

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA (OS)- 78/2007 & CM No. 4328/2008**

Reserved on: 29th August, 2008

Date of Decision: 19th December 2008

PUNJAB & SIND BANK Appellant

Through: Mr. Pallav Saxena, Advocate with
Mr. Rajiv Mehra, Advocate.

Versus

PEERLESS GENERAL FINANCE & INVESTMENT CO. LTD.

..... Respondent

Through: Mr. Bhaskar P. Gupta and
Mr. Abhijit Chatterjee, Sr. Advocates with Mr. Abhinav
Vashisht and
Ms. Radha Rangaswamy, Advocates

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MR. JUSTICE V.K. SHALI

1. Whether the Reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether the judgment should be reported in the Digest?

JUDGMENT

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MUKUL MUDGAL, J.

1. The present appeal arises out of the judgment and decree dated 07.08.2007 passed by the learned Single Judge of this Court in CS (OS) No. 920/1993 wherein a decree was passed in favour of the plaintiff/ Respondent herein and against the defendant/Appellant herein for a sum of Rs. 4, 00, 00,000/- alongwith simple interest thereon @ 15 per cent per annum from 01.04.1991 till the date of realization.

2. The brief facts of the case are as follows:-

a) That the Appellant, Punjab and Sind Bank, is a Nationalized Bank and is under the overall supervision and command of the Reserve Bank of India which exercises all financial, administrative and other controls on the Appellant as it does with all other Banks and companies engaged in similar functions.

b) The Respondent herein- M/s. Peerless General Finance & Investment Company

Limited is a non-banking company however, the same on its own showing is in the business inter-alia of lending money claimed by it in the present case.

c) Bhasins Associates Private Limited (hereinafter referred to as the Bhasins) were earlier availing of various financial / banking limits and facilities from the Appellant Bank in relation to its various projects both domestic and international. These included inland Bank Guarantee, Inland Letter of Credit-cum-trust receipt facility, overseas bank guarantee and Rupee Term Loans.

d) By its communication dated 20.09.1988 addressed to the Manager of the International Banking Division Branch of the Appellant Bank, located at 6, Scindia House, Connaught Place, New Delhi, Bhasins represented to the Appellant Bank that it had been awarded the contract for constructing a coal handling plant at Chanderpur, for Maharashtra State Electricity Board (hereinafter referred to as the 'Contract').

e) It was also represented by Bhasins that the said Contract of a total value of Rs. 62 crores had been awarded in favour of L&T and L&T had sub-contracted the entire job of civil constructions, erection of machinery, installation and testing on a turnkey basis to Bhasins.

f) The total value of the Contract awarded to Bhasins by L&T was of a value of Rs. 23 crores. The said Contract was required to be completed over the next 36 months.

Bhasins had in fact started the job and had initiated steps in mobilizing its resources.

g) That by the communication, dated 20.09.1988, Bhasins had requested the appellant bank for sanction of an ad-hoc additional guarantee limit of Rs. 400.00 lakh to support their Chanderpur contract.

h) That it was also requested by the Bhasins that the Appellant Bank should agree to a lower margin of 5% since it was represented that the working capital of Bhasins could not allow a higher margin. That it was categorically represented by Bhasins to the Appellant in the following words *“In view of the nature of advance towards mobilization of the contract and in view of this being adjustable in our running bills in phases and that we would need to funds to speed up the process of the job, we would request your special dispensation for a margin of only 5% of the guarantee value, to be placed in FDR with you on receipt of the advance.”*

i) That upon due consideration of the said requests made by Bhasins, including the purposes for which the said Bank Guarantees were required, the Head Office of the

Appellant vide its Sanction Memo dated 29.09.1988, confirmed the sanction of the Bank Guarantee limit of Rs. 400 lakhs in the form of 10 guarantees of Rs. 40 lakhs each.

j) That by Resolution dated 28.09.1988, the Directors of the Appellant Bank after due consideration of the said request of Bhasins and the aforesaid recommendations resolved to sanction an additional bank guarantee (one time) of Rs. 400.00 lacs at a cash margin of 15% to the company for its Chanderpur Project to be issued in favour of M/s. Larsen & Toubro for advance payment.

