
(2007) 12 RAJ CK 0028
In the Rajasthan High Court

State Bank of India

APPELLANT

Vs

Jaipur Vidyut Vitran Nigam

RESPONDENT

Date of Decision : 05-12-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96

Citation : (2008) 2 RLW 1519

Hon'ble Judges : P.B. Majmudar, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

P.B. Majmudar, J.—This first appeal is directed against the judgment and decree passed by Additional District Judge No. 3, Jaipur City, Jaipur dated 10.12.1990 by which the learned trial Judge has decreed the suit filed by the present respondent-Rajasthan State Electricity Board, Jaipur (for short "RSEB").

2. The respondent RSEB instituted a suit being Civil Suit No. 72/86 for recovery of Rs. 4,27,500/- with interest from the present appellant, original defendant in the said suit. According to the plaintiff, an order was placed with M/s. U.P. Cables Co. Pvt. Ltd., New Delhi (hereinafter referred to as "the Contractor") to supply 500 km. of particular type of wire. According to the plaintiff, the delivery was to commence from 22.10.1979 and the contractor was to supply entire goods within ten months from 22.10.1979. For performance of the said work, the plaintiff insisted upon the security from the contractor and the defendant (present appellant) furnished a security guarantee No. 12/108 for an amount of Rs. 1,90,000/- on 29.7.1980. As per the guarantee, it was agreed between plaintiff and the defendant that in case the contractor fails to supply the goods, the Bank will make payment of aforesaid guarantee amount of Rs. 1,90,000/-on demand to the plaintiff-RSEB. As per the stipulation in the agreement, the guarantee was to remain in force upto 30.6.1981. It is also the case of the plaintiff that the defendant State Bank of India further executed a performance guarantee No. 12/115 on 23.8.1980. According to this guarantee, it was agreed that in terms of

contract between RSEB and contractor, the contractor should furnish bank guarantee of 5% of the total contract value by way of security for supplying free of costs any material that may be required to be supplied due to defects arising from faulty material, design and workmanship. At the request of contractor; the Bank agreed to execute performance guarantee. It is the case of the plaintiff that the contractor did not supply the total quantity of goods but he supplied only 163.65 Km. on 4.7.1980 and thereby failed to perform the contract. It is the case of the plaintiff that vide a telegram dated 28.9.1981, the plaintiff asked the Bank to remit the amount of security guarantee i.e. Rs. 1,90,000/- and a letter of confirmation was also sent to Bank on the same day i.e. 28.9.1981. It is also the case of the plaintiff that the contractor failed to perform the contract, therefore, the plaintiff sent another telegram on 28.12.1981 to the defendant Bank to remit the amount of Rs. 2,37,500/- towards the performance guarantee and a letter of confirmation was also sent in this behalf on 28.12.1981. According to the plaintiff, the Bank has failed to remit the amount in question and therefore, the suit for recovery of Rs. 4,27,500/- with interest was filed by the plaintiff against the defendant-Bank.

3. The said suit was resisted by the defendant-Bank by filing written statement. The defendant, in the written statement, has admitted the fact about the execution of security guarantee and performance guarantee, but denied the factum of receiving any telegram dated 28.9.1981 or 28.12.1981. It is the case of the defendant that neither such telegram nor any letter was issued by the plaintiff within the lime limit. It is also the case of the defendant that as per the terms of the guarantee, in so far as the security guarantee is concerned, the period of guarantee was only upto 30.9.1981 and In case of performance guarantee, the period of guarantee was only upto 30.12.1981 and that since no intimation prior to these dates was received by the Bank from the plaintiff for making payment in connection with the aforesaid two guarantees, the Bank cancelled the said guarantees after the expiry of the claim period i.e. on 11.8.1982 and therefore, the plaintiff is not entitled to receive any amount. It is also the case of the defendant that the suit is barred by limitation and that M/s. U.P. Cables, who is necessary party in the suit, was not joined in the suit, and the Court at Jaipur has no jurisdiction to decide the suit, therefore, on these and such other grounds, the suit of the plaintiff was resisted.

4. The learned trial Judge framed various issues arising out of the pleadings and after recording evidence of both the parties and after considering the oral and documentary evidence available on record, decreed the suit of the plaintiff against the defendant. Against the aforesaid decree, the appellant (original defendant) has filed this first appeal u/s 96 of the C.P.C. During the pendency of the suit, the plaintiff came to know that the plaint is not signed by the Officer Incharge and therefore, an application was submitted on 20.3.1987 for permitting the Officer Incharge of the RSEB to sign the plaint. The trial Court by its order dated 18.5.1987 permitted the Officer Incharge to sign the plaint. Subsequently, the appellant defendant Bank filed an application under Order 6

Rule 16 C.P.C. that the suit is liable to be dismissed. The defendant further filed an application under Order 14 Rule 5 C.P.C. on 6.3.1990 that issue No. 7 may be modified and since the Officer Incharge signed the plaint on 18.7.1987, the issue of limitation should be modified in the following terms:

Whether the suit is barred by limitation because the Officer Incharge has signed the plaint on 18.7.1987?

