
(1989) 03 CAL CK 0029
In the Calcutta High Court
Case No : Matter No. 1 of 1988

Scrap Mould Will APPELLANT
Vs
Metal Scrap Trade Corporation Ltd. RESPONDENT

Date of Decision : 11-03-1989

Acts Referred:

Arbitration Act, 1940 — Section 41

Citation : (1989) 2 CALLT 350 : (1992) 74 CompCas 175 : 94 CWN 33

Hon'ble Judges : Prabir Kumar Majumdar, J

Bench : Single Bench

Advocate : Samnath Chatterjee, Bhaskar Gupta and Abhijit Chatterjee, for the Appellant; Biswarup Gupta and S.P. Majumdar, for the Respondent

Final Decision : Dismissed

Judgement

Prabir Kumar Majumdar, J.—The petitioner, Scrap Mould Will, entered into a contract with the respondent, Metal Scrap Trade Corporation Limited, on or about June 10, 1987, for supply of 28,000 MT plus/ minus shredded scrap at the seller's option. The scrap was intended to be purchased by the respondent as the canalising agent for distribution to various ultimate consumers in the country.

2. One of the terms and conditions of the said contract between the parties required the petitioner to furnish a performance bond from an approved bank for US dollars 1,82,280 being 5% of the value of the contract.

3. In compliance with the aforesaid requirement, the petitioner furnished a bank guarantee issued by the Standard Chartered Bank, 4, Netaji Subhas Road, Calcutta, for US dollars 1,82,280.

4. By the said bank guarantee, the said Standard Chartered Bank guaranteed that they would indemnify the respondent and/or keep the respondent indemnified against any loss or damage that may be caused to, or suffered by, the respondent by reason of any breach of contract by the petitioner of any of the terms and conditions of the said contract or performance thereof.

5. The relevant portion of the said bank guarantee is as follows :

"Against contract No. FT/11/MS/C-24/7-88, dated June 10, 1987, covering 28,000 MT 50/0 melting scrap of carbon steel-shredded scrap conforming to US ISIS code No. 210/211 (hereinafter called "the said contract") entered into between Metal Scrap Trade Corporation Ltd., Calcutta (hereinafter called "the purchaser") and Scrap Mould Will (hereinafter called "the seller"), this is to certify that, at the request of the seller, we, Standard Chartered Bank, 4, Netaji Subhas Road, Calcutta 1, are holding in trust in favour of the purchaser, Metal Scrap Trade Corporation Ltd., Calcutta, the amount of USD 1,82,280 (U. S. dollars one hundred eighty-two thousand two hundred eighty only) to indemnify and keep indemnified the purchaser, Metal Scrap Trade Corporation Ltd., Calcutta, against any loss or damage that may be caused to, or suffered by, the purchaser, Metal Scrap Trade Corporation Ltd., Calcutta, by reason of any breach of contract by the seller of any of the terms and conditions of the said contract and/or the performance thereof, we agree that the decision of the purchaser, Metal Scrap Trade Corporation Ltd., Calcutta, whether any breach of any of the terms and conditions of the said contract and/ or in the performance thereof has been committed by the seller and the amount of loss or damage that has been caused or suffered shall be final and binding on us and the amount of the said loss or damage shall be paid by us forthwith on demand to Metal Scrap Trade Corporation Ltd., Calcutta."

6. By a letter dated December 19, 1987, the respondent invoked the said bank guarantee dated July 1, 1987. The said letter is in the following terms :

"Metal Scrap Trade Corporation Ltd., 225F, Acharya J. C. Bose Road, Calcutta 20.

Ref. No. ACT/FT/MS/C-24/87-88/P-4 Dated 19th December, 1987.

The Manager, Corporate Banking, Standard Chartered Bank, 4, Netaji Subhas Road, Calcutta.

Dear Sir,

Sub : Performance guarantee bond No. 852/301/87, dated July 1, 1987, for USD 1,82,280 executed by you in our favour on behalf of Scrap Mould Will, Bahrain, claim for encashment thereof due to non-performance by the seller.

