

(2001) 02 MAD CK 0124

In the Madras High Court

Case No : Original Application No's. 672 and 673 of 2000 in C.S. No's. 532 and 536 of 2000 and Application No's. 3537 and 4420 of 2000 in C.S. No. 532 of 2000

W.S. Industries (India) Ltd.

APPELLANT

Vs

Indian Overseas Bank and Others

RESPONDENT

Date of Decision : 05-02-2001

Acts Referred:

Sales of Goods Act, 1930 — Section 39

Citation : (2003) 115 CompCas 507

Hon'ble Judges : A. Ramamurthi, J

Bench : Single Bench

Judgement

A. Ramamurthi, J.—Original Applications Nos. 672 and 673 of 2000 are filed by the respective applicant/plaintiff to grant ad interim injunction restraining respondents Nos. 1 and 2 from effecting any payment under the guarantees/counter guarantees provided by them as detailed in the schedule to the judge's summons. Application No. 3537 of 2000 has been filed by the first defendant in C. S. No. 532 of 2000 to vacate the interim order passed in O. A. No. 673 of 2000 dated July 19, 2000. Application No. 4420 of 2000 has been filed by the second defendant in C. S. No. 532 of 2000 to vacate the order passed in O. A. No. 673 of 2000.

2. The case in brief for disposal of all the applications is as follows :

The applicant/plaintiff supplied to the respondent suspension insulators, potential transformers and current transformers covered under 17 individual purchase orders placed by the third defendant in C. S. No. 536 of 2000 and by the fourth defendant in C. S. No. 532 of 2000 on the applicant and also caused the issuance of bank guarantees by the second respondent backed by counter guarantee of the first respondent in terms of the warranty clause in the purchase order issued by the third respondent in one suit and the issuance of bank guarantee of the third respondent backed by counter guarantee of respondents Nos. 1 and 2 in

terms of warranty clause in the purchase order issued by the fourth respondent in other case. Items covered by the purchase orders in respect of which the third respondent/fourth respondent had sought to invoke the bank guarantees were all supplied well over two years ago and the warranty period had also expired except in the case of one product contained in one such order. That being so, the third respondent/the fourth respondent had fraudulently and unjustly sought to invoke the bank guarantees in respect of such purchase orders. Such action will cause great hardship and loss to the applicant/plaintiff. Hence, the plaintiff filed a suit for a declaration that the invocation of guarantees is null and void and for a consequential injunction restraining them from effecting any payment under the guarantees/counter guarantees given by them in relation to the purchase orders. The plaint averments will establish that the entire action of the third respondent/the fourth respondent is a fraud being played by them on the plaintiff as well as the other respondents. If the respondents effect payment under the guarantees/counter guarantees, as the third respondent/fourth respondent being based at Egypt, it would be impossible for the plaintiffs to recover any amount from them. The notice of invocation is also not in accordance with the guarantee and therefore, the invocation is defective. The plaintiffs have made out a strong prima facie case for the grant of injunction and the balance of convenience also lies in their favour. Hence, the applications.

3. The first defendant in C. S. No. 532 of 2000 filed an application to vacate the interim order and denied the various averments made in the affidavit filed by the plaintiff. The three guarantees in respect of which this court has passed the interim order of injunction are irrevocable and unconditional in nature. The first of them dated April 21, 1996, was issued by the Egyptian bank in favour of the beneficiary undertaking payment on behalf of the plaintiff, a sum up to the extent of US dollars 15,838 to the beneficiary upon first demand and notwithstanding any contestation. The Egyptian bank issued the said guarantee on a request from and against a counter guarantee of the London bank, who in turn, made the said request and issued the counter guarantee. The said request was made on the basis of a request made who unconditionally and irrevocably undertook to reimburse to the bank all amounts which the bank may be obliged to pay, if the guarantee is invoked and to indemnify the bank against all losses, costs and charges which may be incurred by the bank on account of the issuance of the guarantee. The period of validity was subsequently extended up to September 30, 2000. The second of the three guarantees dated December 12, 1996, was issued by the Egyptian bank in favour of the beneficiary undertaking payment on behalf of the applicant a sum to the extent of US dollars 85,110. The Egyptian bank issued the bank guarantee on a request from and against a counter guarantee of the London bank. The period of validity for this also was extended up to November 28, 2000. The third guarantee dated December 12, 1996, was issued by the Egyptian bank in favour of the beneficiary undertaking payment on behalf of the plaintiff of a sum of US dollars 38,138 to the beneficiary upon a "first demand and notwithstanding any contestation".