5. The defendant Bank further filed an application under Order 13 Rule 2 C.P.C. on 6.3.1990 with a prayer that letter dated 28.12.1981 written by the RSEB may be taken on record. The trial Court by its order dated 12.2.1990 allowed the application for amendment in the issue and by the same order, the trial Court dismissed the application under Order 13 Rule 2 C.P.C. Ultimately, after hearing the arguments from both the sides, the trial Court by its judgment and decree dated 10.12.1990 decreed the suit for an amount of Rs. 4,27,500/- with costs and further ordered that the plaintiff will be entitled for interest @ 12% per annum on the amount decreed from the date of the suit i.e. 27.9.1984. The trial Court also found that the suit is within limitation and the Court at Jaipur has territorial jurisdiction to decide the suit.

6. Learned Advocate for the appellant-Bank, Mr. Bhandari, submitted that the trial Court has erred in deciding the suit in favour of the plaintiff-respondent. Learned Advocate Mr. Bhandari also submitted that since the Bank had not received any intimation within the period during which the guarantee was in existence, the suit was required to be dismissed as the Bank was justified in revoking the guarantee in view of the fact that time limit was already over. Learned Advocate Mr. Bhandari further submitted that in any case, the plaintiff was not entitled to invoke the performance guarantee as it cannot be said that the contractor had committed any default or had failed to perform the contract and therefore, in any case no decree could be passed in connection with the performance guarantee dated 23.8.1980. In this connection, learned Advocate for the appellant relied upon the terms of the guarantee and stated that unless it is proved that the contractor was negligent in performing his duty, the said guarantee could not have been invoked. It is also submitted that if the contractor has failed to supply the material, it cannot be said that he was negligent in performing and discharging his duty and obligation unless plaintiff is able to prove that it has suffered any loss or damages by the reason of failure by the contractor to supply the material of good quality. It is also submitted by Mr. Bhandari that the Bank had not received any telegram nor any letter during the time limit of guarantee in dispute. Mr. Bhandari further submitted that the suit of the plaintiff is time barred because when it was presented, the same was not signed by the concerned Officer Incharge of the Bank and at the time when said defect was removed, the limitation period had already expired. Mr. Bhandari also submitted that the plaintiff had failed to prove that any such telegram was sent to the defendant and therefore, the plaintiff has failed to prove his case that within the time limit prescribed in the agreement, an intimation was sent by the

plaintiff to the defendant. It is further submitted by Mr. Bhandari that in any case the bank guarantee was given by the Bank from its Delhi Branch and no cause of action can be said to have arisen within the territorial jurisdiction of the Court at Jaipur and therefore the suit was required to be dismissed for want of jurisdiction. Mr. Bhandari accordingly submitted that considering the evidence on record, the suit was required to be dismissed.

7. Mr. Rahul Kamwar appearing for Mr. G.C. Garg, learned Advocate for the defendant-respondent, on the other hand, submitted that the plaintiff has led ample evidence to show that the telegrams were sent within the prescribed time limit but in spite of that the Bank made payment to the contractor. It is also submitted by learned Advocate for the respondent that the Court at Jaipur has territorial jurisdiction. It is further submitted that the suit is within the period of limitation and the trial Court has properly appreciated the evidence on record and decreed the suit. It is submitted by learned Advocate for the respondent that there is a clear admission on the part of the defendant that before cancellation of agreement, the defendant had already received confirmation letter sent by the plaintiff regarding sending of telegrams and it is clear from the evidence that the guarantees were cancelled on 11.8.1982 i.e. after expiry of six months from receiving the letter regarding revocation, which clearly shows the bad intention on the part of the original defendant. It is also submitted that both the telegrams (Ex. 21 and Ex. 24) were sent by the respondent to the appellant regarding bank guarantees and both are public documents. It is further submitted that since there was some defect at the time of filing of the suit regarding not signing of the plaint by the concerned officer-in-charge, the said defect was later on rectified by signing the plaint by the competent officer and it cannot be said that the suit is time barred as it was not signed by the appropriate officer at the relevant time. It is further submitted that the Court at Jaipur had territorial jurisdiction to decide the suit and that in any case the decree cannot be set aside by the appellate Court on the ground of lack of territorial jurisdiction as the decree has been passed on merits and no prejudice has been caused to the defendant on the ground that the proceedings have been tried at Jaipur and even the defendant had led full evidence both oral and documentary. It is further submitted that the omission to verify a pleading is a mere irregularity and the pleadings which is not verified as required under Order 6 Rule 15 can be verified at any later stage of the suit and even after the expiry of period of limitation. It is further submitted that M/s. U.P. Cables was not a necessary party to the suit and non-joinder of the same in the suit does not affect the merit of the case and that it cannot be said that no effective decree can be passed even in absence of M/s. U.P. Cables (original contractor). It is, therefore, submitted that the trial Court has passed the decree after appreciating the evidence on record and that the decree passed by the trial Court is required to be confirmed in this first appeal.