In reference to the above, we hereby invoke the above guarantee for encashment for value of USD 1,82,280 (United States dollars one lakh eighty-two thousand two hundred eighty) as the party has failed to perform under the contract. You are directed to issue a draft in our favour in equivalent Indian rupees immediately on receipt of this notice for encashment.

Thanking you,

Yours faithfully, For Metal Scrap Trade Corporation Ltd. (Sd) S. Sinha Ray Dy. Manager (FTA) 19-12-1987."

7. A further letter of demand by the respondent dated January 2, 1988, was also addressed to the said Standard Chartered Bank. The said letter is as follows :

"Metal Scrap Trade Corporation Ltd.

(A Government of India Enterprise)

225F, Acharya Jagadish Bose Road,

Calcutta-700 020.

Ref. No. ACT/FT/MS/C-24/87-88/PG Dated January 2, 1988.

The Manager (Corporate Banking)

Standard Chartered Bank,

4, Netaji Subhas Road, Calcutta 1.

Dear Sir,

Sub: Guarantee No. 852/301/87, dated July 1, 1987 for USD 1,82,280 executed by you-claim for encashment, vide our letter dated December 19, 1987.

Please refer to our letter invoking the above guarantee due to non-performance of contract for supply of materials against our contract with the seller.

You are hereby requested to encash the said P. G. Bond for USD 1,82,280 and draft/pay order may be issued, accordingly, in our favour. Your immediate action in this regard will be appreciated.

Thanking you,

Yours faithfully, For Metal Scrap Trade Corporation Ltd. (Sd) S. Sinha Ray Dy. Manager (FTA)."

8. It appears from the said letter dated December 19, 1987, that the respondent invoked the said bank guarantee as, according to the respondent, the petitioner has failed "to perform under the contract". It appears from the said further letter of demand dated January 2, 1988, that the respondent issued a reminder as to invocation of the said bank guarantee due to non-performance of contract for supply of materials against the respondent's contract with the petitioner.

9. Reading the said two letters together, it appears that the respondent invoked the said bank guarantee on the ground that the petitioner has failed to perform under the contract or the petitioner's non-performance of the contract for supply of materials against the respondent's contract with the seller, i.e., the petitioner.

10. The said contract dated June 10, 1987, between the parties contained an arbitration clause.

11. The petitioner states that the petitioner has performed a substantial part of the said contract dated June 10, 1987, and is ready and willing to perform the

rest of the contract, but is prevented from so doing by the respondent under the contract.

12. The petitioner has filed an application u/s 20 of the Arbitration Act, 1940, for filing of the said arbitration agreement contained in the said contract, being contract No. FT/11/MS/C-24/7, dated June 10, 1987, as, according to the petitioner, disputes and differences have arisen under the said contract.

13. This application is followed by the present application u/s 41 of the Arbitration Act for an injunction restraining the enforcement of the said bank guarantee pursuant to the demand made by the respondent by its said letter dated December 19, 1987.

14. It has been contended by the petitioner that the said bank guarantee has to be enforced in terms thereof, that is, the demand for payment or encashment of the bank guarantee must be in terms of the guarantee itself.

15. The respondent had contended that the said bank guarantee can be enforced upon fulfilment of the conditions, that the petitioner has committed breach of any of the terms of the contract or performance thereof as a result of which a loss or damage has been caused to, or suffered by, the respondent, and the respondent has quantified the loss or damage allegedly suffered by the respondent due to alleged breach or non-performance of the contract. It is contended by the petitioner that none of the said conditions is fulfilled. It is also the contention of the petitioner that even if there is quantification of loss or damage, such quantification of loss or damage has not been stated in the said letter of demand, nor has the bank been informed of that otherwise.

16. The petitioner has also contended that the allegations of the respondents in the said letter of demand dated December 19, 1987, to the effect that the petitioner has failed to perform under the contract is wholly incorrect. The petitioner has further contended that the respondent had deliberately and mischievously misled the bank to get the entire payment covered by the said bank guarantee by practising fraud upon the banker by suppressing the material fact. According to the petitioner, such suppression amounts to fraud giving rise to a special equity in favour of the petitioner.