4. The three guarantees were issued in the course of international trade and commerce. They were also governed by the Egyptian law and were enforceable in Egypt by the beneficiary in Egypt notwithstanding any dispute between the plaintiff and the beneficiary. The Egyptian bank issued the guarantees against the counter guarantees issued by the London bank which too are enforceable in Egypt. The bank made the request to the London bank and through the letter to the Egyptian bank to issue the three guarantees against the counter guarantee-cum-indemnity of the applicant. Since the guarantees have been issued in a foreign country and the terms and the enforcement thereof are governed by the Egyptian law, this court has no jurisdiction to entertain the suit and the application is also liable to be rejected in limine. The allegation that the beneficiary sought to fraudulently invoke the bank guarantee issued by the correspondent bankers who have in turn written to respondents Nos. 1 and 2 and are in the process of writing to the third respondent seeking payment under the counter guarantees is false. There is no fraud whatsoever in the transaction relating to the issuance of the guarantees or in their invocation. The existence or otherwise of a dispute between the beneficiary and the applicant relating to the underlying contract is wholly irrelevant.

5. The guarantees in question have been issued in the course of international trade and commerce which are of prime concern and importance to the country. This court as well as the apex court have held that the bank guarantee cannot be interfered with unless there is fraud and irretrievable injustice involved in the case and the fraud has to be an established fraud. In the instant case, all the three guarantees are unconditional in nature and they provide for payment on invocation on a mere demand and notwithstanding any dispute between the applicant and the beneficiary. If payment, as demanded by the London bank is not made, the image and reputation of the bank and also the country in international trade and commerce will suffer a serious setback. In the message dated August 3, 2000, the bank has received from the London bank the letter has indicated that it is not bound by the interim order passed in O. A. No. 532 of 2000 and that the bank is bound to repay the London bank, the amount it has paid to the Egyptian bank with interest. The applicant has not made out any case for the issue of an interim order of injunction against the bank. If the order is allowed to continue, it will seriously affect the image and reputation of the bank in the international trade and, as such, the order is liable to be vacated.

6. The second defendant in C. S. No. 532 of 2000 filed Application No. 4420 of 2000 to vacate the interim order and also denied the averments made by the plaintiff in the affidavit. The plaintiff has failed to make full and frank disclosure of all the material facts. This court has no jurisdiction to try and entertain the suit as well as the application for the reason that the dispute in question is between the plaintiff and the fourth defendant which has its place of business in Egypt. Therefore, the plaintiff is bound to seek any kind of relief in respect of its dispute with the fourth defendant before the courts in Egypt. The transactions are independent of the contract between the plaintiff and the fourth defendant

and in any event are governed by Egyptian law. In respect of the guarantees made by the second defendant in favour of the third defendant, it is stated that these transactions are also independent of the contract between the plaintiff and the fourth defendant and also are governed by English law. In respect of the guarantees made by the first defendant in favour of the second defendant, it is stated that in any event these transactions are governed by Indian law. No cause of action had arisen in India so far as the transaction relates to the fourth defendant. All the bank guarantees furnished by the defendants are back to back and are inter-related to each other. The plaintiff is guilty of delay and laches and cannot now seek an order of injunction which only affects the second respondent and not the fourth defendant. The allegations have been made only against the fourth defendant and as the fourth defendant had already received payments under the guarantee, there is no question of any injunction being maintained against other defendants. It is not the case of the plaintiff that a fraud has been played on the banks relating to bank guarantees. The order passed by the court is not only harsh on the second defendant who has already paid the money under the bank guarantee but is stopping the first defendant from making payment to the second defendant and, as such, it is liable to be revoked. The third defendant called in its guarantee on July 10, 2000, and the second defendant called in its guarantee to the Punjab National Bank, Chennai on July 12, 2000. The plaintiff has approached this court much later, i.e., on July 19, 2000, by which time, expectedly, most of the monies payable to the guarantees in question would have been paid. The second defendant has also invoked the counter guarantee issued by the first defendant on July 12, 2000. Since defendants Nos. 1 and 2 have already complied with their part of the commitment, the second defendant is entitled to be paid the amount due to it from the first defendant.