8. I have heard learned Advocates for the parties at length, have gone through the pleadings, evidence both oral and documentary and have also gone through

the judgment and decree passed by the trial Court. The point which requires to be determined in this appeal is whether the plaintiff can be said to have proved his case and whether the plaintiff was entitled to claim the amount prayed for in the suit. In this connection, the factual aspect of the matter is required to be taken into consideration. The defendant-appellant placed an order with M/s. U.P. Cables Co. Pvt. Ltd., New Delhi for supplying 500 Km. of particular wire. It is not in dispute that the contractor was required to supply the entire goods within 10 months from 22.10.1979, and the appellant Bank furnished a security guarantee No. 12/108 for an amount of Rs. 1,90,000/-. Clause 7 of the aforesaid bank guarantee is in the following terms:

Notwithstanding anything contained herein before the Bank's liability under this guarantee is restricted to Rs. 1,90,000/- (Rs. One lac ninety thousand only) and the guarantee shall remain in force upto 30.6.81 unless demand or claim in writing is presented on the Bank within 3 months from that date, the Bank shall be released and discharged from all liabilities thereunder.

9. The appellant Bank thereafter executed a performance guarantee No. 12/115 on 23.8.1980. In the said bank guarantee, it was agreed that the contractor should furnish a bank guarantee of 5% of the total contract value by way of security for supplying free of costs any material that may be required to be supplied due to defects arising from faulty materials, design or workmanship. The Bank executed performance guarantee at the request of contractor for a sum of Rs. 2,37,500/- with grace period of six months. So far as the first guarantee is concerned, the same was valid till 30.12.1981 whereas second guarantee i.e. performance bank guarantee is concerned, the same was valid upto 30.12.1981. It is not in dispute that the contractor could not supply full quantity as he supplied only 163.65 km. wire against agreed quantity of 500 km. In this behalf, on 28.9.1981, the plaintiff sent a telegram to the appellant Bank to remit the amount of security guarantee of Rs. 1,90,000/- along with a letter of confirmation to the Bank. On 28.12.1981, the plaintiff sent a telegram to the Bank to remit the amount of Rs. 2,37,500/- towards the second guarantee i.e. performance guarantee as the contractor had failed to perform the contract. The said guarantees were cancelled by the Bank on 11.8.1982. The plaintiff thereafter sent reminders to the Bank on 14.2.1983 and 10.5.1984 and ultimately, the Bank sent a letter to the plaintiff on 31.7.1984 stating that both the bank guarantees have been canceled on 11.8.1982. Therefore, the plaintiff had filed the present suit.

10. The principal question in this appeal which requires consideration is whether the plaintiff was entitled to invoke the said guarantees and whether the same were invoked within the time limit prescribed and whether the plaintiff was entitled to receive any amount towards second guarantee i.e. performance guarantee.

11. On behalf of the plaintiff, one Shri Sumer Chand Jain was examined, who at the relevant time was serving as Senior Accounts Officer of the RSEB. In his

evidence, he has stated that the contractor was defaulter in the matter of supplying the material. The said witness has also stated that the contractor wrote a letter to the plaintiff wherein he was stated that because of increase in the price, he is not in a position to supply the remaining goods. The plaintiff also wrote a letter to the contractor (Ex. 18) pointing out to the contractor that he had supplied only 163.65 km. wire and requested the contractor to supply rest of the material immediately. Considering the aforesaid aspect of the matter, in my view, it is not in dispute that the contractor had failed to carry out his contractual obligation and he was not in a position to supply the remaining material in question to the plaintiff. Therefore, the plaintiff has clearly established his case that he defendant had failed to discharge his contractual obligation and failed to perform his contract. Even learned Advocate for the defendant is also not in a position to dispute this aspect but the main contention on the part of the defendant is that no attempt was made by the plaintiff to invoke the said guarantees within the prescribed time limit. On behalf of the defendant, the suit was resisted mainly on the ground that the Bank was not informed within time limit and no steps were taken to invoke the same, therefore, the plaintiff is not entitled to recover the amount towards the said guarantees though the defendant-Bank has accepted the fact about executing both the guarantees i.e. security guarantee of Rs. 1,90,000/- and performance guarantee of Rs. 2,37,500/-. The plaintiff's witness Shri Sumer Chand has also stated in his evidence that two telegrams were sent on 28.9.1991 and 28.12.1981 to the Bank and both the telegrams were received by the Bank and thereafter, reminders were also sent to the Bank. The plaintiff examined one Shri Radheshyam Gupta (PW. 2) who had also clearly stated that two telegrams were sent to the Bank. A copy of the telegram dated 28.9.1981 was also produced at Ex. 29 on record and a copy of the telegram dated 28.12.1981 was produced at Ex. 24 on record. The plaintiff has also produced a copy of the dispatch register on the record which is Ex. 35.

