

**(1999) 10 CAL CK 0035**

**In the Calcutta High Court**

**Case No :** Civil Appellate Jurisdiction (Original Side) A.P.O.T. No. 672 of 1999  
G.A. No. 3656 of 1999 with W.P. No. 16252 of 1999

South Eastern Coalfields and Others

APPELLANT

Vs

Gujarat Ambuja Cements Limited and Others

RESPONDENT

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**Date of Decision :** 14-10-1999

**Acts Referred:**

Constitution of India, 1950 — Article 12, 226

**Citation :** (2000) 1 CALLT 418

**Hon'ble Judges :** Vinod Kumar Gupta, J; Prodyot Kumar Sen, J

**Bench :** Division Bench

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**Judgement**

V.K. Gupta, J.—This appeal is directed against the judgment dated 17th August, 1999 passed by the learned single Judge of this court in W.P. No. 1652(W) of 1999 whereby the writ application filed by Respondents 1 & 2 against the appellants and respondents 3 to 5 was allowed and by moulding the relief, the learned single Judge Issued a Writ of Mandamus directing the Appellants not to stop supply of Coal to the Petitioners under the Programmes established on the basis of the current Linkage for alleged nonpayment of interest claimed by the appellant arising out of the Programme established on the basis of the Linkage which was later on transferred to Eastern Coal Fields Limited.

2. The facts giving rise to this Appeal are that the respondent No. 1, being a Company incorporated under the Companies Act had been taking Coal from the Appellant No. 1, (South Eastern Coal Fields Limited) a Government Company and a subsidiary of Coal India Limited, for running its Cement Factory at Ambuja Nagar in Gujarat. Respondent No. 1 being a manufacturer of Cement at its factory at Ambuja Nagar (Gujarat) required Coal in bulk quantity for its manufacturing activity. Coal India and its subsidiaries admittedly have a monopoly in respect of supply of Coal and the Coal is supplied on the recommendation of Standing Linkage Committee directly under the control of Govt. of India, Ministry of Coal. It appears that during the period 23rd March,

1992 and 29th March 1996, on the recommendation of the said Standing Linkage Committee, while the appellants had been supplying Coal to respondent No. 1 at a particular price at its Cement Factory at Ambuja Nagar (Gujarat), the Appellants decided to charge premium (c)10% over and above the original price of the Coal as fixed. The Respondent No. 1 did not agree to the levy of this 10% premium charge. It challenged such levy by filing a writ petition in the High Court of Madhya Pradesh at Jabalpur. In that Writ petition an Interim order was passed by the High Court of Madhya Pradesh restraining the recovery of the 10% premium amount on the the price of Coal. On 4th May 1993 however the writ petitioner was dismissed by Madhya Pradesh High Court. Respondent No. 1 filed a Special Leave Petition in the Supreme Court on 19th May 1993. On 20th May 1993 an interim order was passed by the Supreme Court in this SLP whereby the appellants were restrained from stopping supply of Coal to respondent No. 1 by reason of the fact that amount relating to the aforesaid non-payment of the premium of 10% was outstanding against respondent No. 1 towards the appellants. Ultimately on 12th August 1998 the aforesaid SLP was allowed by the Supreme Court and the Judgment of the High Court of M.P, was set aside. The Writ petition pending in the High Court was revived and the High Court was directed to re-hear the Writ petition. The interim order earlier granted by the Supreme Court in the aforesaid SLP was allowed to continue until the final disposal of the Writ petition by the High Court. In effect and substance therefore, Respondent No. 1 without payment of the premium amount (c) 10% continued to avail of the supply of Coal from the appellants between 23rd March 1992 and 29th March 1996. On 4th May 1999 the High Court of Madhya Pradesh dismissed the Writ petition and upheld the validity of the claim of the appellants for levying 10% premium. The Respondent No. 1 accordingly became liable to pay the amount for the aforesaid period towards 10% premium on the price of the Coal in respect of the supplies received by it at its Ambuja Nagar Plant for this period. It is undisputed that on this account a sum of Rs. 3,40,16,878.54 became due from the respondent No. 1 and payable to the appellants. It is the admitted case of the parties, as would be seen later that this amount has since been paid by respondent No. 1 to the appellants. The appellants however also claimed that because of the belated payment of this amount, the appellants are entitled to charge interest from respondent No. 1 and according to the appellants the interest amount works out to Rs. 3,29,44.523.05.