17. The respondent has disputed the aforesaid contentions of the petitioner, and has also denied that the said invocation of the bank guarantee by the respondent by its said letter dated December 19, 1988, is illegal or wrongful.

18. It has been submitted by the respondent that the bank guarantee is part of an international commercial transaction in the form of a performance guarantee wherein an irrevocable commitment in the form of a bank guarantee has been issued in favour of the beneficiary by the bank.

19. The respondent has also submitted that it is not necessary for invocation of the said bank guarantee to actually quantify the actual loss or damage suffered by the respondent for the non-performance of the said contract.

20. The respondent has also contended that, under the said bank guarantee, the bank undertook an absolute obligation to pay to the respondent and the bank is holding the money covered by the said bank guarantee in trust to and for and on behalf of the respondent. According to the respondent, this cannot be stopped directly or indirectly or in any manner by the petitioner. The respondent contends that the effect of the order prayed for by the petitioner would be an injunction restraining the bank from performing its obligations under the said guarantee and the petitioner cannot be allowed to do indirectly what the petitioner cannot do directly.

21. The principles upon which the enforcement of bank guarantee can be invoked or restrained are now well-settled. The law on this point is now well-settled both in the courts in England and the courts in our country.

22. The Court of Appeal in England had occasion to consider this question in *Hamzeh Malas and Sons v. British Imex Industries* [1958] 2 QB 127. There, the plaintiffs contracted to purchase from the defendants a large quantity of reinforced steel rods to be delivered in two instalments. Payment was to be effected by opening, in favour of the defendants, two confirmed letters of credit in respect of the said two instalments. Letters of credit were opened and the defendants realised the amount against the first of such letters of credit upon delivery of the first instalment. The plaintiffs complained that the instalment was defective, and sought an injunction restraining the defendants from realising the second letter of credit. The trial judge refused such prayer and the plaintiffs appealed to the Court of Appeal. It was held by the Court of Appeal that although the court had wide jurisdiction to grant an injunction, this was not a case in which, in exercise of its discretion, it ought to do so. Jenkins L. J., speaking for the court, observed (at page 129) :

"We have been referred to a number of authorities, and it seems to be plain enough that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes upon the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties as to whether goods are up to contract or not. An elaborate commercial system has been built up on the footing that the banker's confirmed credits are of that character, and, in my judgment, it would be wrong for this court in the present case to interfere with that established practice."

23. The Court of Appeal in England had occasion once again to consider this question, in *Elia and Rabbath v. Mastas and Matsas* [1966] 2 LL LR 495. Lord Denning M. R., while refusing to grant injunction, observed :

"... a bank guarantee is very much like a letter of credit. The courts will do their utmost to enforce it according to its terms. They will not, in the ordinary course of things, interfere by way of injunction to prevent its due implementation."

24. This question was again considered in *R.D. Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd.* [1977] 2 All ER 862 (QB), where the court

observed as follows (at page 870) :

"It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration . . . The machinery and commitments of banks are on a different level. They must be allowed to be honoured free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged."

25. The point was again reviewed by the Court of Appeal in the case of *Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.* [1977] 3 WLR 764 when Lord Denning M. R., speaking for the court, observed (at page 773) :

"All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer, nor with the question whether the supplier has performed his contracted obligation or not ; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee on demand, if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank had notice."

26. Recently, the House of Lords considered this question in *United City Merchants (Investments) Ltd. v. Royal Bank of Canada* [1982] 2 All ER 720. The earlier view is reiterated. It is observed that the whole commercial purpose for which the system of confirmed irrevocable documentary credits had been developed in international trade was to give the seller of goods an assured right to be paid before he parted with control of the goods without risk of payment being refused, reduced or deferred because of a dispute with the buyer. The bank's duty to the seller is vitiated only if there was fraud on the part of the seller.

27. The Supreme Court, in *Tarapore and Co. Vs. V/O Tractoroexport and Another*, considering the question of enforceability of a confirmed letter of credit, observed that the opening of a letter of credit constitutes a bargain between the banker and the seller of the goods which imposes an absolute obligation on the bank to pay.