7. There is no privity of contract between the plaintiff and the second defendant nor is the plaintiff a party to the arrangement of guarantees and counter guarantees inter se between the defendants. Since the bank guarantees had been invoked even prior to the filing of the present suit and monies payable under the other guarantees have already been paid, the refund/payment of the money by the first defendant to the second defendant under the counter guarantee cannot be stopped. Therefore, the balance of convenience is also only in favour of the defendants. The plaintiff is bound by the terms and conditions of the guarantee and is estopped from causing any hindrance in the encashment of the bank guarantee by the defendants. Defendants Nos. 1 to 3 had nothing to do with the dispute between the plaintiff and the fourth defendant. The report of the technical committee holding the transformers to be defective is of no consequence and did not give rise to any cause of action as against defendants Nos. 1 to 3. As per the well established rule laid down by the apex court as well as the other courts, the bank has been vested with unlimited and unfettered rights under the bank guarantees and it is the beneficiary who is solely to determine if there has been a breach of contract Unless the order is set aside,

they would be put to much loss and hardship. An alternative and equally efficacious remedy by way of suit for damages is available to the plaintiff. The plaintiff is not likely to suffer any loss. The plaint is defective and is liable to be rejected. Hence, the orders are liable to be vacated.

8. The plaintiff filed separate counter affidavit relating to the applications filed by defendants Nos. 1 and 2 to vacate the order. Since the plaintiff has reiterated the very same averments raised by them in their affidavits, it is unnecessary to reproduce the same.

9. Heard learned counsel for both the sides.

10. The points that arise for consideration are :

(i) Whether the plaintiff has got prima facie case and the " balance of convenience is in its favour ?

(ii) Whether the interim order passed by this court is liable to be vacated as claimed by defendants Nos. 1 and 2 ?

(iii) To what relief ?

Points: The plaintiff supplied suspension insulators, potential transformers and current transformers covered under 17 individual purchase orders placed by D3 in C. S. No. 536 of 2000 and by D4 in C. S. No. 532 of 2000 and also caused the issuance of bank guarantees backed by counter guarantee in terms of the warranty clause in the purchase order. The warranty period had also expired except in the case of one product contained in one such order. However, D3/D4 had fraudulently and unjustly sought to invoke the bank guarantees in respect of such purchase orders. The plaintiff therefore filed a suit for declaration that the invocation of guarantees is null and void and for a consequential injunction restraining them from effecting any payment under the guarantees/counter guarantees given by them in relation to the purchase orders. The averments in the plaint will establish that the entire action of D3/ D4 is a fraud being played by them on the plaintiff as well as the other respondents. If the payments are effected based under the guarantees/counter guarantees, it would be impossible for the plaintiffs to recover any amount from them, since it is based at Egypt. The invocation is also defective and as such as the plaintiffs have got a prima facie case and the balance of convenience is in their favour, these two applications are filed.

11. D1 and D2 resisted these applications on the ground that this court has no jurisdiction to entertain the suit as well as the applications since except D1 bank, the other defendants are situated outside the jurisdiction of this court. The plaintiff is also not within the jurisdiction of this court. No leave has been taken to institute the suit even in respect of D1. Three guarantees in respect of which this court has passed the interim order of injunction are irrevocable and unconditional in nature. The first of them dated April 21, 1996, was issued by the Egyptian bank in favour of the beneficiary undertaking payment on behalf of the

plaintiff. The Egyptian bank issued the said guarantee on a request from and against a counter guarantee of the London bank, who in turn, made the said request and issued the counter guarantee. The said request was made on the basis of a request made unconditionally and irrevocably undertaking to reimburse to the bank all amounts which the bank may be obliged to pay. The period of validity was subsequently extended. The second bank guarantee dated December 12, 1996, was also issued by the Egyptian bank in favour of the beneficiary. The third guarantee dated December 12, 1996, was also similarly issued undertaking payment on behalf of the plaintiff.