3. Going back a little. It is the undisputed case of the parties that for obtaining the supplies of Coal from the appellants, in accordance with the sate conditions as set out by the appellants and as agreed to by the respondent No. 1, reespondent No. 1 was required to furnish Cash security to the appellants and keep it in deposit with them to the extent of the Linkage granted which in other terms meant to the extent of the Coal supplied by the appellants to the respondent No. 1. On account of such Cash Security therefore, an amount of Rs. 1,46,32,800 was lying with the appellants at the relevant time in respect of such Linkage for supply of Coal at Ambuja Nagar Plant. Some time in January, 1997

respondent No. 1 stopped taking any Coal supply from the appellants for its Ambuja Nagar Cement Factory because from that period onwards it started Importing Coal for its said factory from outside India. It also appears that the last supply of the Coal by the appellants to the Ambuja Nagar Factory was made in March 1997 and the transaction between the appellants and respondent No. 1 in respect of Ambuja Nagar Factory formally came to an end and was closed on 12.05.1997. The amount of Security therefore, as deposited by respondent No. 1 and lying with the appellants towards securing the supply of Coal to Ambuja Nagar Cement Factory was refunded by the appellants to respondent No. 1 on 12.05.1977. Actually the demand for such refund was made by respondent No. 1 on 22nd February '97 and the amount was refunded on 12th May '97. It may also be worthwhile to note here that after the respondent No. 1 had stopped taking supply of coal from the appellants for its Ambuja Nagar Cement Factory, in respect of this Factory Respondent No. 1 transferred its linkage from the appellants to Eastern Coal Fields Limited, another subsidiary of Coal India Limited. The facts regarding respondent No. 1 stopping taking any supply of Coal from the Appellants for its Ambuja Nagar Factory, Respondent No. 1 resorting to importing the same from outside India, and the Respondent No. 1 transferring its linkage for this factory from the appellants to Eastern Coal Fields Ltd., coupled with the fact that on 12th May, 1997 the appellants unequivocally refunded to Respondent No. 1 the Cash Security deposit of Rs. 1,06,01,500 are all relevant for our purpose as these are indicative of the fact that as on 12th May, 1997, when the liability of Respondent No. 1 in respect of payment of premium amount was subsisting, the appellants chose to refund to Respondent No. 1 the aforesaid amount without any reservation, unconditionally and without any demur, prejudice or protest. It appears that thereafter, in 1998 the respondent No. 1 opened a new Cement Plant at Roop Nagar in the State of Himachal Pradesh and obtained a linkage with the appellants for supply of Coal to this Plant. For ensuring the supply of Coal to the new Plant at Roop Nagar (H.P.) Respondent No. 1 during April to June, 1998 deposited an amount of Rs. 61.85 lacs in Cash with the Appellant Company as and by way of Cash Security Deposit. This amount of Cash Security however kept on Increasing from time to time, depending upon the extent of the Linkage and the quantity of Coal supplied by the appellants to respondent No. 1. At this point of time, that is sometime after June, 1998, the Cement Manufacturers' Association made a Representation to the Chairman, Standing Linkage Committee, Govt of India, Ministry of Coal for allowing them to furnish Bank Guarantees for financial coverage, in place of cash deposits, to secure the supplies of Coal. On consideration, such representation was accepted by the Competent Authority in the Govt. of India and accordingly Respondent No. 1 withdrew the Cash Security Deposit lying with the Appellants and in its place furnished Bank Guarantee from ANZ Grindlays Bank, 19, Netaji Subhash Road Branch, Calcutta. The furnishing of Bank Guarantee, the extent of such Bank Guarantee and the manner in which it was furnished are relevant. The first such Bank Guarantee appears to have been furnished through a covering letter of respondent No. 1 Issued on 2nd November, 1998. This letter requires to

be re-produced verbatim for our ready reference. It reads as under :-

"Ref : HIM/SECL/3 2nd November, 1998 The Chief Finance Manager South Eastern Coalfield Ltd. 14 R.N. Mukherjee Road Calcutta-700 001

Kind attn : Mr. M. M. Bhattacharyya Dear Sir,

Destination : GACL Siding served by Roopnagar (Northern Railway).

Sub : Financial coverage.

