantee in connection with the mobilisation advance despite the knowledge that the mobilisation advance has been fully utilised by the Petitioner in connection with the execution of the works. He says that this is clear when Annexure "N" letter is read along with Annexure "R" to the petition, being letter dated 16.2.1989, written by the Nbcc to the Bank of India, recommending that further sums of Rs. 25 lacs be advanced to the Petitioners. Admittedly this letter also establishes that the entire contract was such-contracted by Nbcc to the Petitioners. The said letter reads as under :-

"FROM: National Buildings CONST. Coporation LTD. Haryana Road Works, 1293 Sector 14, Sonapat, Haryana Dated Feb. 16,1989. To: The Chief Manager, Bank of India, Industrial Finance Branch, Shivaji Stadium, New Delhi Dear Sir, The above work was awarded to M/s. Nangia Constructions (India) Pvt. Ltd. valuing Rs. 943 lacs. For boosting the progress of work a further financial assistance of Rs. 25 lacs is required by M/s. Nangia Constructions (India) Pvt. Ltd. It is recommended that the said financial assistance be provided at the earliest. We undertake to recover from their payments as per request made by M/s Nangia Constructions (India) Pvt. Ltd. and as per instruction given by the Bank. Thanking you, Yours faithfully sd/- (A.C. Mathur) Project Manager Copy forwarded to (1) The Chief Manager, Bank of India, Nehru Place, New Delhi. (2) M/s. Nangia Constructions (India) Pvt. Ltd., 204, Sahyog, 58, Nehru Place, New Delhi. sd/- (A.C. Mathur) Project Manager"

(135) It is contended by Mr. Shiv Dayal that it is only from the letter dated 19.4.1989, written by the Petitioner to the Nbcc with a copy to the Chief Engineer, State of Haryana, that the State of Haryana came to know for the first time that the Nbcc has not merely sub-let three items of work, but the entirety of the work has been sub-let on back to back basis, and this awareness on the part of the State of Haryana, is to be found in the letter written by the State of Haryana in response to the aforesaid Annexure "S" dated 19.4.1989. The letter written by the Chief Engineer to the Nbcc after State of Haryana had received Annexure "S", is annexure ""T" which reads as follows:-

"FROM: Chief Engineer (National Highways) Haryana Public Witness .D. B&R Branch, Chandigarh, To: National Buildings Construction Corpn. Ltd., (A Government of India Enterprise), Nbcc House, Lodi Road, New Delhi-110003 (India), Memo No. 34-NH-86/2011/WB. Dated Chandigarh, the 18.5.89, Subject : Widening to Four Lanes including strengthening of existing pavement of S.S. Marg N.H.I, from Km 50 to Km 74.80 (Murthal to Samalkha) Contract-1 The above work stands allotted to you vide this office memo No. 34-NH-86/1239

dated 1.7.87 at the contract value of Rs. 943.97 lacs. On your request made vide your letter No. PM/HRW/1-88-89/61 dated 26.4.88 (copy enclosed), approval to sub-let the following items of this work to Nangia Constn. (India) Pvt. Ltd., New Delhi was accorded vide this office Memo No. 1422 dated 30.5.88 (copy enclosed): -

Sl. No.	Description of work	Amount of work (Rs.)	Remarks
1.	General & site clearance as per item 1.01,1.02, or B.O.Q. of contract	6,30,000.00	
2.	Earth Work in Embankment as per item 2.01,2.02 of B.O.Q. of contract.	1,40,64,051.00	
3.	Cross drainage work as per clause 5,01 to 5,15 and 6.01 to 6.19 of B.O.Q. of contract.	1,02,80,742.00	
		2,49,74,793.00	

M/s. Nangia Constructions (India) Ltd., in their reference No. NCPL/454/89 dated April 19, 1989 which is addressed to you and copy stands endorsed to this office (copy enclosed), have informed this office that you have sub-let the entire work to them on back to back basis at a commission (royalty of Corporation) of 5% of the amount of the executed by them. This action of yours is quite contrary to the terms and conditions of the contract of this work and tantamounts to your under breaching the contract and attracts action against you under clause 63 Vol. I Section Iii of the contract. Before any action is taken against you for bearing the contract, you are directed to clarify your position with respect to sub-letting of the entire work to Nangia Constructions (India) Pvt. Ltd., New Delhi in contravention of the contract and also terminate the contract, if any entered into by you with Nangia Constructions (India) Pvt. Ltd. New Delhi (except the items of the work for which approval stands accorded to you for subletting) and supply necessary documents of termination of the contract to this office by 31.5.89. In case you fail to send the reply and requisite documents to this office within the period, stipulated action will be taken against you as per terms and conditions of the contract agreement. (D.B. Gupta) Chief Engineer (National Highways) Haryana P.D.W. W&R Branch, Chandigarh".