12. Learned counsel for defendants Nos. 1 and 2 contended that the three guarantees were issued in the course of international trade and commerce and they were also governed by the Egyptian law and were enforceable in Egypt by the beneficiary in Egypt, notwithstanding any dispute between the plaintiff and the beneficiary. In fact, the Egyptian bank issued the guarantees against the counter guarantees issued by the London bank, since the guarantees have been issued in a foreign country and the terms and the enforcement thereof are governed by the Egyptian law this court has no jurisdiction to entertain the suit. The averment that the beneficiary sought to fraudulently invoke the bank guarantee issued by the correspondent bankers who have in turn written to D1 and D2 and are in the process of writing to D3 seeking payment under the counter guarantees are false. There is no fraud whatsoever in the transaction relating to the issuance of the guarantees or in their invocation. This court as well as the apex court have held that the bank guarantees cannot be interfered with unless there is fraud and irretrievable injustice involved in the case and the fraud has to be an established fraud. If payment, as demanded by the London bank is not made the image and reputation of the bank and also the country in international trade and commerce will suffer a serious set-back. The plaintiff has not made out any case for the issue of an interim order of injunction against the bank. If the order is allowed to continue, it will seriously affect the image and reputation of the bank in the international trade and as such, the order is liable to be vacated. No cause of action had arisen in India, so far as the transaction relates to D3/D4. Moreover, the plaintiff is also guilty of delay and laches and cannot now seek an order of interim injunction. D2 has already paid the money under the bank guarantee, D3 also called on its guarantee on June 10, 2000, whereas the plaintiff has approached the court only on July 19, 2000, by which time most of the monies would have been paid. D2 had also invoked the counter guarantee issued by D1 on July 12, 2000. Since D1 and D2 have already complied with their part of the commitment, the second defendant is entitled to be paid the amount due to it from D1. The plaintiff is not a party to the arrangement of guarantees and counter guarantees inter se the defendants. The balance of convenience is also in favour of the defendants. The report of the technical committee holding the transformers to be defective is of no consequence and did not give rise to any cause of action against D1 to 3 and it is always open to the plaintiff to claim damages, if ultimately established.

13. Both the parties have filed typed sets of documents to establish their case. The validity of the bank guarantee has been extended from time to time. The plaintiffs themselves have written a letter to IOB dated January 20, 1997, as well as dated February 1, 1997, and the name of the beneficiary, to D3/D4 in the respective cases. Under the two letters, it is stated as follows: "In this connection, we wish to inform that we have already executed a general guarantee in your favour as security for your executing separate guarantees on our behalf in favour of the named beneficiary. All the terms and conditions of the general guarantee shall apply to and cover your said guarantee. As already agreed with you in our general counter guarantee, we authorise the bank to pay the amount demanded by the beneficiary after receipt of demand in writing from them without reference to us and irrespective of any dispute between us and the said beneficiary. The payment so made shall be binding upon and recoverable from us." This would give an idea relating to the intention of the parties with reference to the bank guarantees. The suit in C. S. No. 532 of 2000 relates to Punjab National Bank D1, whereas the other suit relates to IOB. In both the suits, the plaintiff is claiming the relief of declaration that the invocation by D3/D4 of the bank guarantees and the consequent invocation of the counter guarantees by D1 in the respective suits are null and void and also for permanent injunction restraining D1 and D2 from paying any amounts under the guarantees/counter guarantees set out in the schedule. By way of interim relief only two applications are filed by the plaintiff and to vacate the interim order already granted, D1 and D2 have filed separate applications.

14. The copies of the bank guarantees are also filed and performance guarantee has been executed in Egypt on account of the plaintiff company at Madras. The documents relating to the counter guarantee are also filed. In one of the fax messages, it is stated that the guarantee will be subject to Egyptian laws. It is therefore evidently clear that most of the documents were executed outside the jurisdiction of this court and under the circumstances, learned counsel for defendants Nos. 1 and 2 contended that this court has no jurisdiction to entertain the suit. However, learned counsel for the plaintiffs contended that D1 bank is situated within the jurisdiction of this court and so far as the other defendants are concerned already leave to sue has been taken. Apart from that the goods were transported only from the harbour at Chennai and as part of the cause of action had arisen within the jurisdiction of this court, there is no substance in the objection raised by D1 and D2.