This is to Inform you that Chairman, Standing Linkage Committee and Additional Secretary, Ministry of Coal has accorded approval for enhancing our linkage to 20.400 tons for October-December quarter i.e. 355 Box Wagon per month.

As per revised financial coverage system, we are enclosing a sealed envelope received from ANZ Grndlays Bank, 19 NS Branch, Calcutta containing one Bank Guarantee in your favour for Rs. 2.53 crores effective from 1st November, 1998 and valid till 30th October, 1999 with a claim period upto 28th February, 2000. Confirmatory letter Issued by the bank regarding Issuance of Bank Guarantee is also attached with the Bank Gurantee. Details of E.G. as follows :-

Linkage for 200.400 tons/month

(i.e. 355 Box Wagons)

Cost of Coal per box wagon 71,100,00

Total Cost (71,100 X 355)

2,52,40,500.00

B.G. Required

2,52,40,500.00

(equivalent to one month coal cost)

Bank Guarantee enclosed

2,53,00,000.00

We undertake to pay your coal bills within 48 hours on receipt of the same.

Kindly send us official receipt for the above.

Thanking you,

Yours faithfully,

FOR GUJARAT AMBUJA CEMENTS LTD.

Sd/- J K SINGHANIA

GENERAL MANAGER (CO-ORDINATION)

Encl. one sealed envelope containing B.C. & confirmatory letter."

4. On 8th January. 1999 the aforesaid Bank Guarantee amount was increased from Rs. 2.53 Crores to Rs. 3.30 Crores as per the details of breakup mentioned in the letter of that date which we re-produce herein-below for our ready reference :-

"Linkage for 27,200 tons/month

(i.e. 473 Box Wagons)

Cost of Coal per box wagon 71,100.00

Total cost (71,100 X 473) 3,36,30,300.00

Programme sanctioned for 464 Box Wagons

(i.e. 8 rakes of 58 Box each)

Cost of coal for 464 Box wagons

(i.e.464 x 71.000) i.e. B.G. Required

3,29,90,400.00

B.G. Enclosed

3,30,00,000.00"

5. Vide the last letter on the subject, dated 8th April '99 respondent No. 1 further Increased the Bank Guarantee to Rs. 3,71,15.000 as per the detailed break-up given in the "sald letter. This letter is reproduced herein below.

"Linkage for 30,600 tons/month

(i.e. 532 Box Wagons)

Cost of Coal per box wagon 71,100,00

Total Cost (71.100 x 532) 3,78,25,200.00

Cost of coal for 522 Box wagons

(i.e. 522 X 71,100) i.e. B.G. Required

3,71,14,200.00

B.G. Enclosed

3,71,15,000.00"

6. Even though the principal amount of Rs. 3,40,16.878.54 towards the 10% premium liability was paid by respondent No.I to the appellants, according to the appellants the respondent No. I was liable to pay Interest on this amount because of its belated payment and the Interest liability had been worked out to Rs. 3,29,44,523.05. As noticed hereinabove, the Bank Guarantee amount was

last extended vide letter dated 8th April, 1999 and the last extended Bank Gurantee to the tune of Rs. 3,71,15,000 was furnished by respondent No. 1 in favour of the appellants. On 28.06.99 the appellants wrote a letter to ANZ Grindlays Bank Ltd., 19, N.S. Road, Calcutta Invoking the Bank Gurantee for the entire amount of the guarantee. It fs the admitted case of the parties that after this Invocation of the Bank Guarantee for the entire amount of Bank Guarantee, that is Rs.3.71,15,000 on 30th June, 1999 Respondent No. 1 paid Rs. 3.40,16,878.54 towards the principal amount of Rs. 10% premium. What now remained according to the Appellants was the Interest liability of Rs.3,29,44,523.05. Accordingly on 31st July 1999 the appellants wrote a letter to ANZ Grindlays Bank, 19, N.S. Road, Calcutta whereby they have submitted a revised claim for the aforesaid amount of Rs. 3,29,44,523.05 and asked the Bank to arrange to make its payment immediately.