12. Considering the evidence of the plaintiff, both oral and documentary, in my view, the plaintiff has successfully proved that such telegrams were sent to the Bank at the relevant time. However, on behalf of the defendant one Shri Yagendra Kumar Guar (DW. 1) was examined. The said witness had stated in his evidence that no such telegrams were received by the Branch. However, he has admitted that confirmation of the said telegrams, which were sent by the plaintiff to the defendant, was received by the Bank on 2.1.1982, which was beyond the period of subsistence of bank guarantee. The defendant also examined one Shri T.C. Sharma, who has also said in his evidence that the plaintiff had not put forward his case in connection with the aforesaid two guarantees within time. In this connection, evidence of defendant's witness Shri Yagendra Kumar Gaur is required to be considered. The said witness in his evidence stated that he was Manager of State Bank of India, Najafgarh Road, New Delhi from 17.1.1985 to 16.10.1987. In his evidence, he has stated that both the guarantees were executed from Najafgarh Road, New Delhi Branch of the Bank. He has also stated

that the plaintiff did not submit his claim within the limitation and therefore, both these guarantees were cancelled. The said witness has stated in his evidence that a confirmation copy of the telegram, which was sent by the plaintiff, was received on 2.1.1982 and therefore, it was beyond the period of limitation. The said witness has stated that the plaintiff might have acted in collusion with the contractor and therefore, the plaintiff is not entitled to any money under the said guarantees. In his cross-examination, the said witness has stated that it is difficult to say as to whether the Receipt Register of year 1981 is available in the Bank or not as it relates to very old period. He has further stated that as per information, same is not available as the old record relating to 5-6 years is destroyed. In his cross-examination, he has stated that he does not know whether before destroying the Receipt Register, permission of the higher authority was taken or not. He has further stated that he was not knowing whether any list of the destroyed record is in the Bank or not. According to the said witness, Ex. 32 telegram was not received by the Bank and according to Bank record, the telegram was not on record of the Bank. He, however, admitted that the confirmation copy of the telegram was received by the Bank on 2.1.1982. So far as this witness is concerned, he had no personal knowledge but he has given evidence as per the available record. It is not in dispute that after receiving a confirmation copy of the telegram on 2.1.1982, the guarantees were cancelled by the Bank after about 7 months. It is surprising that in between, the Bank had not taken any step by entering into correspondence with the plaintiff and the guarantees were cancelled and the payment was made to the contractor after about 7 months from receiving the confirmation regarding sending of the telegrams by the Bank. It is not in dispute that such confirmation of telegrams was received by the Bank as back as on 2.1.1982 so at least at that time the Bank came to know that a telegram was already sent and it is not in dispute that if the date of sending this telegram is taken into account, the same was within time limit of Bank guarantee. It is required to be noted that it is not the case of the Bank that before receiving such confirmation letter, guarantee was already cancelled and payment was already made to the contractor. As a matter of fact, there is nothing on record to show that after receiving such confirmation letter the Bank had tried to verify the fact that any such telegram was sent or not. Instead an about more than 6-7 months, the payment was made to the contractor by the Bank. As against that, the plaintiff had proved by documentary evidence that the telegram was sent to the Bank, which was within time limit and thereafter, a confirmation letter was also sent.

13. Considering the facts and circumstances of the case, in my view, the trial Court was perfectly justified in coming to the conclusion that the plaintiff has proved the fact that telegrams were sent to the bank and the trial Court has rightly discarded the evidence of the bank in this regard. Considering the evidence on record, it cannot be said that the Bank has successfully proved the factum (sic) not sending of the telegrams by the plaintiff. It is not in dispute that such telegrams were sent during the subsistence of bank guarantee and within

the period during which such guarantee was in force. It is surprising that even after receiving the confirmation letter, the payment was made after 6-7 months and also, in between no attempt was made by the Bank to find out the factum about receiving such telegrams which according to the plaintiff was sent to the defendant.