(136) Next it is contended by Mr.Shiv Dayal that immediately on receipt of Annexure ""T" with its threat of cancellation of the contract from the State of Haryana, the officers of the Nbcc make an attempt to have both the guarantees Nos. NP/G/16/136 and NP/G/16/137 encased from the bank.

(137) The contentions of Mr. Shiv Dayal relative to the fraud vis-a-vis the mobilisation advance are as follows : Mr. Shiv Dayal contends that the act of the Nbcc asking the Petitioners to furnish bank guarantee for mobilisation advance without obtaining permission to sub-let the entirety of the contract on back to back basis, is fraudulent. He further contends that the letter dated 24.8.1988. written by the Nbcc to the State of Haryana whereby the Nbcc had sought permission to sub-let three items of works only is fraudulent ; the mobilisation advance realised by Nbcc from the State of Haryana related to the entirety of the contract. The mobilisation advanced realised, less 5%, was made over by Nbcc to the Petitioners. If the conduct of the Nbcc had been above board then the Nbcc should have given mobilisation advance to the Petitioners up to the value of

three items of works only, i.e. about rupees 20 lacs, and the mobilisation guarantee ought to have been for a sum of rupees 20 lacs only. Instead, the Nbcc called upon the Petitioners to give mobilisation guarantee in the sum of rupees 89 lacs, which represented 95% of the mobilisation advance for the entire contract (5% being receivable by Nbcc in terms of the agreement between Nbcc and the Petitioners). This is clear from the fact that the mobilisation guarantee (reproduced here above) is for rupees 89 lacs and not for rupees 20 lacs.

(138) Mr. Shiv Dayal also contends that despite the fact that the Nbcc had received the entirety of the mobilisation advance from the State of Haryana, only part of it was released to the Petitioners from time to time and thereby, the Nbcc retained part of mobilisation advance which it was not entitled to obtain, and gained financial advantage for itself. Mr. Shiv Dayal states that whereas according to the agreement between the parties, the amount of mobilisation advance which was received by the Nbcc had to be released unto the Petitioners within 10 days of the receipt in terms of the contract, it was not released. By this method also, the Nbcc retained financial advantage contrary to the terms of the contract between Nbcc and the Petitioners.

(139) Mr. Shiv Dayal contends that fraud was also committed by the Nbcc in connection with the recoveries of the mobilisation advance from the Petitioners, inasmuch as whereas the contract between the Nbcc and the Petitioners on the one hand, and the contract between the Nbcc and the State of Haryana, provided that the mobilisation advance would be recovered six months after the receipt thereof from out of the running bills, even this was varied to the disadvantage of the Petitioners and to the advantage of the NBCC. Mr. Shiv Dayal says that the part of the mobilisation advance was received by the Petitioners for the first time in March, 1988, recoveries thereof could commence from the running bills only from 1.10.1988 (six months later). Mr. Shiv Dayal says that the Nbcc to gain financial advantage to itself, made recoveries of the mobilisation advance from the running bills submitted by the Petitioners w.e.f. May, 1988, while representing to the State of Haryana that recoveries of the mobilisation advance should be postponed till October, 1988 vide annexure "N", where it is stated that the recovery be commenced w.e.f. 1.10.1988.

(140) Mr. Shiv Dayal contends that the conduct of the Nbcc is to mislead both the State of Haryana and the Petitioners, to gain advantage for itself, and, therefore) the conduct is fraudulent, and in view of the fraud perpetrated, in view of section 17 of the Contract Act, the guarantees were obtained (by committing fraud) ought not to be permitted to be invoked.

(141) Mr. P.P. Malhotra appearing for the respondent admits that a back to back contract exist, one being between the State of Haryana and the Nbcc, and the other back to back contract being between the Nbcc and the Petitioners, and that it is in pursuance of the back to back contract that the guarantees were furnished by the Petitioners. He, however, contends that the bank guarantees are contracts independent of the back to back agreement between the Petitioners and NBCC.