7. On 28th July 1999 Respondent No. 1 moved the learned single Judge of this court by filing Writ application and prayed for an Interim order. The learned single Judge even though refused to pass any interim order at that stage and Issued directions for filing Affidavits, observed that whatever action was taken during the pendency of the writ application would abide by the result of the Writ petition. During the pendency of the Writ petition undoubtedly the Bank had remitted the claimed amount of Rs. 3,29,44,523.05 and accordingly on 6/7th Augutst, '99 the appellants wrote a communication to Respondent No. 1 whereby they Indicated that this amount had been received by them from the Bank and that accordingly the Bank Guarantee amount at that stage stood reduced to Rs. 41,40,477 which was not sufficient to cover their monthly programme. This letter, being very relevant for our purpose requires to be re-produced which we do as hereunder :-

"South Eastern Coalfields Limited 13, R.N. Mukherjee Road,

Regd. Office SEEPAT ROAD. BILASPUR Calcutta.

(MP)-495001

Ref. No. SECL/CAL/S&M/2270 Date 07.8.99

To M/s. Gujrata Ambuja Cement Ltd., 216, Acharya Jagadlsh Bose Road "Sri Ganesh Centre", Calcutta-700 017.

Dear Sirs,

Sub : Enhancement of Bank Guarantee against Rail Programme.

You are kindly aware that your Bank Guarantee No.F/1001/98/442 amounting to Rs. 3,71,15,000 (Rupees Three Crores Seventy one lakhs fifteen thousand only) Issued by ANZ Grindlays Bank has been encashed to the extent of Rs. 3,29.44,523. As such Bank Guarantee has reduced to Rs. 41,70,477, which is not sufficient to cover your monthly rail programme.

Since the financial coverage has fallen short, you are hereby requested to make

good the shortfall amount within 10.8.99 to enable us to continue regular supply of coal. In default, we will be constrained to stop supply which you may please note.

Thanking you,

Yours faithfully,

Sd/. Raghu Nandan Sales Manager"

8. The following reliefs were prayed for by respondent No. 1 in the writ application :

"(a) Rule 27 of the Rules of this Hon"ble Court be dispensed with;

(b) Writ of mandamus commanding the respondents to forbear from claiming interest in respect of 10% premium on account of coal supplied during period from 19th February, 1992 to 29th March 1996 by the respondent No. 3 to the petitioners.

(c) The writ of Mandamus be issued directing the respondents to cancel and withdraw the letters dated June 5, 1999 and June 24, 1999 being Annexures "I" and "J" hereto and to desist from raising any claim for interest against the petitioners in respect of 10% premium for supplies of coal made during the period from 19th February 1992 to 29th March 1996.

(d) Writ of Mandamus be issued directing the respondents to forbear from suspending current supplies of coal to the petitioner's Cement factory or encashing the Bank Guarantee No.F1001/98/442 dated 30.10.98 given on account of non-payment of Interest as demanded by the letters dated June 5, and June 24, 1999 Issued by the Respondent No. 3 being Annexure "I" and "J" hereto.

(e) Writ of prohibition prohibiting the respondents from giving effect or further effect to their demand for interest as made in the letters dated June 5, June 24, 1999 being Annexure "I" and "J" hereto and from suspending current supplies of coal to the petitioner cement factory and from encashing the Bank Guarantee No. F1001/ 98/442 dated 30.10.98 furnished by petitioners for current supplies of coal.

(f) Rule Nisi in terms of prayers above.

(g) Injunction restraining the respondents from enforcing the demand for Interest on the amount of 10% premium in respect of supplies of coal made during the period from 19th February 1992 till 29th March 1996 in any manner or from suspending current supplies of coal to the Cement factory of petitioners for non-payment of such interest.

(h) It be declared that the respondent No. 3 is not entitled to claim interest on the amount of 10% premium in respect of coal supplied during the period from 19th February 1992 till 29th March 1996 or alternatively that interest (c)18.25%

per annum is excessive and unreasonable.

(i) Interim order in terms of prayers (g) and (h) above;

(j) Further and/or other orders;

(k) Costs,"

9. The question to be decided in this Appeal, also the question which was dealt with by the learned single Judge in the judgment under Appeal was as to whether the appellants had the power, authority and jurisdiction to invoke the aforesaid Bank guarantee for satisfying their alleged claim in respect of interest amount which they thought had accrued to them on account of belated payment of the 10% premium charge between 1992 to 1996 in respect of the Coal supply to the Ambuja Nagar Plant of Respondent No. 1. In other words, the question to be considered is, by reason of invocation of the Bank Guarantee, did the appellants have power, authority and Jurisdiction to reduce the Security Deposit from Rs. 3,71,15,000 to Rs. 41,70,477 and thus, consequently, in effect and substance bring to a stop the supply of the Coal to Respondent No. 1 and call upon it to furnish further Security to the extent of the Invoked amount as a condition for continuing with the supplying of Coal, Alternatively putting, did the Appellants have such power, authority or jurisdiction to appropriate the Bank Guarantee amount, after invoking it, to satisfy their claim in respect of their alleged entitlement of the interest having been accrued to them, as Indicated hereinabove.