14. Learned Counsel for the appellant-bank has submitted that even if, it is presumed that the plaintiff was entitled to receive amount towards first guarantee i.e. security guarantee for Rs. 1,90,000/-, so far as second guarantee i.e. performance guarantee is concerned, looking to the clause in the guarantee, the plaintiff was not justified in invoking the same as the plaintiff was required to prove that it sustained loss. In this behalf, it is required to be noted that so far as second guarantee i.e. performance guarantee is concerned, the same was of Rs. 2,37,500/-with grace period of 6 months and the same was valid upto 30.12.1981. However, learned Mr. Bhandari submitted that the second guarantee was a conditional guarantee and unless the plaintiff did not sustained any damage, the plaintiff is not entitled to receive any amount towards second guarantee. Mr. Bhandari also submitted that M/s. U.P. Cables has not committed any breach of contract and the plaintiff was not entitled to receive any amount towards performance guarantee. Mr. Bhandari also submitted that even the contractor had taken out proceedings against the plaintiff by invoking arbitration clause in connection with deduction of penalty of 5% and the sole Arbitrator gave an award to the effect that the plaintiff has wrongly invoked the bank guarantee and it passed an award in favour of M/s. U.P. Cables in which RSEB was directed to refund the entire amount of bank guarantee. However, it is pointed out that the said award was not confirmed by the Court in view of the decree passed in the present matter and therefore, the said award is not an enforceable award. However, considering the said aspect of the matter that the contractor raised the dispute against the plaintiff would clearly show that the theory put forward by the defendant that the plaintiff and M/s. U.P. Cables were in collusion with each other is not at all believable. As a matter of fact, the Bank acted in a very rash manner by making payment to the contractor even though it was brought to the notice of the Bank by way of correspondence that the telegrams were sent within time, which is established by the confirmation letter and admittedly, after receiving the confirmation letter, the payment was made subsequently after 6-7 months.

15. So far as performance guarantee is concerned, the same was valid upto 30.12.1981 and as per the Clause 1 of the said agreement, decision of the Chief Engineer was to be treated as final. As per Clause 6 of the agreement, during the currency of the agreement, the guarantee was not to be revoked without the consent of the Chief Engineer. The performance guarantee was an independent contract and was irrevocable in character. The performance guarantee imposes absolute obligation on the banker to pay irrespective of any dispute, which may arise between the parties on the question whether a party has fulfilled his part of the contract or not. It is, therefore, not possible to accept the submission of Mr.

Bandari that so far as second guarantee, i.e. performance guarantee is concerned, it was conditional one and unless the plaintiff proves that the contractor has committed breach of the contract, the plaintiff is not entitled to invoke the said guarantee or that the plaintiff is required to prove damages before invoking the said guarantee.

16. At this stage, reference is required to be made of certain decisions cited by Mr. Bandari. Mr. Bandari has relied upon the case of State of Maharashtra Vs. Dr. M.N. Kaul (Deceased by his Legal Representatives) and Another, wherein the Supreme Court has held in para 6 as under:

6. The question is whether this guarantee is enforceable. That depends upon the terms under which the guarantor bound himself. Under the law he cannot be made liable for more than he has undertaken. It is often said that a surety is a favoured debtor, for in the expressive phrase of Lord Westbury L.C. In *Blest v. Brown* (1982) 4 De GF & J 367

You bind him to the letter of his engagement.

Beyond the proper interpretation of that engagement you have no hold upon him.

These observations have been recalled in cases of guarantee and suretyship by the Judicial Committee and also this Court. See for example AIR 1935 21 (Privy Council) and *M.S. Anirudhan Vs. The Thomco's Bank Ltd.*, To this there are some exceptions. In case of ambiguity when all other rules of construction fail, the Courts interpret the guarantee contra proferentem that is, against the guarantor or use the recitals to control the meaning of the operative part where that is possible. But whatever the mode employed, the cardinal rule is that guarantor must not be made liable beyond the terms of this engagement.

However, in view of the fact that the contractor failed to perform the contract and reading Clauses of the said guarantee, it cannot be said the plaintiff was not entitled to revoke the same.