His contention that the bank guarantees are independent contract, has been dealt with by me herein earlier. His main contention was that the bank guarantee is an independent contract, and that being independent, it must be permitted to be operated without let or hindrance. For the reasons stated by me earlier, this contention of Mr. Malhotra has to be rejected in the facts and circumstances of the case and the law relating to guarantees, already discussed.

(142) In reply to Mr. Shiv Dayal's arguments of fraud and misrepresentation, Mr. P.P. Malhotra contends that the prohibition against sub-letting of the contract by the Nbcc was known to the Petitioners from the very beginning. He says that even in the notice, inviting tenders, it was stated that there will be no sub-letting. However, that notice inviting tender, has not been brought to my notice, and, Therefore, nothing further can be said on that basis. Even if the prohibition against sub-letting was known to the Petitioners, it is apparent that the agreement between the parties postulated seeking of permission from the State of Haryana to sub-let the entirety of the contract which permission was not to be unreasonably withheld by the State of Haryana. From what has been stated earlier, it appears that the Nbcc did not resort to an open policy with respect to the execution of the contract between the State of Haryana and itself. For example it stated that we are sub-letting three items of work". This is despite the fact that the back to back contract between the Petitioners and the Nbcc had come into existence sometime on 20.7.1987. In this view of the matter, at this stage of the proceedings I accept what has been stated by the Petitioners, rather than what has been. urged by the respondent.

(143) In support of his contention that the prohibition against subletting was known to the Petitioners, Mr. P.P. Malhotra invited my attention to the minutes of the meeting dated 21.4.1987 between the representatives of the Petitioners and the NBCC. According to the minutes filed in Court, three officers of the Nbcc participated in that meeting, and the Petitioners were represented by Mr. Madan Lal Nangia. He relied upon clauses (i), (ii) and (viii) of the said minutes, which read as under :-P.P. Malhotra invited my attention to

"(I)The work would be executed by M/s. Nangia Constn, Pvt. Ltd. on back to back basis. (ii) M/s. Nangia Constn, Pvt. Ltd., confirmed that the rates quoted by them are inclusive of all taxes and include margin of 5% for NBCC. It was also confirmed that these rates are based on specifications and terms and conditions of the main contract. (viii) The work would be executed by M/s. Nangia as sub-contractor and meanwhile M/s. Nangia would approach clients for their inclusion as joint-venture member as M/s. Nangia Constn. Pvt. Ltd. are already pre-qualified by the clients. It is also confirmed by M/s. Nangia that all peripheral works within the scope of the work laid in the main contract will be executed by them within quoted price of the contract. any additional, altered, substituted and deviated items of work shall also be carried by M/s. Nangia as per instructions of the main clients. Such work shall be carried out on the same terms and conditions as provided in the agreement and the rates fixed and paid by the

clients shall also subject to margin of corporation at 5%."

(144) It is to be noted that this meeting took place before the contract between the State of Haryana and the Nbcc was entered into 1.7.1987. The pre-contract understanding between the parties, Therefore, was to work on back to back basis, that rates were based on the conditions in .the main contract. This cannot mean that the main contract was available to anyone. It is obvious that it was not available because the contract was entered into almost 2-1/2 months later, 1.7.1987. As regards item No.(viii), since the State of Haryana contract terms are of printed kind, it may have been known to both the parties that there is a prohibition against the sub-letting, and it is for this reason that in item (viii) it was stated by the Nbcc that they will obtain permission of the State of Haryana for the whole of the contract. It is possible that item (viii) of this minute records what it does because the Petitioners and the Nbcc expected that this permission would be given; as it happens in the facts of this case, as is established by the letter dated 4.4.1988, the Nbcc sought permission of only three items of work not for the whole of the work. There is no indication in the documents filed in Court, that Petitioners were aware that Nbcc had sought permission to sub-let items of works other than those three mentioned in letter dated 4.4.1988.