k) That by the communication dated 29.09.1988, the concerned officer of the concerned Head Office Department of the Appellant informed the Senior Manager of the International Banking Division Branch to whom Bhasins had made the request, that the case had been approved by the Board in its Meeting of 28.09.1988. The authorization was to issue advance payment guarantee of Rs. 400 lakhs at 15% cash margin in favour of M/s. Larsen & Toubro.

l) That immediately on being handed over the said Ten (10) Bank Guarantees, Bhasins thereafter also handed over a copy of communication dated 29.09.1988 addressed by Bhasins to L&T.

m) By this Letter, Bhasins had indicated that under the cover of this Letter, the Ten (10) Bank Guarantees were being enclosed and sent to L&T. Further, the said Letter also contained a request to L&T to release the advance of Rs. 400 Lakhs and to remit the said amount to the concerned International Banking Division Branch of the Appellant and to be deposited in the Current Account of the Bhasins.

n) Letters of Extension of the Bank Guarantees were made in favor of the Respondent and the same were extended and such extensions were conveyed to the Respondent.

o) Bhasins defaulted in relation to the alleged loan agreement between Bhasins and Respondent. The Respondent through written communications between 27.03.1990 and 14.03.1991 purportedly invoked the Bank Guarantees and called upon the Appellant to make the payments thereunder. The Appellant refrained from making payments.

p) The Respondent preferred a Writ Petition being C.W. 4019/1990 before this Hon'ble Court. Both the Appellant and the Bhasins were arrayed as Respondents in the said Writ Petition. It was alleged by the Respondent that the Appellant had made an unconditional promise to pay the sum specified in the Bank Guarantees on Bhasins failing to make payment of any installment in respect of a loan. The aforesaid Writ Petition, being C.W. No. 4019/1990, came up for hearing before this Hon'ble Court on

14.01.1992 and was dismissed.

q) Aggrieved by the Judgment dated 14.01.1992, passed by this Hon'ble Court, in dismissing the said Writ Petition, the Respondent preferred a Special Leave Petition before the Hon'ble Supreme Court. Notice was issued on the said Petition. During the pendency of the said Special Leave Petition, the Respondent filed a Recovery Suit before the Hon'ble High Court of Calcutta. The Appellant and Bhasins were joined as Defendants in the said recovery suit. The said Suit was filed upon obtaining leave under Clause 12 of the Letters Patent Act.

r) In the meantime, the Special Leave Petition came to be listed before the Hon'ble Supreme Court. The Hon'ble Supreme Court vide its Order dated 18.08.1992, finding that none had appeared on behalf of the Respondents, was pleased to dispose of the said Special Leave Petition, holding that the questions whether the Bank Guarantee had been invoked in terms of the contract or not, could not be said to be a disputed question of fact, as the Guarantee prima-facie appeared to be unconditional.

s) Aggrieved by the said Order dated 18.08.1992, the Appellant filed an Application, explaining the reasons for the absence of the counsel for the Appellant herein on

18.08.1992 when the matter was called for hearing.

t) The said Application came to be considered on 02.11.1992. The said Order dated 18.08.1992 came to be recalled. The Hon'ble Supreme Court was pleased to dispose of the said Appeal leaving it open to either parties to raise all the contentions before this Hon'ble Court which were open to them in law.

u) The effect of the said order dated 02.11.1992, passed by the Hon'ble Supreme Court was that though the case had been remanded back to this Hon'ble Court, the Hon'ble Supreme Court had left open to the parties to raise all contentions which were permissible to them in law.

v) On remand from the Hon'ble Supreme Court, the said Writ Petition being C.W.P. No. 41019/1990 came to be listed before this Hon'ble Court on 29.01.1993. Before the said Writ Petition came to be withdrawn on 29.01.1993, the Respondent had instituted a Recovery Suit before the Hon'ble High Court of Calcutta, joining both Bhasins and the Appellant herein as Defendants.