28. The Supreme Court, in the case of *United Commercial Bank Vs. Bank of India and Others*, , has observed that a bank issuing or confirming a letter of credit is not concerned with the underlying contract between the buyer and seller. The Supreme Court also proceeded to observe that the opening of a confirmed letter of credit constitutes a bargain between the bankers and the vendors of the goods which imposed on the banker an absolute obligation to pay. It is further observed

by the Supreme Court that the same consideration also applied to a bank guarantee. A letter of credit sometimes resembles and is analogous to a contract of guarantee. A bank which gives a performance guarantee must honour that guarantee according to its terms.

29. This is the consistent view taken by the Supreme Court in the later decisions with regard to the effect and operation of the performance guarantee or the bank guarantee. The same view is also reiterated in *Centax (India) Ltd. Vs. Vinmar Impex Inc. and Others*,

30. The latest decision of the Supreme Court on the point is *U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd.*, The Supreme Court again had to consider the effect of the bank guarantee and whether the bank should be restrained from honouring such guarantee given by it. In this case, it has been held by the Supreme Court that an irrevocable commitment, either in the form of a confirmed bank guarantee or an irrevocable letter of credit, cannot be interfered with except in case of fraud or in case of question of apprehension of irretrievable injustice having been made out. It has also been held by the Supreme Court in this case that commitments of the bank must be honoured free from interference by courts. Otherwise, trust in commerce, internal or international, would be irreparably damaged. It is, however, recognised by the court that only in exceptional cases, that is to say, in case of fraud or in case of irretrievable injustice that may be caused to the party that the court should interfere by issuing an order restraining the bank from honouring the guarantee.

31. The Supreme Court has also recognised the position that whether it is a traditional letter of credit or a new device like performance bond or performance guarantee, the obligation of the bank appears to be the same.

32. This court also had occasion to consider the effect of the bank guarantee and whether an injunction should be granted restraining the bank from honouring the guarantee. These are *Texmaco Ltd. Vs. State Bank of India and Others*, , *Bird and Co. Vs. Tripura Jute Mills and Another*, *National Project Construction Corporation Ltd. Vs. G. Ranjan*, , *United Commercial Bank Vs. Hanuman Synthetics Ltd. and Others*, and *D.T.H. Construction (P) Ltd. Vs. Steel Authority of India Ltd. and Another*, and others.

33. Keeping the aforesaid principles in mind, let me now examine the bank guarantee in the instant case. I have already set out the bank guarantee that the bank is to indemnify and keep indemnified the purchaser, Metal Scrap Trade Corporation Ltd., by reason of any breach of contract by the seller of any of the terms and conditions of the said contract and/or the performance thereof. It would also appear from the said bank guarantee that the decision of the purchaser, Metal Scrap Trade Corporation Ltd., as to whether any breach of terms and conditions or in the performance thereof has been committed by the seller and the amount of loss or damage that has been caused or suffered shall be final and binding on the bank and the amount of such loss or damage shall be paid by

the bank forthwith, on demand, to Metal Scrap Trade Corporation Ltd., Calcutta.

34. The effect of the said bank guarantee is that the bank, forthwith on demand, shall pay the amount of the loss or damage that may be caused to, or suffered by, the purchaser, Metal Scrap Trade Corporation Ltd., and also the decision of Metal Scrap Trade Corporation Ltd. as to whether there has been any breach of any of the terms and conditions of the contract or in the performance thereof and also the amount of loss or damage that has been caused or suffered shall be final and binding on the bank. Therefore, as soon as there is invocation of the bank guarantee in writing as has been done here by the letter dated December 19, 1987, read with the other letter dated January 2, 1988, the bank should honour the said guarantee. It appears from the letter dated December 19, 1987, that Metal Scrap Trade Corporation Ltd. invoked the bank guarantee for encashment for a value of USD 1,82,280 (United States dollars one lakh eighty-two thousand two hundred eighty) as, according to Metal Scrap Trade Corporation Ltd., the party has failed to perform under the contract. By the second letter dated January 2, 1988, Metal Scrap Trade Corporation Ltd. invoked the bank guarantee due to non-performance of the contract for supply of materials against their contract with the seller.