(145) It is also contended by Mr. P.P. Malhotra that the pleadings that full particulars of fraud are not pleaded by the Petitioners, and, Therefore, they cannot urge fraud, as has been urged by Mr. Shiv Dayal. As noted in the earlier part of this judgment, pleadings were allowed to be amended, and para 33A was added. Besides, along with the pleadings, annexures were filed, which are part and parcel of the pleadings. All the facts which are necessary to take up the plea of fraud, are available from the annexures themselves. As such ; in the instant case, when the application along with section 20 petition and its annexures, are read, sufficient particulars of fraud are available, and in my view, the contention of Mr. P.P. Malhotra that full particulars of fraud have not been given, as required by Order Vi Rule 4 of the Code of Civil Procedure, is not borne out in the instant case.

(146) It is also contended by Mr. P.P. Malhotra that the Petitioners have unauthorisedly procured annexure "T" dated 18.5.1989, being letter written by the State of Haryana to the Nbcc, I do not see what effect unauthorised procreation of letter has on the question whether the guarantees in the sum of rupees 89 lacs each permitted to be encased or not. The fact of the matter is that the contents of the letter dated 18.5.1989 have not been denied,

(147) It is further contended by Mr. P.P. Malhotra that annexure "N" is a document which has been fabricated by the Petitioners. It is not possible at this stage of the proceedings to give any conclusive finding on this contention. This contention appears to have been raised only because of this letter contains averments that the mobilisation advance has been fully utilised on the project, and if this contention is not raised, then those statements will, prima facie, amount to admission. In any case, whatever contention the Nbcc has vis-a-vis

this letter, will be dealt with in due course,

(148) Mr. P.P. Malhotra says that Annexure "S", being letter dated 19.4.1989, establishes that the allegations made by the Petitioners regarding fraud and misrepresentation are all lies. This is not the way I read the letter. This letter specifically says that the contract has printed conditions which, the Petitioners may be aware of, and that would explain how they know about the State of Haryana not permitting assignment and sub-letting. At the same time the parties were aware that for authorised sub-letting it is the contractor of the State of Haryana, who has to move and obtain permission from the State of Haryana. As far as the State of Haryana was concerned, the contractor was NBCC. It was NBCC to move the State of Haryana to permit sub-letting or assignment. The Petitioners could not have done it.

(149) I think there is substance in the contention of Mr. Shiv Dayal that in case of bank guarantees, the Courts can interfere, and prevent their encashment when the courts can form a prima facie view from the pleadings and documents filed, that a fraud has been committed by the beneficiary. That there is some substance for the allegations of fraud, is established in the instant case by various documents which have been reproduced herein, and the conduct of the NBCC, in not obtaining permission from the State of Haryana to sub-let the entirety of the contract, withholding of information regarding the existence of back to back agreement between NBCC and the Petitioners, seeking permission to sub-let only three items of work, despite the fact that from the very beginning (even as minutes of the meeting dated 21.4.1987 establish) it was intended by the parties that permission for sub-letting the entire contract on back to back basis, will be sought by the NBCC in the event the contract is awarded to the NBCC. The NBCC chose to be less than frank, in the facts and circumstances of the case, may be termed as fraudulent.

(150) I am of the view that there is substance in the contention of Mr. Shiv Dayal that bank guarantees in connection with mobilisation advance is in any case is a contingent document in terms. It refers to the provisions of the printed conditions of the contract between NBCC and State of Haryana, and specifically the word "giving the right of claim to the employer", establish this.

(151) My attention has been drawn to clause 60(7)(a) of the contract at page 112 which is annexure "W" to the petition. This provision reads as under:

"Advance Mobilization Loan. (a) The Employer will make an interest-free advance loan to the Contractor for the costs of mobilization in respect of the works in a lump sum amount equivalent to 10 (ten) percent of the Contract. Price named in the Letter of Acceptance, payable in the proportionate amounts of foreign and local currencies as provided for in the Contract. Payment of the loan will be due under separate certification by the Engineer after (i) execution of the Form of Agreement by the parties thereto, (ii) Provision in accordance with Clause 10 of Part I and Part II, and (iii) provision by the Contractor of a Bank guarantee by a

bank acceptable to the Employer in an amount equal to the advance loan, such bank guarantee to remain effective until the advance loan has been completely repaid by the Contractor out of current earnings under the Contract and certified accordingly by the Engineer. A form of bank guarantee acceptable to the Employer is indicated in Section X Annex C. The advance loan shall be used by the Contractor exclusively for mobilization expenditures, including the acquisition of Constructional Plant, in connection with the Works. Should the Contractor misappropriate any portion of the advance loan it shall become due and payable immediately, and no further loan will be made to the Contractor thereafter".