w) The said suit filed at Calcutta being Suit No. 330/1992, was founded on the allegations that the Respondent had granted a loan of Rs. 4 crores to Bhasins and for the

repayment of which the Appellant had purportedly furnished Ten (10) unconditional and irrevocable Bank Guarantees of Rs. 40 lakhs each.

x) During the pendency of the said Suit, before the Hon'ble High Court of Calcutta, the Respondent instituted Suit No. 920/1993 before this Court seeking recovery of Rs. 5,92,98,176.57 besides pendente lite and future interest @ 21% per annum with half yearly rests from the Appellant being the sole Defendants.

y) By its order dated 12.07.1993, the High Court of Calcutta allowed the Application filed by the Respondent observing that the Respondent did not wish to proceed against the Appellant. The said Suit being Suit No. 330/1992, filed by the Respondent herein before the High Court of Calcutta, subsequently came to be transferred before this Court on a petition filed by the Respondent. This Suit has also since been decreed in favour of the Respondent, and against Bhasins.

3. The Respondent filed Suit No. 920/1993 in this Court wherein the Appellant was arrayed as the sole Defendant. By the order dated 18.03.1996, this Court was pleased to grant unconditional leave to defend the Suit. The Appellant vide the said judgment filed its written statement to the Suit. By the order dated 17.09.1998, this

Court was pleased to frame the following issues:-

- “1. Whether the plaint has been signed and verified and the suit instituted by a duly authorized and competent person?
2. Whether the bank guarantees were issued by the defendant on the basis of a loan transaction between the plaintiff and M/s. Bhasin Associates Limited?
3. Whether the defendant was obliged to pay under the bank guarantee on default of Bhasin Associates to repay the loan?
4. Whether the bank guarantees in question are to secure inter-corporate advance?
5. Whether inter-corporate advance guarantees to be issued by a Nationalized Bank have been forbidden by law and opposed to public policy including Reserve Bank of India Regulations? If so, its effect?
6. Whether the guarantees were unconditional and irrevocable as alleged and the defendant is bound to pay under the same?
7. Whether the bank guarantees are unenforceable being vague and ambiguous?
8. Whether the suit is barred under Order 23 Rule 1 (4) CPC?
9. Whether the suit is barred under Order 2 Rule 2 CPC?
10. Whether the suit is bad for misjoinder and non-joined of parties?
11. Whether the guarantees in question have been invoked in terms of the bank guarantees?
12. Whether the plaintiff was entitled to invoke the guarantees when admittedly there was no breach by Bhasin Associates of its agreements with Larsen & Toubro?
13. Whether the plaintiff is entitled to any amount?

14. Whether the plaintiff is entitled to any interest? Is so, at what rate, and for what period?

15. Relief”.

4. The impugned judgment was delivered by the learned Single Judge of this Court on 07.08.2007 wherein the Appellant had been held to be liable to pay an amount of Rs. 4 crores to the Respondent alongwith simple interest thereon @ 15% per annum w.e.f 01.04.1991. The learned Single Judge concluded as follows:-

“76. The plaintiff gave certain advances to Bhasin Associates against guarantees issued by the defendant. It is the claim of the plaintiff that Bhasin Associates did not repay the amounts advanced. The advance of Rs.4, 00, 00,000/- were paid to Bhasin Associates against the bank guarantees. The terms of the bank guarantee merely required a demand to be made by the plaintiff for the payment of the amount. No specific form of making the demand has been prescribed nor was the plaintiff required to furnish any proof of nonpayment of the money by Bhasin Associates. The bank guarantees were invoked by the letters Ex. PW1/15, PW1/17, PW 1/18 and PW 1/19. A perusal of the said letters shows that the same in effect state that the entire amount along with interest has become due and the bank guarantee is thus being invoked.