10. To understand the true perspective of the aforesaid questions, we have to read the Bank Guarantee as a whole. After usual recitals and preambles. It reads thus :

".....We, ANZ Grindlays Bank Ltd..... do hereby irrevocably. And, unconditionally guarantee to pay to you, Coal India Limited or your subsidiary South Eastern Coalfields Limited at Seepat Road, Bilaspur-495 001 or 13, R.N. Mukherjee Road. Calcutta-700 001 or such other place or places as you may direct and without demur/all amounts which the company may be liable to pay to your subsidiary as price of coal supplied excluding Railway Freight but including Interest bills, long flame coal bills, transportation charges bills, other supplementary bills and all Incidental charges subject to the following terms and conditions :-

1. Payment pursuant to the guarantee will be demanded by Coal India Limited or its subsidiary South Eastern Coalfields Limited from the Guarantor and will be met by the Guarantor without any question. As to whether the occasion or ground has arisen for such demand the decision of the Coal India Limited or its subsidiary South Eastern Coalfields Limited shall be final.

2. The Coal India Limited and its subsidiary South Eastern Coalfields Limited shall have the fullest liberty without reference to the Bank and without affecting this guarantee to postpone for at any time or from time to time the exercise of all or any of their powers and rights under arrangements made with the company and

the Bank as Guarantor shall not be released from this guarantee by any arrangement between the Coal India Limited or its subsidiary South Eastern Coalfields Limited or any alteration thereof made with or without the consent of the Bank as guarantor or by exercise or non exercise by the Coal India Limited or its subsidiary South Eastern Coalfields Ltd. of all or any of their powers and rights against the Company, or any other forbearance and or omission on the part of the Coal India Limited or its subsidiary South Eastern Coalfields Ltd. or Indulgence granted by or on behalf of the coal India Limited/South Eastern Coalfields Ltd to the company where under the law relating to suretyship would but for this peovlsion have the effect of releasing the Bank as Guarantor from their obligations under this guarantee.

3. The guarantee herein comtained shall not be determined or efected by the winding up or Insolvency of the Company but shall in all respects and for all purposes be binding and operative until all monies due to the Coal India Limited/South Eastern Coalfields Ltd. In respect of all liability of the Company are fully paid.

4. It is also agreed that Coal India Ltd./South Eastern Coalfields Ltd. will be entitled at its option to enforce this grarantee against the guarantor as principal debtor in the Instance notwithstanding any other security or guarantee that Coal India Ltd./South Eastern Coalfields Ltd. may have in relation to the Company"s liability.

5. The Guarantee will remain valid for a period of 12 months from the date hereof I.e. upto 30th October 1999 and for a further period of 120 days from the expiry of period of validity i.e. upto 28th February, 2000. The Guarantee is effective from the day of 1st November, 1998.

6. It is expressly agreed between the parties that this guarantee is not only in respect of price of coal for all orders for purchase of coal which may be placed by the Company on Coal India Ltd., South Eastern Coalfields Ltd. during the subsistence of this agreement but also for the price of coal in respect of all order which have already been placed by the Company on South Eastern Coalfields Limited for which any previous guarantee, has been given by the guarantor in favour of Coal India Ltd., South Eastern Coalfields Ltd., and this guarantee is also for all amounts that may be due under the guarantees previously given on bealf of the Company.

7. This guarantee will also be valid and operative and shall cover all claims or demand of Coal India Ltd., South Eastern Coalfields Ltd., to the extent of the amount guaranteed in respect of despatches of Coal for which allotment has been made in a period earlier than this guarantee and the extension period thereof.