35. It has been contended by the petitioner, seeking an order of injunction restraining the bank from honouring the bank guarantee, that the guarantee is not an unconditional guarantee. It is also contended on behalf of the petitioner that there has been no assessment of loss or damage. Therefore, as has been contended by learned counsel for the petitioner, the invocation of bank guarantee has not been made in accordance with the terms of the bank guarantee. Learned counsel for the petitioner submits that it is clear from the decisions of English courts as also the Supreme Court and High Courts of this country that the bank guarantee must be enforced according to the terms of the guarantee. According to learned counsel for the petitioner, the conditions of the bank guarantees are that there has been a breach of contract and, secondly, as a result of such breach, the party invoking the bank guarantee has suffered loss or damages, and, thirdly, such loss or damage has to be quantified. Learned counsel contends that it has not been adjudicated as yet that there has been any breach of contract on the part of the petitioner nor that the condition has been fulfilled, namely, the quantification of the amount of loss and/or damages by some adjudication.

36. Learned counsel for the petitioner has drawn the attention of the court to the bank guarantee and particularly the expression contained therein that the bank agreed to indemnify and keep indemnified the respondent, Metal Scrap Trade Corporation Ltd., against any loss or damage that may be caused to or suffered by the respondent by reason of any breach of the contract by the seller, namely, the petitioner, of any of the terms and conditions of the contract or performance thereof. Learned counsel has also pointed out that there is no decision by the respondent about the amount of loss or damage that has been caused to or

suffered by the respondent. It is submitted by learned counsel for the petitioner that by the letter of invocation dated December 19, 1987, or the other letter dated January 2, 1988, it has been alleged by the respondent that the party, namely, the petitioner, has failed to perform under the contract and by such invocation, the respondent has demanded the entire value of the bank guarantee, that is, USD 1,82,280. It will appear from the said invocation letter that the respondent has failed to make any decision quantifying the amount of loss alleged to have been suffered by the respondent nor is there any mention that the respondent has suffered any loss or damage nor has there been any mention of any quantification of the alleged loss or damage. It is, therefore, contended by learned counsel appearing for the petitioner that this invocation is not according to the terms of the bank guarantee and since it is not in accordance with the terms and conditions of the bank guarantee, the bank should be restrained from honouring the bank guarantee on the alleged demand of the respondent as contained in the said letter of invocation. Learned counsel, referring to the various English decisions referred to above as also the Indian decisions mentioned above, strenuously contended that, as there has been no quantification of the amount of loss nor has there been any adjudication of breach of the contract, the invocation is not according to the terms of the contract and it has been consistently held by the courts that bank guarantee should be honoured in accordance with its terms and conditions.

37. It has also been contended on behalf of the petitioner that there has been suppression on the part of the respondent before invoking the said bank guarantee and that the petitioner has fully performed its part of the contract. The petitioner contends that the respondent's allegation that the petitioner has failed to perform under the contract is not correct as there has been part performance of the contract by the petitioner and" it cannot be the case that the petitioner failed to perform under the contract, that is, that nothing has been supplied by the petitioner. Learned counsel contends that this is suppression of a fact which is tantamount to fraud resulting in special equities in favour of the petitioner.

38. In this connection, learned counsel for the petitioner has placed heavy reliance on the decision of this court in the case of Banerjee and Banerjee Vs. Hindusthan Steel Works Construction Ltd. and Others, . In this case, there were two sets of bank guarantees, one of security deposit and the other in respect of the mobilisation advance made to the petitioner. It was noticed by the learned single judge deciding the said case that, under the terms of the guarantees, the party invoking the guarantee had to make a written demand stating that the person at whose instance the said guarantee was furnished had committed a breach of contract and, as a result, loss or damage has been suffered by the party invoking the bank guarantee. According to the learned judge deciding the said case, two conditions are there in this kind of guarantee, that is, there has been a breach of contract and as a result thereof, the party invoking the bank guarantee has suffered loss and damages and has taken a decision regarding the quantification of such damage or loss.