77. The terms of the bank guarantees show that the same were issued in respect of the amount advanced to Bhasin Associates by the plaintiff. The plaintiff claims that the principal

sum as also the interest due thereon was not repaid by Bhasin Associates. The guarantees were thus invoked. The amount advanced to Bhasin Associates was for the purpose of enabling it to fulfill its contract with L&T. However the guarantees were in respect of the amounts advanced and the non performance of the terms of the contract with L&T was not a condition required for the invocation of the bank guarantees. In fact as noticed, the plaintiff was not even required to provide any proof of any amount being due from Bhasin Associates by way of refund of the advance payment or any loss being caused or damage suffered by L&T by reason of any default on the part of Bhasin Associates. The aforesaid shows that the bank guarantees were invoked in terms thereof. The plaintiff advanced money to Bhasin Associates against the bank guarantees and repayment of the advance had not been made. Thus, the same were invoked in accordance with the terms thereof.

78. The bank guarantees were duly invoked vide letters dated 27.03.1990 (Ex. PW 1/15), 21.06.1990 (Ex. PW 1/17), 10.12.1990 (Ex. PW 1/18) and 14. 03.1991 (Ex. PW 1/19) and no amounts were paid in pursuance to the said letters. The plaintiff is thus entitled to be paid Rs. 4,00,00,000/-. It may be noticed that the amount of Rs.54.00 lakh stated to have been paid by Bhasin Associates is, in fact, towards servicing of interest.”

5. The learned Counsel for the Appellant contended as follows:-

(a) When the Bhasins had approached the Appellant for the Bank Guarantee limit it had done so by representing that the Bank guarantee limit of Rs. 4 lakhs was required to secure Rs. 400 lakhs of advance payment for mobilization and carrying out the obligations of Bhasins in reference to the said sub-contract with L&T. The advance was to be adjusted in future bills over a period of 36 months and consequently the

Appellant had issued the Bank Guarantees to cover the said mobilization advance and performance of the contract by Bhasins.

(b) The purported inter-se arrange, if any, of arranging the said advance by L&T through the Respondent herein was never brought to the notice of the Appellant nor had the Appellant any occasion to consider any such proposal.

(c) A base perusal of the Bank Guarantees in question would show that it was only the award of a contract by L&T which was made the basis or foundation for issuing the bank guarantees and not any other contract or arrangement as was being alleged by the Respondent in the Suit.

(d) The stand of the Respondent in the Suit was inconsistent with the allegations made by it in the earlier Writ Petition being C.W. No. 4019/1990.

(e) The Appellant was not a party to any such loan transaction between the Respondent and Bhasins. There was no privity between the Appellant and the Respondent therein with respect to any such loan transaction and since clearly the Suit being founded on an alleged loan transaction between Bhasins and the Respondent herein, to which the Appellant, admittedly, was not a party, the suit could not be

maintained against the Appellant herein nor any liability could be attached to the Appellant.

(f) The Guidelines, Directions and Circulars (aforementioned) having been issued by the Reserve Bank of India, the same had statutorily forced and barred any Nationalized Bank from issuing a Guarantee securing any inter-corporate advance. Thus, the alleged transaction, as sought to be set-up by the Respondent, stood vitiated being contrary to statutory regulations, Circulations and Directions and being against public policy.

(g) The bank guarantees, as was being claimed by the Respondent herein, were thus forbidden by law and/or were opposed to public policy and therefore, unlawful and void. Even otherwise, the bank guarantees in question were so vague or ambiguously worded, that it would not be possible for this Court to satisfy itself of ascertaining and carrying into effect the intention of the parties. The ambiguity and vagueness apparent on the face of the Bank Guarantees were patent, rendering the same void.

(h) If the guarantees in question were to cover the alleged loan transaction, between the Respondent and Bhasins, the same would have stated so in uncertain terms. The proposal had to be certain and specific or at least capable of being made certain or not

loose or vague. The contracting parties ought to be aware of the precise nature and scope of their mutual rights and obligation.

(i) In the present case, the Appellant neither had any knowledge nor obligated itself of any such loan transaction between the Respondent (Peerless) and Bhasins or the terms and conditions of the alleged loan transaction.