11. Mr. Mukherjee, learned Senior Advocate appearing for the appellants has contended that the terms of Bank Guarantee are wide enough to embrace within its amplitude the power of the appellants to invoke it in respect of any claim of

the appellants, past or present, either relating to the transactions prior to the furnishing of the Bank Guarantee or during its subsistence, in respect of supplies made to Ambuja Nagar Factory or Roop Nagar Factory, in respect of price of Coal or any interest liability accruing from any belated payment of such price of coal. Particularly Mr. Mukherjee has referred to the opening part of the Bank Guarantee and Paras 1, 6 and 7 thereof. Mr. Mukherjee laid great stress on the scope and ambit of Para-7 of the Bank Guarantee to buttress his argument that the Bank Guarantee would be valid and operative and should cover all claims or demands of the appellants to the extent of the amount guaranteed in respect of despatches of Coal for which allotment has been made at a period earlier than the execution of guarantee bond and the extension period thereof. According to Mr. Mukherjee the instrument of the Bank Guarantee being a bi-lateral agreement between the Bank and the appellants, the power of the appellantes to invoke the Bank Guarantee is absolute and unfettered and the Bank was liable to not only remit the amount claimed but the Appellants were also within their power to appropriate this amount in any manner they liked. Mr. Mukherjee referred to the following judgments in support of his submission that the appellants were entitled to invoke the Bank Guarantee and to appropriate the amount in question :

- (1) Hindustan Steel Workers Construction Ltd. Vs. G.S. Atwal and Co. (Engineers) Pvt. Ltd.,
- (2) National Textiles Corporation (South Maharashtra) Limited Vs. Tamil Nadu Co-Operative Marketing Federation Ltd. and Another,
- (3) H.M. Kamaluddin Ansari and Co. Vs. Union of India (UOI) and Others,
- (4) Tarapore and Co. Vs. V/O Tractoroexport and Another, .

12. Even though generally speaking, a Bank Guaratee is in the nature of a Tripartite Agreement, strictly speaking, it is bi-partite in the sense that the Bank furnishes a guarantee to the beneficiary, but then tripartite in the sense that it is furnished at the Instance of respondent No. 1. In this case, we would be called upon to construe the scope of the Bank Guarantee as such in order to interpret its various terms and conditions, Including those contained in paras 1, 6 and 7 and in the preamble. In this case we are primarily concerned with the action of the appellants in stopping the supply of Coal after intimating to the Respondent No. 1 that the amount of Security deposit has been now reduced to Rs. 41,70,477 as against the original amount covered against the Bank Guarantee of Rs.3,71,15,000.

13. What we are considering in this Appeal, in effect and substance, is not the power as such of the appellants to invoke the Bank Guarantee or, for that matter any question relating to the obligation of the Bank to honour its commitment given in the Bank Guarantee. It is the established law by now that the beneficiary of the Bank Guarantee is entitled, at its option to Invoke the Bank Guarantee and communitate its intention of doing so to the Bank and, once the