39. The learned judge finally held that there has been suppression of a fact inasmuch as the beneficiary attempted to cover the entire sum under the bank guarantee without making any decision as to the quantum of loss or damage suffered and this suppression of material fact would give rise to a special equity in favour of the person at whose instance the said guarantee was furnished. The learned judge, has, however, found that although there was no allegation of fraud in the petition, a wilful or false representation by the beneficiary that the entire guaranteed amount had become due should be treated on the same footing as fraud giving rise to special equity.

40. Learned counsel for the petitioner has also, in this connection, relied on a decision of the Delhi High Court in Synthetic Foams Ltd. Vs. Simplex Concrete Piles (India) Pvt. Ltd., , which followed the decision of this court in Banerjee and Banerjee Vs. Hindusthan Steel Works Construction Ltd. and Others, .

41. Learned counsel for the respondent has, however, submitted that the bank guarantee is really a contract between the bank and the beneficiary of the bank guarantee to the effect that, whenever there is a demand by the beneficiary in terms of the bank guarantee, the bank ought to honour the bank guarantee. In honouring such bank guarantee, the bank is not concerned with the underlying contract nor is the bank concerned with the relationship between the beneficiary and the party at whose instance the bank has furnished the guarantee. According to learned counsel for the respondent, the bank is also not concerned with the question whether the party furnishing the bank guarantee has committed any breach of contract or has failed to perform its contractual obligations.

42. It has also been contended by learned counsel for the respondent that it is sufficient if the bank understood the purport of the notice in a commercial sense, then the bank has to honour the bank guarantee and the beneficiary can invoke the same for enforcement.

43. It has also been contended by learned counsel for the respondent that mere allegation of fraud is not enough to persuade the court to grant relief by way of an order of injunction. He has, however, submitted that it is true that the fraud may give rise to special equity and that is only an exception to the rule that the court should not interfere with enforcement of the bank guarantee which is an independent contract between the bank and the beneficiary of the guarantee. Learned counsel for the respondent has also submitted that it is not enough to allege fraud. It must be established and very clearly established. In other words, there must be very strong prima facie case of fraud and special equities in the form of preventing irretrievable injustice.

44. Learned counsel has relied on a very recent decision of the Supreme Court in U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., . It has been contended by learned counsel for the respondent that the special equity has to be understood in the sense of irretrievable injustice. It has further been observed by the Supreme Court, as has been pointed out by learned

counsel for the respondent, that it must be of an egregious nature of the beneficiary and not the fraud of somebody else and there must be strong prima facie case in special equity requiring interference by the court for preventing irretrievable injustice between the parties.

45. Regarding the quantification of the amount of loss, learned counsel for the respondent has pointed out that this very objection has already been taken into consideration in *Texmaco Ltd. Vs. State Bank of India and Others*, , a decision which has also been followed and confirmed in the latest Supreme Court decision in *U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd.*, .

46. It has been observed in *Texmaco Ltd. Vs. State Bank of India and Others*, as follows:

"Then it was contended that there has been no decision of STC as contemplated under Clause 3 referred to hereinbefore and no demand. This position also, in my opinion, cannot be sustained because, in the letter dated June 15, 1974, it has been stipulated that "notwithstanding the foregoing", STC maintains that Texmaco failed to perform in an orderly manner its obligations under the aforesaid contract. In view of the foregoing, STC hereby asks you to make full payment". Whether the STC has acted logically or illogically, rationally or irrationally, is not the question relevant but, in this case, of course, there is no evidence that the STC has acted illogically or irrationally. Then, counsel for the petitioner submitted that, with a foreign buyer, it was being contended by the STC that there has been orderly performance. Therefore, it was urged that there was an inconsistent stand or in other words the STC could not be allowed to both approbate and reprobate. This position also is not relevant. Under the terms of the bank guarantee, it is upon the STC's decision to claim the money notwithstanding any dispute between the STC and Texmaco that the bank has obliged itself to discharge those liabilities. Learned Solicitor-General, appearing for the STC, has assured the court that, in case ultimately the STC succeeds in reducing or in wiping out the liability payable to the foreign Yugoslav firm in respect of the main contract, proportionate reduction and refund will be given to the petitioner. In that view of the matter, the terms of the guarantee oblige the bank to pay to the STC on demand being made and the existence of the dispute as to due performance or orderly performance is irrelevant on this aspect of the matter. There is no question of any fraud or any equity entitling the plaintiff to an injunction. If that is the position then, in my opinion, the plaintiff is not entitled to an injunction in this application."