6. The learned counsel for the Appellant further contended that the present case is not one where the alleged principal borrower was seeking restraint of the enforcement /invocation/encashment of Bank Guarantees, but a case where the Appellant Bank legitimately and bonafide had made out and established that the purported Bank Guarantees were not such guarantees that had been furnished for securing any alleged loans/advances as had been contended by the Respondent, but to secure an entirely different “contract” as is clearly evident from a bare perusal of the terms, covenants and stipulations contained in such guarantees. There was obviously, as was established by the Appellant, no consensus ad-idem inter-se the Appellant on one hand and the Respondent and the other or for that with Bhasins from the inception of the transaction culminating in the furnishing of the bank guarantees and even thereafter. At no point of time, had the Appellant Bank either contemplated, considered or intended to furnish

bank guarantees to secure the alleged loans and/or advances and /or inter-corporate deposits as was sought to be urged and contended by the Respondent.

7. The learned Counsel for the Appellant submitted that it was clearly established by the Appellant before the learned Single Judge and as before the Trial Court also that what was guaranteed by the Appellant was the amount that would have been due “as the losses or damages caused to or suffered or would be caused to or suffered by the purchaser by reason of default on the part of the contractor to execute the work under the aforesaid contract.” The Purchaser referred to in the guarantees is L&T. Admittedly, the Bank Guarantees had not been invoked by L&T. Admittedly, there was no demand by L&T either singly or jointly with the Respondent. It was clearly proved and established by the Appellant that the Bank Guarantees in question were not furnished to secure any alleged loan or any installment thereof.

8. The learned counsel for the Respondent on the nature of Bank Guarantee and their construction and as to who is entitled to invoke it and on the question of the Bank's Obligations contended that the Hon'ble Supreme Court in the case of *Vinitec Electronics Private Limited Vs. HCL Infosystems Ltd., (2008)1 SCC 544* has held that:-

“The law relating to invocation of bank guarantees is by now well settled by a catena of decisions of this Court. The bank guarantees which provided that they are payable by the guarantor on demand is considered to be an unconditional bank guarantee. When in the course of commercial dealings, unconditional guarantees have been given or accepted the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes.”

The Bank Guarantees being unconditional and being independent contracts between the Banker and the plaintiff as beneficiary, the liability of the Bank as guarantor is absolute and the Bank has an absolute obligation to pay on the innovation of Bank Guarantees irrespective of the alleged disputes involving L&T and Bhasins. In the present case, the operative part of the Bank Guarantees creates an obligation upon the Bank to pay on a mere demand by the respondent without any demur or protest and without the respondent having to prove anything more and in particular any of the things mentioned in the said second paragraph of the bank guarantee document. In other words, proving of any of such things by the Bank was specifically excluded when enforcing the Bank Guarantees. The reference to Larsen & Toubro is in the recital part and not in the operative part of the bank guarantee. To strengthen his argument further he relied upon the case of *New India Assurance Company Ltd. vs. Kusumanchi Kameshwara Rao & Anr.* – (1997) 9 SCC 179 wherein the Hon’ble Supreme Court held as follows:-

“A Bank Guarantee document is the sole repository of the terms of the guarantee. Nothing but such terms can be looked at.”

9. He further contended that to render an agreement void, the parties to any agreement have to be under a mistake of fact essential to the agreement under Section 20 of the Contract Act. There is neither any pleading nor any proof in support of the said allegation. For the same reason, Section 10 of the Contract Act has got no application. The very fact that the appellant bank has issued three letters of extensions addressed to the respondent extending the validity periods of three of the Bank Guarantees clearly shows that the Bank was under no mistake of fact as to who in fact was the beneficiary.

10. The learned counsel for the respondent further contended that the alleged Circular of the Reserve Bank of India purporting to prohibit Banks from issuing Guarantees for securing an inter-corporate advance is an internal Circular of Reserve Bank of India to all commercial Banks and not binding on the respondent, which is a third party. It may be stated that the Bank has stated as follows in the last paragraph of each of the Bank Guarantees *“The bank has power to issue this guarantee under its Memorandum and Articles of Association and the undersigned has full power to sign this guarantee on behalf of the Bank.”* The Hon’ble Supreme Court in the case of **Canara Bank and others Vs. Standard Chartered Bank (AIR 2002 SC 132)** has observed that:-

“We agree with the observations of the Special Court which had been referred to herein above in connection with this connection and furthermore, as held by this court in B.O.I. Finance Limited v. Custodian (1997 (10) SCC 488). The instructions which were issued by the Reserve Bank of India were meant to be complied with only by the Banking Companies and could not be regarded as binding on the other parties. There was no evidence raised or sought to be raised in the present case which could possibly have led the Court to the conclusion that the transaction was opposed to public policy.”