17. In order to substantiate his say that the bank guarantee in question was not absolute and unconditional one, but was a conditional bank guarantee, Mr. Bhandari has relied upon the decision of the Calcutta High Court in the case of *Allied Resins and Chemicals Ltd. Vs. Minerals and Metals Trading Corporation of India Ltd. and Another*, wherein the Court observed in para 18 as under:

18. In our opinion at this stage the question before us is whether we shall interfere with the discretion exercised by the learned trial Judge. As pointed out in the case of *Bird and Co. v. Tripura Jute Mills* CWN 802 we are not concerned in this appeal with what will ultimately happen in the suit. In this appeal this Court is concerned with an order passed by the learned trial Judge in an interlocutory application. As no proper prima facie case has been made out for any order of injunction, the learned trial Judge exercised his discretion properly in refusing to pass any order of injunction. In our opinion also, no prima facie case has been made out on behalf of the plaintiff-appellant. The importance of a bank

guarantee has been pointed out in the aforesaid decisions. We may also point out that the latest decisions of both the Division Benches of this Court and the Supreme Court of India point out that there is no practical difference between a bank guarantee and a letter of credit. The bank and the beneficiaries are the only parties in a Bank guarantee. It may be pointed out that we are merely hearing the appeal from an order passed in an interlocutory application in the suit. We are not hearing the suit. At this stage we are only concerned with the prima facie case and balance of conveniences. In our opinion, it all depends on the facts of each and every case and the language of the particular document, irrespective of the question whether it is a bank guarantee or a letter of credit. The question is whether the terms and conditions for enforcement of the bank guarantee have been complied with or not. We agree with Mr. Sen that the bank guarantee in the present case, as it clearly shows from Clause (1) itself, is not an absolute and unconditional one from one point of view. The last four sentences as we have set out hereinabove show that it is a conditional one. But having regard to Clause (3) of the said guarantee, i.e. the "finality" clause, the result is the same. By virtue of Clause (3) of the said guarantee the decision of the beneficiary as to whether the plaintiff-appellant has failed to carry out their obligation shall be final and binding on the bank furnishing the bank guarantee. Even if according to Clause (1) such payment is not unconditional but whether the condition has been fulfilled or not and whether the obligation has arisen or not will depend on the decision of the beneficiary itself. We are unable to accept the interpretation of Mr. Sen regarding Clause (3) to the effect that the question of final decision" of the beneficiary has no application when the goods have not been offered. The said question is covered by and comes within the scope of "carrying out the obligation." In their letter demanding the amount from the bank, the beneficiary is saying that the plaintiff-appellant had failed to take delivery of the goods. That complies that the goods were offered for delivery. In any view of the matter whether the goods were offered for delivery or not, it is a dispute relating to "carrying out the obligation" of the purchaser within the meaning of Clause (3) and there is a finality to the decision of the beneficiary in respect of that matter which is binding on the bank and the Guarantee becomes enforceable. Therefore, in our view no prima facie case has been made out for grant of such injunction and no case has been made out for interfering with the discretion exercised by the learned trial Judge in refusing to pass an interim order of injunction. Further in view of the decisions referred to above, on the question of balance of convenience also we are against the plaintiff-appellants. As pointed out by the Supreme Court in the case of United Commercial Bank Vs. Bank of India and Others, and other decision, in such a case no temporary injunction should be granted.

However, as discussed earlier, it was not obligatory for the plaintiff looking to the nature of the agreement to prove actual loss.

18. Mr. Kamwar on the other hand has relied upon the decision of the Supreme Court in the case of State of Maharashtra and another Vs. M/s. National

Construction Company, Bombay and another, wherein it has been held by the Supreme Court that the bank must honour the bank guarantee and the Court would not interfere in absence of allegation of any fraud. Mr. Kamwar has also relied upon the decision of the Supreme Court in the case of AIR 1997 1644 (SC) wherein it has been held by the Supreme Court that in the case of irrevocable and unconditional bank guarantee payable on demand without demur, whenever such bank guarantee is sought to be encashed by the beneficiary, the bank is bound to honour the guarantee irrespective of any dispute raised by the customer at whose instance the guarantee was issued against the beneficiary. This is, however, subject to two exceptions, viz. a fraud committed in the notice of the bank which would vitiate the very foundation of the guarantee or encashment of the bank guarantee would result in irretrievable harm or injustice of the kind which make it impossible for the guarantor to reimburse himself.

19. Mr. Kamwar also relied upon the decision of the Supreme Court in the case of BSES Ltd. (Now Reliance Energy Ltd.) Vs. Fenner India Ltd. and Another, wherein the Supreme Court has held in para 9 and 26 as under:

9...a bank guarantee is an independent contract between the bank and the beneficiary thereof. Accordingly, irrespective of any dispute between the beneficiary and the party at whose instance the bank has given the guarantee, the bank is obliged to honour its guarantee, as long as the guarantee is unconditional and irrevocable. Our attention was drawn to the judgment of this Court in U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd. It was pointed out in that case that a bank guarantee must be honoured in accordance with its terms as the bank, which gives the guarantee, is not concerned with the relations between the supplier and the customer. Neither is the bank concerned with the question whether any of them have failed in their contractual obligations or not. In other words, the bank must pay according to the tenor of its guarantee, on demand, without proof or condition.