15. Learned counsel for the plaintiffs contended that it is alleged that the purchase order was placed in Egypt and received by the plaintiffs. So far as D1 is concerned no leave is necessary. In respect of other defendants leave has already been ordered by this court on July 17, 2000, and July 18, 2000, and they have not filed any application to revoke the leave already granted. They have also not entered appearance under the provisions as contemplated under Order 5, Rule 11 of the O. S. Rules. The applicability of law has no relation to the ousting of a jurisdiction of this court. Clause 12 of the Letters Patent provides for

the High Court having jurisdiction where the cause of action arises wholly or with the leave of the court in part, or if the defendant dwells or carries on business within jurisdiction. If the cause of action arises wholly within the jurisdiction of court then irrespective of the residence of the defendants, the High Court would have jurisdiction. On the contrary if the cause of action arises wholly outside the jurisdiction and still if all the defendants reside within, even then the court would have jurisdiction. Further, where the cause of action is inseparable, then where some of the defendants reside within jurisdiction and some do not and the cause of action is found common to all of them by the residence of one of the defendants, it is enough to hold that a cause of action is in part arising within jurisdiction and moreover, the performance of the contract has been completed by handing over the consignment to the carrier nominated by the purchasers, and which is on an FOB basis. It is also clear from the bill of lading issued by the carrier for the delivery of cargo to the carrier was made at Madras port for delivery to the purchaser in Egypt. In view of Section 39 of the Sale of Goods Act, 1930, delivery to a carrier for transmission to the buyer is delivery of goods to the buyer. There were no circumstances to show that the plaintiff has chosen the forum mala fide or that if the suit were to go on, the other party would be so handicapped in his defence that it would lead to injustice.

16. Learned counsel for the plaintiff also relied on *South East Asia Shipping Co. Ltd. Vs. Nav Bharat Enterprises Pvt. Ltd. and Others*, wherein it is stated that the cause of action consists of a bundle of facts which give cause to enforce the legal injury for redress in a court of law. The cause of action means, therefore, every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the plaintiff a right to claim relief against the defendant. It must include some act done by the defendant since in the absence of such an act, no cause of action would possibly accrue or would arise. The principle in this decision can be made applicable to the case on hand. Further according to the case cited, mere execution of the bank guarantee at Delhi would not give rise to cause of action there. No cause of action having arisen within the jurisdiction of the Delhi High Court, suit was not maintainable. The contract was executed in Bombay and performance of the contract was also required to be done in Bombay but the bank guarantee executed by the respondent at Delhi was transmitted to Bombay for performance of the contract. As the suit was filed for perpetual injunction before the Delhi High Court on its original side from enforcing the bank guarantee, it was held that the suit was not maintainable. If this analogy is taken into consideration, although the bank guarantee was executed at Egypt, considering the fact that the goods were transported only from Madras and as D1 bank is also within the jurisdiction of this court, prima facie, it is clear that this court has got jurisdiction to entertain the suit. Apart from that in respect of the defendants other than DI, leave to sue was also granted. They have not chosen to file any application to revoke the leave already granted. The contesting defendants have also filed

counters as well as written statements and submitted to the jurisdiction of this court. Under the circumstances, I am of the view that there is no force relating to the jurisdiction issue raised by D1 and D2.

17. Learned counsel for the plaintiff next contended that they have got prima facie case and the balance of convenience is also in their favour and under the circumstances, the interim injunction already granted to them by this court has to be made absolute and there is no reason to vacate the same. The burden is only upon the plaintiff to establish a prima facie case as well as balance of convenience. The purchase orders were placed from Egypt to the plaintiff company for supply of certain articles. The guarantee as well as counter guarantee have also been given. Now interim relief is sought by the plaintiff to restrain D1 and D2 from effecting any payment under the guarantee/counter guarantee provided by them to the beneficiary.