47. This court also in the case of *D.T.H. Construction (P) Ltd. Vs. Steel Authority of India Ltd. and Another*, , has held that, if the notice of demand issued by the beneficiary of the bank guarantee is not strictly in accordance with the language of the bank guarantee, that would not be an excuse for the bank for nonpayment of the amount due under the guarantee. It has been observed that, if the bank understood the purport of the notice, then the bank cannot be heard to say that there has been no statement in the notice that the beneficiary has suffered loss

and/or damages on account of the defaults committed by the person on whose behalf the guarantee was given. This court has also observed in this case that, if there is substantial compliance with the terms of the guarantee in the notice, that would be sufficient and, if there be no defect in understanding the nature and purport of such notice by the bank, the bank is bound to honour its commitment under the guarantee. In this connection, the court referred to a decision of this court in another case in Road Machines (India) Pvt. Ltd. Vs. The Projects and Equipment Corporation of India Ltd. and Another, .

48. The principle of law as deduced from the cases referred to above is that the bank guarantee is a contract between the bank and the beneficiary, independent of any underlying contract between the parties. The only exceptions to such rule are cases of fraud. Another circumstance has been added, namely, irretrievable injustice as has been indicated in the latest Supreme Court case in U. P. Co-operative Federation [1989] 65 Comp Cas 283. It has also been recognised by the Supreme Court as also the other High Courts that it is certainly not enough to allege fraud ; it must be established, and, in such circumstances, very clearly established.

49. In my opinion, there is no case for irretrievable injustice. If it is ultimately found that the bank has honoured the bank guarantee not according to law or that the beneficiary has invoked the guarantee not according to its terms, the petitioner can very well proceed against the defaulting party under the law and claim damages from the defaulting party, if such a case is established in a court of law.

50. I see that the invocation of the bank guarantee by the beneficiary has been made in this case in accordance with the terms of the bank guarantee. I also hold that quantification of loss or damage is not absolutely necessary but a decision by the beneficiary that there has been a loss or damage caused to the beneficiary by reason of breach of contract by the party at whose instance the bank guarantee was furnished was sufficient. The demand for the sum covered by the bank guarantee may be taken as a decision as to quantification of loss or damages and as such is not dependent upon any adjudication by any other forum. When the bank guarantee is invoked as has been done here claiming the entire sum covered by the bank guarantee, that may be taken as a loss or damages suffered by the beneficiary. Learned counsel for the petitioner has, however, submitted that since there is difference in view with regard to the enforcement of the bank guarantee as has been indicated in the case of Banerjee and Banerjee Vs. Hindusthan Steel Works Construction Ltd. and Others, , and the other cases of this court referred to above, this court should refer the matter to a larger Bench for final decision on it. I do not think that it is necessary. I have referred to the Supreme Court decision on the point as also the English decisions and the consistent view taken by the courts is that the bank should always honour a bank guarantee on demand by the beneficiary irrespective of any dispute that may arise between the parties under the underlying contract

entered into between the parties, inasmuch as the bank is not a party to such, contract nor is the bank bound by such contract. The only exceptions, as has been pointed out, are cases of fraud and also another circumstance, that is, irretrievable injustice. I have already indicated before that no case of fraud has been established in this case nor is there any case for apprehension of irretrievable injustice.

51. The bank's obligation to honour the bank guarantee has been made clear by several decisions of the Supreme Court and, therefore, the decision in Banerjee and Banerjee Vs. Hindusthan Steel Works Construction Ltd. and Others, , although taken on the facts of that case, does not lend any assistance to the petitioner.

52. This application, therefore, fails and is hereby dismissed. There will be no order as to costs in the facts and circumstances of this case. Interim orders are vacated.

53. Learned advocate, appearing for the petitioner, prays for stay of operation of this order. The prayer is refused.