26. Accordingly, we are prima facie not satisfied that performance had been duly and satisfactorily certified. Under the terms of the "wrap-around agreement", the appellant was entitled to encash all or any of the bank guarantees for breach of the first respondent's obligations under any one of the contracts. In our view, it is the case of the appellant that there was no satisfactory performance of the contract, as a result of which the appellant was justified in encashing the bank guarantee concerned. Indeed, as per the terms of the bank guarantee itself, the appellant is the best judge to decide as to when and for what reason the bank guarantees should be encashed. Further, it is no function of the second respondent Bank, nor of this Court, to enquire as to whether due performance had actually happened when, under the terms of the guarantee, the second respondent Bank was obliged to make payment when the guarantee was called in, irrespective of any contractual dispute between the appellant and the first respondent.

20. Mr. Kamwar has further relied upon the decision of the Delhi High Court in

the case of *Pesticides India, Props Mewar Oil & Gen. Mills Ltd. v. State Chemical & Pharmaceuticals Corporation of India Ltd. and Ors.* reported in AIR 1982 Delhi 78, wherein the Court has held in para 17 that performance guarantee is an autonomous and independent contract and that it is irrevocable in character and the obligations arising under the bank guarantees are independent of the obligations arising out of the contract between the parties. The performance guarantee imposes an absolute obligation on the bankers to pay irrespective of any dispute which may arise between the parties on the question whether a party has fulfilled his part of the contract or not. It is independent of the primary contract of sale between the buyer and seller. In para 19 of the aforesaid judgment, the court has observed as under:

19. The bank is not concerned with the rights and wrongs of the underlying disputes but only with the performance of the obligations which they themselves have confirmed. The letter of guarantee is addressed to the seller in unqualified terms. It is not subject to disputes such as there may be between the buyer and the seller. These promises must be allowed to be honoured, free from interference by the Courts.

21. Mr. Kanwar has also relied upon the judgment of the Delhi High Court in the case of *Banwari Lal Radhe Mohan Vs. Punjab State Co-operative Supply and Marketing Federation Ltd. and Another*, . In the said decision, it has been held that:

The performance guarantees or performance bonds, a comparatively recent specie of Banker's commercial credit has many similarities to a letter of credit and stand on a similar footing to a letter of credit. Such guarantees, even though having their genesis in the primary contract between the parties, are nevertheless "autonomous" and independent contracts and 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 obligations or not, nor with the question whether the supplier is in default or not and the only exception is when there is a clear fraud of which the bank has notice. In short these guarantees impose an absolute obligation on the banks to pay on demand in their terms and the Courts usually refrain from interfering with the obligation, except in rare cases of fraud.

22. Mr. Kamwar has further relied upon the case of *Hindustan paper Corporation Ltd. v. Keneilhouse Angami* reported in 1990(2) BCLR 1, wherein it has been held by Calcutta High Court that bank guarantee itself is a contract separate from the original contract pursuant to which the bank guarantee is furnished. The bank is not a party to the original contract. Similarly, the party at whose instance the bank guarantee is furnished pursuant to the agreement, is not a party to the bank guarantee. The bank guarantee is to be enforced if it complied with the terms and conditions of the bank guarantee itself and not whether there is any default or breach of the terms and conditions of the main contract and it does

not depend upon a dispute arising out of the main contract.

23. Considering the case laws cited on the subject and considering the facts and circumstances of the case, in my view the plaintiff-respondent has succeeded in proving his case against the appellant-defendant bank for getting the decree for recovery of the amount in question and the plaintiff-respondent was entitled to enforce the tank guarantee in question.

24. Considering the said aspect, the plaintiff has proved his case against the Bank for recovery of the amount in question as in spite of the fact that within the period of limitation, the Bank was informed by the plaintiff about his intention to invoke the guarantee, yet the payment was made to the contractor after 6-7 months thereafter. The defendant has neither proved on record the Receipt Register nor has examined the Branch Manager, who was Incharge at the relevant time. Apart from that, when a serious dispute was pending between the parties, it was not proper on the part of the Bank to destroy the relevant record as according to the evidence of Bank witness, normally record is destroyed after 6-7 years and if that period is to be considered, then it is clear that the suit was already pending by that time. Under these circumstances, it is not possible to accept the case of the defendant that the record in connection with the present case i.e. Receipt Register must have been destroyed by the Bank. Even in the written statement, the fact about receipt of the telegrams has been admitted.