18. Learned counsel for the plaintiff contended that potential transformers have been manufactured by the plaintiff strictly in adherence to the parameters specified by D4 and the same have been tested as per IEC standards by them in India and abroad. During October, 1999, the beneficiary sought to allege certain complaints regarding some potential transformers supplied by the plaintiff and relating to some of such purchase orders. All the transformers carry special fuses as a safety measure. The beneficiary requested the plaintiff to remove the fuses and this was reluctantly done by the plaintiff after informing the fourth defendant of the dangers in this course of action. On inspection by the plaintiff's representative it was found that the transformers had suffered external flashovers which in other words are external system disturbance affecting the functioning of such transformers. This can never be attributed to any defect or flaw in the manufacturing. Now the beneficiary sought to address a letter to the plaintiff making a huge claim towards replacement of a few such transformers and it was refuted by the plaintiff. The plaintiff had compulsorily extended the bank guarantees on account of the fact that large amounts were covered by such bank guarantees and therefore under such economic coercion and duress, the plaintiff was compelled to cause such guarantees to be extended. However, this would not in any manner amount to extension of the warranty period which had expired. It is further stated that the action of the beneficiary is totally fraudulent apart from causing irretrievable injustice and the entire exercise by the beneficiary is a calculated scheme of fraud perpetrated by them on the plaintiff with a view to secure an unjust enrichment. Now the beneficiary has chosen to invoke all 11 guarantees in respect of 11 purchase orders. Learned counsel for the plaintiff further stated that if the beneficiaries are allowed to encash the guarantees, while the plaintiff who is based in India would not be able to successfully and effectively recover back the same from the beneficiary, who is based in Egypt. Even assuming without admitting that D3 had any warranty claim against the plaintiff, they could seek to invoke guarantees only for the value of such claim and they cannot invoke the same for the full value of the guarantee completely unrelated to the value of such alleged claims.

19. It has been held in 2000 A.W. L. J. 444 that no doubt the law relating to invocation of bank guarantees is well settled. The beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending dispute and the bank giving such a bank guarantee is bound to honour it as per its terms except in the case of fraud and irretrievable harm or injustice to the other party. It is equally settled that the beneficiary is entitled to invoke the bank guarantee and seek its encashment in accordance with the terms and tenor of the bank guarantee. And obviously the bank guarantee could be invoked if any liability contemplated/covered by the bank guarantee is payable by the contractor under the terms of the bank guarantee.

20. Learned counsel for the plaintiff relied on Arul Murugan Traders Vs. Rashtriya Chemicals and Fertilisers Ltd., Bombay and Another, : that if the element of fraud exists, then courts step in to prevent one of the parties to the contract from deriving unjust enrichment by invoking bank guarantee.

21. It has also been held in Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and another, : that commitment of banks must be honoured free from interference by the courts and it is only in exceptional cases, that is to say in the case of fraud or in a case where irretrievable injustice would be done if bank guarantee is allowed to be encashed, the court should interfere. The same view has been reiterated in Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and others, :

22. Reliance is also placed on State of Maharashtra Vs. Dr. M.N. Kaul (Deceased by his Legal Representatives) and Another, : that whether a guarantee is enforceable or not depends upon the terms under which the guarantor bound himself. The guarantor cannot be made liable beyond the terms of his engagement. Enforceability of the guarantee also depends upon its terms.

23. It has been also held in Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, : that the beneficiary was made sole judge as to whether there was breach of contract to supply equipment on stipulated dates or not, the beneficiary making demand in terms of guarantee. Bank was under obligation to honour its obligation. It could not in law avoid payment. Court ought not to have issued injunction restraining the bank from honouring its obligation. There is no dispute about the principles enunciated in the aforesaid decisions and the applicability of the same depends upon the facts and circumstances in each case.

24. The learned senior counsel for D1 relied on AIR 1997 1644 (SC) that the law relating to invocation of irrecoverable bank guarantees is well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it according to its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be

defeated. The courts, should, therefore, be slow in granting an injunction to restrain the realisation of such a bank guarantee. This decision is applicable to the case on hand. The same view has been reiterated in *Vinay Engineering Vs. Neyyeh Ligonite Corporation Limited and Another*, : *M/s. Dodsai Limited Vs. Krishak Bharati Co-op. Ltd. and Another*, ; *Kisan Sahakari Chini Mills Ltd. Vs. Richardson and Cruddas (1972) Ltd. and another*, ; *Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and another*, : *Centax (India) Ltd. Vs. Vinmar Impex Inc. and Others*, and *S.A. Sattar and Others Vs. Mrs. Kuruvilla and Others*, .