It is not a fact that any of the witnesses on behalf of the respondent bank has stated in the course of evidence that the respondent bank or the witnesses themselves were aware of the existence of the circular in question. The appellant has not placed any portion of the evidence to show that any such alleged admission was made.

11. The learned counsel for the Respondent also submitted that a suit in the Calcutta High Court for a decree against Bhasin Associates Ltd. was filed in April, 1992. The suit out of which the present appeal arises was filed by the Plaintiff on 24th March, 1993 against the Bank. The name of Punjab & Sind Bank was deleted from the cause title of the Calcutta High Court suit on 12th June, 1993. The alleged bar under Order XXIII of CPC would not apply because no relief had ever been claimed against the Bank in the Calcutta suit and it was only stated in the Plaint as a recital of fact and history that the loan was secured by the Bank Guarantees issued by the Punjab & Sind Bank. It was

also stated that the matter was pending in a Special Leave Petition before the Hon'ble Supreme Court of India after a Writ Petition filed by the Plaintiff had been dismissed by this Hon'ble Court. That was the position as on the date of filing of the Plaint. In any event, as the name of Punjab & Sind Bank was deleted after filing of the suit in this Hon'ble court, bar under Order 23 of CPC would not apply, assuming without admitting that there has been an abandonment of a claim by the Plaintiff against the Bank in the Calcutta suit.

12. It is pertinent to note that in a proceeding arising out of a writ petition earlier filed by the respondent against the bank, the Hon'ble Supreme Court in its order dated 18th August, 1992 has observed in respect of the present bank guarantee that whether the bank guarantee has been invoked in terms of the contract cannot be said to be a disputed question of fact as the bank guarantee prima facie, appeared to be unconditional. To ascertain whether the bank guarantee is conditional or unconditional, what needs to be seen are the terms of the bank guarantee and the terms of the letter invoking the bank guarantee.

13. The terms of the bank guarantees clearly show that the appellant in the operative

part of the bank guarantee has undertaken to pay the amounts thereof on a mere demand made by the respondent without the respondent having to prove the amount to be due from Bhasin Associates by way of refund of such advance payment or any portions of portion thereof. Thus, the terms of the bank guarantees and the letters of extension clearly lay down that the bank guarantee was unconditional. In our view, the bank guarantees being unconditional and being independent contract between the Banker and the respondent as the beneficiary, the liability of the bank as guarantor is absolute and the bank has an absolute obligation to pay on invocation of bank guarantees.

14. The Board Resolution of a meeting held on 28th September, 1998 of Bhasin Associates clearly records that the respondent had agreed to provide a loan of Rs.400 lacs to Bhasin Associates after receiving the bank guarantee. This is evident from the letter/receipt of Bhasin Associates dated 5th December, 1998 acknowledging the receipt of the amount of Rs.400 lacs from the respondent against bank guarantees. The letter dated 20th September, 1998 on behalf of Bhasin Associates to the appellant only mentions that Bhasin Associates is seeking additional ad-hoc guarantee limit but does not mention the party in whose favour the guarantees were to be issued, though the

reason for seeking the additional credit is the contract entered into with L&T. It is only the sanction memo of the appellant which mentions the name of L&T as the appellant. However, the letters of extension of bank guarantees on behalf of the appellant are addressed to the respondent and not to the L&T. It is, thus, clearly apparent that the bank guarantees were issued by the appellant on behalf of the Bhasin Associates in favour of the respondent. Thus, the appellant had in each of the 10 bank guarantees given an undertaking to pay a maximum amount of Rs.40 lacs to the respondent on a demand at any time as may be claimed by the respondent. On a perusal of the bank guarantee and letters of extension, we also cannot uphold the plea of the appellant that the respondent was never brought to the notice of the appellant and there was no privity between the respondent and the appellant with respect to any loan transaction cannot be sustained.