Bank receives such a communication, it is bound to comply with the same. About such legal proposition there is no doubt whatsoever in our mind. The question which however falls for our consideration in this Appeal has to be viewed in a slightly different perspective. That perspective is based, not entirely on the terms of the Bank Guarantee document itself, but is directly linked to the circumstances under which the Bank Guarantee was executed by the Bank on the instructions of the Respondent No. 1. Undoubtedly at all times before the execution of the Bank Guarantee, Respondent No. 1 had been obtaining the supply of Coal from the Appellants based on the Security by way of Cash deposit. It is the undisputed case of the appellants that such Cash Deposit was directly proportionate to the extent of the supply to be received by Respondent No. 1. It was on the representation of the Cement Manufacturers' Association that the Govt of India agreed to replace the system of Cash Security by furnishing of Bank Guarantee for the equivalent amount. It was in this background that the Bank Guarantee in question was furnished by Respondent No. 1 for a specified amount. It therefore one looks to the letter dated 2nd November, 1998 whereby the Bank Guarantee was for the first time furnished, one finds that the amount of Bank Guarantee (Rs. 2.53 Crores) was directly linked to the extent of supply of Coal and the value of such supply indicated in the letter itself. This letter clearly mentioned the linkage for 20,400 tons per month, that is 355 box wagons. It was clearly mentioned in this letter that the cost of Coal per box wagon was Rs. 71,100 and if one multiplied this amount with the number of box wagons, that is 355, one got the figure of Rs. 2,52,40,000 as the Bank Guarantee required was equivalent to one month's price of Coal. Letter dated 8th January, 1999 whereby the amount of Bank Guarantee was increased to Rs. 3,30,000.00, was clearly based on the increased supply of Coal from 20,400 tons per month to Rs. 27,200 tons per month, that is from 355 box wagons to 473 box wagons. Finally in the letter dated 8th April, 1999, the quantity of Bank Guarantee was further increased to Rs. 3,71,15,000 because at that stage the linkage of Coal supply was further increased to 30,600 tons per month, corresponding to 532 box wagons. In this background therefore, when we examine the true intent, purport and scope of the preamble, Clause 1 and Clauses 6&7 of the Bank Guarantee we find that these had direct bearing and proximate relationship to the transaction of the Coal and the exact quantity to be supplied by the appellants to Respondent No. 1 after 2nd November, 1998 or the despatches of Coal for which allotment has been made in a period "earlier than this guarantee" and extension period thereof, as stipulated in Clause-7 of the Bank Guarantee: Mr. Mukherjee, learned Senior Advocate appearing for the Appellants relied very heavily on Clause-7 to contend that the expression used "for which allotment has been made in a period earlier than this guarantee" will cover the interest claim of the appellants for the period 1992 to 1996. We do not agree at all. If one reads Clause-7 as a whole, and not in isolation as also along with Clauses 6, 1 and the preamble going backwards in that order one will find that this Clause clearly covers the claim of the appellants in respect of the price of Coal sold and of course interest thereupon, if sale price is paid beyond agreed period, sale transaction taking

place either after the execution of the Bank Guarantee or in proximate closeness to its execution, to cover such Immediate past claims as were earlier covered by the cash security, but later on replaced by the Bank Guarantee. As we know, since the appellants had allowed and agreed to substitute the Bank Guarantee for Cash Security and had refunded the cash to respondent No. 1, there could be situations where during the intervening period some claim may have been outstanding.

14. Intention of the parties can also not be lost sight of. The Respondent No. 1 had furnished the Bank Guarantee because it was for it to ensure that it received uninterrupted supply of Coal. Furnishing of the Bank Guarantee on 30th October, 1998 in the background of the letters dated 2nd November, 1998, 8th January, 1999 and 8th April, 1999 will surely not reflect the intendent of the parties that it was by way of a security in respect of a claim which had occurred or might have occurred sometime between 1992 and 1996. Not only this, the Intention is further buttressed by the fact that the appellants themselves, once the linkage from Ambuja Nagar Factory had been brought to an end had refunded the cash amount of Respondent No. 1 lying with them without any objection, demur or reservation.

15. Undoubtedly the Bank, once it was approached had no option but to honour its commitment and without asking any question, to remit the amount asked for, to the appellants. But it was not proper on the part of the appellants to have invoked the Bank Guarantee in respect of a claim which did not from the subject matter of the Bank Guarantee and which, as indicated hereinabove, was not related to the transaction in question. If the appellants thought that they had a claim against respondent No. 1 in respect of the interest liability of Respondent No. 1 on account of belated payment of 10% premium amount, it should not have refunded the cash lying with it which it did in February, 1997. That amount was to the tune of Rs. 1,06,01,500.

16. Coupled with the question of Invoking the Bank Guarantee is the directly related question of appropriating the amount covered therein. When the Bank Guarantee was furnished by respondent No. 1 in favour of the appellants, the intention was very clear. It was that if the respondent No. 1 failed in its obligation of paying the price of the Coal purchased by it, the appellants would be at liberty to Invoke the Bank Guarantee and appropriate such sum as would be sufficient to meet their demand towards price of Coal sold. Appropriation to that extent alone was permissible. What we are saying in other words, is that the parties had bi-laterally agreed that the appellants would appropriate the Bank Guarantee amount, after Invoking it towards their claim of supply of Coal relatable to the execution of the Bank Guarantee and not for any claim in the distant past, unrelated to such supply of Coal as such which the appellants might have had against the Respondent No. 1. In our view such power of appropriation was not given by Respondent No. 1 to the appellants. Nor could such power be discerned from the Bank Guarantee itself. To that extent we may say that the act of the

appellants in invoking the Bank Guarantee for their alleged claim of interest not relatable to the supply of Coal to Respondent No. 1 directly linked with the furnishing of Bank Guarantee was an arbitrary act and the appellants being "State" within the meaning of Article 12 of the Constitution cannot be permitted to act arbitrarily.