(152) The aforesaid provision indicates that there are two conditions imposed with regard to the mobilisation advance, and these conditions have to be adhered to by the persons to whom mobilisation advance has been given -in this case Nbcc, and owing to the back to back contract, the Petitioners. These two conditions are that the amount of mobilisation advance must be used in connection with the contract and that there must not be any misappropriation of the mobilisation amount.

(153) It appears prima facie, from annexure "N" written by the Nbcc that the entire amount has been utilised in connection with the project, and Therefore, the condition that the mobilisation advance can be recalled if there is misappropriation, cannot be met. Therefore, on this account there can be no occasion to recall the mobilisation amount, and, Therefore, no occasion to invoke the mobilisation guarantee. The recovery of the mobilisation advance according to the terms of the contract, guarantee, can be there if the amount advanced is not used for the contract, or the amount advanced is misappropriated. Neither of these conditions is satisfied in the instant case, as the letter Annexure "R" written by Nbcc to the Petitioners "Banker show, prima facie, that the Petitioners have used the mobilisation advance for the contract, and, Therefore, there is no misappropriation of mobilisation amount. The above said reasons are good for restraining encashment of the Mobilisation advance guarantee issued in favor of the NBCC.

(154) Besides this Mr. Shiv Dayal also contends that there is fraud in the invocation of the bank guarantee as the invocation letter dated 19.5.1989 does not give any details of the non-utilisation or the breach or non-fulfilment of the terms on which the mobilisation advance was given. In the letter dated 19.5.1989, what is sought to be recovered from the mobilisation advance guarantee is a sum of Rs. 67,25,500.00 . This, by necessary implication Mr. Shiv Dayal contends, admits that a sum of Rs.23,59,324.00 has been recovered by the Nbcc from out of the running bills of the Petitioners.

(155) Mr. Shiv Dayal also wants me to take a note of the subsequent event of filing of a suit in the court of Subordinate Judge, Sonapat, by the Nbcc for restraining the State of Haryana from recovering the amounts under the guarantees which have been given by the Nbcc to the State of Haryana. In that suit, in paras 22 to 27 it is admitted that Rs. 23,59,324.00 have been recovered

by the Nbcc from the Petitioners. Paras 22 to 27 of the plaint reads as under :-

22. That the said bank guarantee can only be invoked in terms of clause 6(7) under which if the obligations express in the said clause (60.7) of the Contract have not been fulfilled and giving rise to a claim to an employer for recovery of whole or part thereof for refund of the loan of mobilisation advance.

23. The clause 60(7) (B) of the Contract provides for the repayment of the advance mobilisation loan to be adjusted from the interim payment from the running bills. Condition No. 60. 7 (a) provides that if contractor should misappropriate any portion of the advance loan it shall become due and payable immediately.

24. That thus it would be seen that the only mode of recovery of advance mobilisation loan provided in the contract is by way of adjustment from running bills or alternatively in case of the misappropriation, its refund can be asked at once.

25. That the petitioner is a public sector corporation. There is no averment of any misappropriation. The method of recovery of advance mobilisation loan amount and the bank guarantee can only arise from running bills and from no other source except of course if the conditions of clause 60(7) (a) of Contract are not fulfilled and the amount is misappropriated. There is no such allegation that the clause 67 of the Contract have not been fulfilled .

26. That even otherwise respondent has already recovered Rs. 23,59,324.00 from the mobilisation advance in the 2nd running bill and about one crore is due to the petitioner on account of the work done for the period from October 1988 to October, 1989. Besides that petitioner has mobilized resources and assets valued at rupees one crore for this project and has even spent huge amount on cost of material.

27. That instead of paying the amount due to the petitioner and even determining the amount payable to the petitioner respondent No. 1 has wrongly, illegally, mala fide and fraudulently to unduly enrich itself in an arbitrary manner invoked the advance mobilisation loan bank guarantee which cannot be invoked and the disputes have arisen between the parties.