25. It has also been held in *Tarapore and Co. Vs. V/O Tractoroexport and Another*, : that an irrevocable letter of credit has a definite implication. It is a mechanism of great importance in international trade. Any interference with that mechanism is bound to have serious repercussions on the international trade. Except under very exceptional circumstances, the courts should not interfere with that mechanism. The same view has been reiterated in *U. P. Co-operative Federation Ltd. v. Singh Consultants and Engineers (P.) Ltd.* [1989] 65 Comp Cas 283 (SC) also.

26. It has been held in *Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others*, that payment under confirmed bank guarantees/irrevocable letters of credit cannot be interfered with unless there is fraud and irretrievable injustice involved in the case ; the fraud has to be an established fraud.

27. It is therefore clear from the aforesaid decisions that the plaintiff must be able to prima facie convince that there is an established fraud to restrain the defendants from invoking the bank guarantee. So far as the present case is concerned, allegations of fraud are levelled against the beneficiary. But it is a matter to be decided only in the course of trial. The beneficiary has pointed out certain defects and on the basis of the technical report has claimed particular amount from the plaintiff and now the plaintiff is blaming the beneficiary and the beneficiary is blaming the plaintiff. When once it is admitted that the guarantee/counter guarantee given is an irrevocable one, normally it has to be honoured unless the plaintiff is able to convince that there is prima facie material to show that some fraud has been perpetrated. Under the circumstances, I am of the view that the plaintiff has failed to establish that any fraud has been committed on the part of the beneficiary and as such the plaintiff is not entitled to get the relief of interim injunction to the full extent. But, at the same time, the guarantee/counter guarantee can be invoked by the beneficiary only up to the claim and not more than that.

28. Learned counsel for the plaintiff next contended that the beneficiary is situated at Egypt, whereas the plaintiff is at Madras. If ultimately, the plaintiff succeeds in the suit by establishing fraud and other materials, then ultimately, the plaintiff may not be able to recover the entire amount from the beneficiary and under the circumstances, the order of interim injunction already granted has to be made absolute. It is also further stated that the beneficiary is not entitled

to encash the entire bank guarantee/counter guarantee and it can be restricted only to the claim already made. It is pertinent to point out that purchase orders were placed by the Egyptian company to the plaintiff company and the goods were also sent. Now, there is dispute between the parties with reference to quality and it is purely technical in nature. Only by technical expert's evidence, it can be ultimately found out whether there was any real defect and whether the plaintiff was responsible and other matters. It is further stated on behalf of D2 that already the amount has been paid. When the order of interim injunction has been granted, it is the duty of the parties concerned to move the court and get proper direction and if any party flouted the orders and paid the money, they will be doing so only at their own risk and now they cannot say that as they have paid the amount, they cannot be restrained. It is also unfortunate that in the counter filed by D2, it is stated that this court has no jurisdiction and as such in spite of the order of interim injunction, the amount has been paid. Even assuming that this court has no jurisdiction, they have to move the court for getting appropriate orders and the parties cannot take law into their own hands and act according to their own reason ignoring the order of the court I am of the view that the act of the second defendant is highly condemnable. They ought to have moved the court for getting direction and only then they should have acted and if any payment has been made by them, they will be doing so only at their own risk and now this cannot be made use of as a ground to reject the case of the plaintiff. Simply because D2 is situated in a foreign country, they cannot expect that the court should pass orders according to their convenience. Under the circumstances, I am of the view that the bank guarantee can be invoked only in respect of 50 per cent. of the claim and in respect of the other 50 per cent., there should be an order of interim injunction, so that ultimately the dispute between the parties can be decided after a full-fledged trial and ultimately, the successful party can get back the remaining 50 per cent. As adverted to, when the beneficiary company is situated out of India and if ultimately the plaintiff succeeds in the suit, the plaintiff may not be able to realise the fruits of the decree and considering the balance of convenience, I am of the view that the order of interim injunction can be restrained only to 50 per cent. of the bank guarantee. Hence, the points are answered accordingly.

29. For the reasons stated above, the interim injunction already granted to the plaintiffs is made absolute only in respect of the 50 per cent. of the bank guarantee and in other respects, the interim injunction already granted is vacated. The applications are ordered accordingly.