17. The appellants had to take into account the background in which, the circumstances under which and the object for which the Bank Guarantee had been obtained by them from respondent No. 1 and then were to decide whether respondent No. 1 had committed any default in relation to the transaction forming the subject matter of the Bank Guarantee and, if such a default was indeed committed, to invoke the Bank Guarantee in furtherance of the action which was required to be taken against respondent No. 1 based on such a default. By invoking the Bank Guarantee in respect of a transaction which had nothing to do with the object of furnishing the Bank Guarantee, since it was not directly or indirectly related to the transaction between the parties forming the core of the purpose for which the Bank Guarantee was submitted, the appellants do appear to have acted arbitrarily, defeating the very purpose for which the Bank Guarantee was furnished. Mr. Mukherjee's vehement and very strong defence of this action of the appellants notwithstanding, we are afraid we cannot countenance such an act which is de hors the object for which the Bank Guarantee was furnished. At a point of time in October--November 1998 when the Bank Guarantee was originally furnished by the respondent No. 1, the claim of the appellants against respondent No. 1 towards 10 percent premium charge was subsisting and pending. The amount against such claim was admittedly around Rs. 3.5 Crores. Similarly at that very point of time the appellants must have been aware and fully conscious that on the belated payment of this 10 percent premium amount the appellants might be entitled to claim and receive Interest from the respondent No. 1. The Interest amount as was worked out by the appellants later on was to the tune of Rs. 3.5 Crores. Both these amounts actually were in the approximation of Rs. 7 Crores or more. When therefore the Bank Guarantee was obtained in October--November 1998 by the appellants from respondent No. 1. by merely accepting the Bank Guarantee to the tune of only Rs. 2,53,00,000, the appellants clearly understood that the parties had entered into an arrangement only with regard to supply of Coal at the Roop Nagar Factory of the appellant and that this Bank Guarantee had nothing to do whatsoever with covering any past liability relating to either the 10 per cent premium charge or the Interest liability thereupon. Had such been the intention of the parties, the amount as required to be covered under the Bank Guarantee should have exceeded Rs. 10 Crores. As we have seen that was not the case. Indeed by invoking the Bank Guarantee, and appropriating the amount in question, the appellants have created a situation whereby the supply of Coal to respondent No. 1 to the extent which was covered under the Bank Guarantee in so far as the Security Deposit was concerned, has been jeopardised. This was not the arrangement which the parties understood when the Bank Guarantee was

furnished. To that extent we are in full agreement with the view of the learned single Judge that the appropriation of the amount by the appellants from out of the Bank Guarantee towards settling their claim in respect of the Interest payment relating to the 10% premium amount was not permissible and the agreement between the parties had not given such an authority or power to the appellants to make such an appropriation of the amount for such a purpose. This act of the appellants therefore cannot be upheld or approved. The invoking of the Bank Guarantee itself is therefore held by us to be Illegal. The consequential appropriation of the amount undoubtedly therefore also becomes illegal.

18. Once therefore we find that the appellants were not entitled to Invoke the Bank Guarantee, and consequently the appropriation was also bad, the parties have to be brought back to a situation of status quo ante; meaning thereby the appellants have to be directed to return the amount to the Bank with interest as would be calculable by the Bank so that the Bank Guarantee is revived for being operational as before its invocation.

19. The appeal accordingly is dismissed. The cross-objections filed by the respondent No. 1 are allowed. The appellants are directed. In modification of the order passed by the learned Single Judge to return the amount in question to the Bank with interest, if demanded by the Bank, at the rate as calculated by the Bank so that the Bank Guarantee is revived and made operational in terms of the Instrument of Bank Guarantee.

No order as to costs.

P.K. Sen,J .

I agree.

Later :

After the judgment was pronounced in court, the learned Advocate appearing for the appellant prayed for staying the operation of the judgment for a limited period. On consideration, we grant the prayer and stay the operation of our judgment for a period of 3 weeks from date.

Let a xerox copy of this Judgment, duly countersigned by the Assistant Registrar of this court, be given to the parties upon their undertaking to apply for and obtain certified copy of the same upon usual undertaking.

20. Appeal dismissed