(156) The suit was filed before the Subordinate Judge, Sonapat on 30.11.1989. In that suit, injunction has been granted in favor of the Nbcc, restraining the State of Haryana from encashing the bank guarantees given by Nbcc in favor of the State of Haryana. Mr. Shiv Dayal says that it has been stated in 1960 Supreme Court 100 at page 105 by the Supreme Court that admission made by a party is the best evidence, although it is not conclusive, same is decisive. The plaint of the Sonapat suit has been put on record, and being a plaint in a suit, I have no hesitation taking note of the contentions which have been raised by the Nbcc in that suit Mr. Shiv Dayal, Therefore, contends that permitting the encashment of the bank guarantees issued by the Petitioners to the Nbcc, would

mean unjust enrichment of the Nbcc despite the fact that they had sub-let the entirety of the contract on back to back basis to the Petitioners, only retaining a right to receive 5% from out of money paid. by State of Haryana for all the work which was executed by the Petitioners. He refers to and relies upon the judgment of the Supreme Court in Mahabir Kishore and others Vs. State of Madhya Pradesh, .

(157) In my view, Mr. Shiv Dayal is, prima facie, right when he contends that the fraud on the part of the Nbcc lay in obtaining bank guarantees for 10% of the value of the entire work, whereas the Nbcc ought to have obtained a bank guarantee for 10% of the value of the work of three items, which it had been permitted to be sub-let.

(158) Mr. Shiv Dayal also urges that there is fraud by the Nbcc in the matter of invocation of the bank guarantee by letter dated 19.5.1989 by the Nbcc to the bank. That letter contains false statement that the contractor had committed breach. Mr. Shiv Dayal says that being a building contract, it is not possible for any building contractor to continue to execute the work without being paid. According to him, the contract being a very large contract, can only be performed if regular payment of running bills are made, and when the payments are stopped, the work could not be carried on. The person responsible for not paying, as far as the Petitioners are concerned, is the NBCC. It is the Nbcc which is the employer for the Petitioners, and it is they who ought to pay for work executed, and when they fail to pay, the money for the work done in terms of the running bills, they could not expect continued performance. The Nbcc could not take advantage of its own wrong in not performing its obligation to pay.

(159) It is also stated by Mr. Shiv Dayal that the allegations in the letter of invocation dated 19.5.1989 that the Petitioners have failed to perform their obligation, is incorrect. The reality was not disclosed by the Nbcc in that letter, and the fraud lay in not revealing the real cause which led the Nbcc invoking the bank guarantee; The real cause being letter dated 19.5.1989, which has been received from the State of Haryana, and ifs unveiled threat for terminating the contract between Nbcc and State of Haryana.

(160) Mr. Shiv Dayal also says that there are special equities in the facts and circumstances of this case, which justify non-encashment of the bank guarantee. According to him, the following special equities exist in this matter, which have to be kept in view by the Court. These are :

(I) That the agreement between the Nbcc and the Petitioners was back to back agreement ; (ii) That the Nbcc was not to invest a single penny, and in fact, not to invest a single penny in connection with the execution of the contract This is not denied in the written statement or the affidavit in opposition. (iii) That the Nbcc was to retain 5% from out of the payments made by the State of Haryana. (iv) That 5% amount has already been deducted from out of the running bills, and retained by NBCC. (v) That the Petitioners had done work for 1 year 8

months, and fully utilised the mobilisation advances, and had to even raise Joans for the purpose of execution of the work, (as is evidenced by the letter written by the Nbcc to Bank of India (annexure "R"). (vi) Running bills presented for and in connection with the execution of the work by the Petitioners since October, 1988. That the work continued till 18.5.1989, but the all the bills submitted, had not been paid, and a huge amount remained unpaid. (vii) That the Nbcc had already certified the running bills for payment, which are of the value of Rupees 92 lacs. (viii) That the Local Commissioner who was appointed by the Court to take measurement of the work done, has done the measurement and there is a great divergence in the valuation of the measurement which was taken jointly. As per the Petitioners, the value of the work done is Rs. 255 lacs approximately, and as per the Nbcc, the work done is of the value of Rs. 52,37,093.00 and Rs. 2, 33, 445.00 for extra items, and Rs. 17,43,752.00 has been spent on the cost of material.

(161) Mr. Shiv Dayal says that for the reason of existence of the special equities, the bank guarantees ought not to be encashed.

(162) Mr. Shiv Dayal says that there is no absolute rule that injunction cannot be granted restraining encashment of Bank Guarantee, he relies upon (1966) 2 LLLR 495 (Elian & Rabbath v. Matsas). Unjust enrichment is by itself a special equity which warrants restraining encashment of Bank Guarantee.