25. So far as question of limitation is concerned, it is required to be noted that originally the suit was filed within limitation and subsequently, the concerned officer of the bank had signed the plaint later on. Learned advocate for the respondent RSEB has relied upon the decision of the Gauhati High Court in the case of Kailash Singh v. Hiralal Dey reported in AIR 1994 Gau 12, wherein the Court has held in para 14 as under:

14. Section 99 is very clear that in decree shall be reversed or substantially varied on the ground of non-joinder or misjoinder of parties or causes of action or any error, defect or irregularity in any proceeding not affecting the merit of the case or jurisdiction of the Court. Although according to Mr. Khetri this section does not include signing and verification of the plaint, I am of the opinion that the expression "any error, defect or irregularity in any proceeding in the suit" will also include signing and verification of the plaint as laid down in Rules 14 and 15 of Order 6, C.P.C. In this connection attention of this Court has been drawn by Mr. Sarma to a decision of the Punjab and Haryana High Court in Smt. Mukhtiar Kaur Vs. Smt. Ghulab Kaur, In that case, the plaint and the verification was not signed by the plaintiff, but by his lawyer. But the plaintiff in the witness box supported all the averments made in the plaint. The Court observed that the counsel for the plaintiff was presumed to be acquainted with the facts of the case. So the verification of the plaint made by him can be accepted. Moreover, it is a defect which only amount to an irregularity and can be ignored for rejecting the plaint. It was also held that legal position is that want of verification has not the effect of making the plaint void and it merely amounts to an irregularity.

Regarding signing of the pleadings although the High Court recorded that decisions are not uniform, the prominent view is that irregularity in signature of a plaint is a mere defect of procedure and does not affect the jurisdiction of the Court.

26. He has further relied upon the decision of the Bombay High Court in the case of All India Reporter Ltd. and Another Vs. Ramchandra Dhondo Datar, wherein the Court that held that the provisions contained in Order 6 Rule Hand 15 of the CPC with regard to signing and verification of plaint are mere matters of procedure and if a plaint is not properly signed or verified but is admitted and entered in the register of suits it does not cease to be a plaint and the suit cannot be said not to have been instituted merely because of the existence of some defects or irregularities in the matter of signing and verification of the plaint. If the defects in regard to the signature, verification or presentation of the plaint are cured on a day subsequent to the date of filling the suit, the date of institution of the plaint is not changed to the subsequent date. It has also been held in the said judgment that omission to verify the plaint is a curable defect and can be cured even after period of limitation.

27. So far as facts of the present case are concerned, since the original plaint has already been filed within limitation and it is an admitted fact that the concerned officer signed the plaint later on in order to cure the defect of signing the plaint by authorized person of the plaintiff-respondent company and when that defect is cured, the suit cannot be thrown out on the ground that since at the time it was filed, it was not properly verified or that since the verification was made later on, i.e. after period of limitation, the same should be dismissed on the ground of limitation. Considering the case law on the subject and considering the fact that such defects can be cured at any stage of the suit, I do not find any substance in the said argument.

28. So far as question of non-joinder of necessary party is concerned, I do not find any substance in the said submission also as the plaintiff has filed this suit to enforce the bank guarantee and the same is an independent contract between the plaintiff and the defendant and in my view, M/s. U.P. Cables can never be said to be necessary party to the present suit. The suit, therefore, cannot be defeated for not joining the original contractor, i.e. M/s. U.P. Cables.

29. So far as the question about territorial jurisdiction is concerned, learned advocate for the appellant has vehemently submitted that the court at Jaipur has no territorial jurisdiction as the bank guarantee was executed by the Delhi Branch of the bank. In order to substantiate his pleadings, learned Counsel for the appellant-Bank has relied upon the decision of the Apex Court in the case of Union of India and Others Vs. Adani Exports Ltd. and Another, In the aforesaid decision, after considering the facts of that case, the Supreme Court has held that no part of cause of action has arisen within the territorial jurisdiction of the High Court at Ahmadabad and the High Court at Chennai was the only Court having territorial jurisdiction.

30. So far as the facts of the present case are concerned, even considering their clause in the bank guarantee, it is clear that the Court at Jaipur has jurisdiction to decide the dispute. The plaintiff is having its office at Jaipur, the correspondence has also taken place at Jaipur and considering the documentary evidence on record and considering the averments in the suit, it can be said that part of cause of action has arisen within the territorial jurisdiction of the Court at Jaipur. Under these circumstances, it cannot be said that Court at Jaipur has no territorial jurisdiction to decide the suit.

31. Considering the aforesaid aspects, in my view, the plaintiff has proved his "case against the defendant in connection with the enforcing the bank guarantee in question and on the basis of the evidence on record, the trial Court has rightly decreed the suit in favour of the respondent original plaintiff. I, therefore, find no substance in this appeal and the same is dismissed with no order as to costs.