(163) It is also contended by Mr. Shiv Dayal that in view of the fact that the bank guarantee between the Nbcc and the State of Haryana had not been invoked by the State of Haryana, then it would not be right till such invocation takes place, to permit encashment of the bank guarantee which is issued in connection with a back to back contract between the Nbcc and the Petitioners, and for this proposition he relies upon the judgment of Division Bench of this Court (D.K. Kapur, Cj and N.N. Goswamy, J.) in Jainson Cloth Corporation v. State Trading Corporation 1986 RLR 566. This Court held that inasmuch as the guarantee executed by the principal contractor had not been invoked by the client, it would not be right to permit the encashment of the bank guarantee furnished by the back to back contractor of the principal contractor.

(164) Mr. P.P. Malhotra says that against the judgment reported as 1986 Rajdhani Law Reporter 566, a SLP has been granted, and this is, Therefore, not good law. In view of the judgment of the Supreme Court in 1977 SC 1177, wherein it has been stated by the Supreme Court that because the judgment is under appeal in the Supreme Court, is no ground for the High Court to ignore the judgment. The judgment in Jainson Cloth Corporation (supra) binds me, and in any case, I am in agreement with what is stated therein.

(165) In view of the discussion above, lam, prima facie, of the view that there is no absolute bar to the grant of an injunction, restraining encashment of bank guarantees. If in any matter it is alleged that the beneficiary is guilty of committing fraud, (as alleged in the instant case), and there appears, prima

facie, from the allegations made in the petition and the documents annexed thereto that the beneficiary has acted fraudulently, either in the matter of obtaining bank guarantee or in the matter of invoking the bank guarantee then consideration for the agreement between the parties for giving the bank guarantee in question, would be unlawful, and the bank guarantee would also be void and unenforceable. Besides, if there is fraud in the matter of invocation of the bank guarantee then, rule of equity, and good conscience would require that the bank guarantee is not permitted to be encashed.

(166) Prima facie, the Nbcc has not disclosed truth of the matter to the State of Haryana; prima facie, the Nbcc has taken a guarantee for amount larger than the one which it ought to obtain keeping in view the permission which has been granted by the State of Haryana to sub-let only three items; prima facie, there is a back to back agreement between the Petitioners and respondent Nbcc, existence whereof is not disputed by the respondent; prima facie the plaint of the suit filed by the Nbcc against the State of Haryana at Sonapat on 13.11.1989, bears out that some money has already been recovered by Nbcc, exact accounting is not possible between the parties at this stage. At present it cannot be said how much money will be due to whom. Prima facie, the works have been executed by the Petitioners, for which it has not been paid. How much remains to be paid, is a matter of dispute. Prima facie, the Nbcc has not paid a single penny or expended any amount during the period the Petitioners were executing the Contract. It cannot be permitted by encashment of the bank guarantee to enrich itself; prima facie special equities mentioned by Mr. Shiv Dayal, exist.

(167) In the facts and circumstances of the instant case the Petitioners have established that they have a prima facie case for restraining the Nbcc from encashing the bank guarantee. Balance of convenience also lies in favor of the petitioners in grant of injunction. If the injunction is not granted, and money is permitted to be taken away, in the facts and circumstances of the case, irreparable loss would be suffered by the Petitioners, inasmuch more than a crore of rupees will be taken away by the person who has prima facie, been less than honest, and may be even fraudulent in its dealing with the Petitioners and the State of Haryana. It would not be proper or in the interest of justice, to leave the Petitioners to seek its remedies by separate suits, and fit and proper to grant injunction, restraining the respondent Nbcc from encashing the bank guarantees No. NP/G/16/136 dated 7.12.1987 and No. NP/G/16/137 dated 19.11.1987. I accordingly grant an injunction restraining encashment of bank guarantees No. NP/G/16/136 dated 7.12.1987, and No. NP/G/16/137 dated 19.11.1987, mentioned here above.

(168) The Petitioners are, however, directed to keep the aforesaid bank guarantees alive till the final disposal of suit No. 1375-A of 1989.

(169) The views expressed herein are not expression of final opinion on the merits of the matter, and are only for the purpose of disposal of the interim

application, and will in no way, affect the final adjudication of the matter.

(170) I.A. No. 3945 of 1989 stands disposed of.