15. The other contention of the appellant that it was only the award of the contract by the L&T which was made the basis or foundation of issuing the bank guarantees and not any other contract or arrangement also cannot be sustained. The loan was sought from the respondent to enable Bhasin Associates to fulfill its obligations under the Contract and the loan was advanced against the bank guarantees. In our view, the circumstances

in which the loan was advanced to Bhasin Associates and the bank guarantee issued i.e. the contract entered into with L&T is not in dispute but at the same time it cannot be disputed that the guarantees were issued to secure the advances and not with regard to the performance of the contract. Thus, we uphold the findings of the learned Single Judge that the appellant cannot really claim that the respondent and the appellant were not *ad idem*.

16. The learned counsel for the appellant has contended that the guidelines, directions and circulars issued by the Reserve Bank of India bars any nationalized bank from issuing a guarantee securing any inter-corporate advance/loan. The learned counsel for the respondent had submitted that the alleged circular of the Reserve Bank of India purporting to prohibit Banks from issuing Guarantees for securing an inter-corporate advance is an internal Circular of Reserve Bank of India to all commercial Banks and not binding on the respondent, which is a third party. The position of law has been clearly laid by the Hon'ble Supreme Court on this issue in the case of ***Canara Bank and others Vs. Standard Chartered Bank-AIR 2002 SC 132*** wherein it was observed that:-

“We agree with the observations of the Special Court which had been referred to herein above in connection with this connection and furthermore, as held by this court in B.O.I.

Finance Limited v. Custodian (1997 (10) SCC 488). The instructions which were issued by the Reserve Bank of India were meant to be complied with only by the Banking Companies and could not be regarded as binding on the other parties. There was no evidence raised or sought to be raised in the present case which could possibly have led the Court to the conclusion that the transaction was opposed to public policy.”

It may be further noted that the Bank has stated as follows in the last paragraph of each of the Bank Guarantees “*The bank has power to issue this guarantee under its Memorandum and Articles of Association and the undersigned has full power to sign this guarantee on behalf of the Bank.*” Therefore, the respondent’s right under the bank guarantee cannot be permitted to be adversely affected due to an alleged mistake on the part of the appellant in issuing bank guarantees contrary to the circulars. The internal circulars also do not provide for any consequences against the respondent in case of issuance of bank guarantees contrary to the provisions thereof in favour of the third parties. The transaction between the parties can also in no way be contrary to public policy. The principle of law as laid down by the Hon’ble Supreme Court in the case of ***Canara Bank*** and ***BOI Finance Ltd.*** (supra) cannot be disputed that a third party unaware of the directions issued by the RBI should not be adversely affected. It was observed that no stipulation can be made which would adversely affect third parties to

whom no directions have been or could be issued and who were not aware of such directions issued to the bank. There is nothing to indicate that the respondent was aware of the various notifications and circulars. Thus, in our view the bank guarantees cannot be said to have been invalidated because of the alleged applicability of the circulars of the Reserve Bank of India.

17. Reliance has been placed by the learned counsel for the respondent on the judgment of the Hon'ble Supreme Court in the case of *Vinitec Electronics Private Limited* (supra). In accordance with the position of law laid down in the aforementioned judgment and in the facts and circumstances of the present case, it is clearly established that the operative part of the bank guarantees created an obligation on the bank to pay on a mere demand by the respondent. No specific form of making the demand had been prescribed nor was the respondent required to furnish any proof of non-payment of the money by Bhasin Associates. The bank guarantees were consequently invoked by the letters dated 27th March, 1990, 10th December, 1990 and 14th March, 1991 and no amounts were paid in pursuance of the said letters. The very fact that the appellant bank has issued three letters of extension dated 19th October,

1989, 27th March, 1990 and 21st June, 1990 addressed to the respondent extending the validity periods of three of the Bank Guarantees clearly shows that the Bank was under no mistake of fact as to who in fact was the beneficiary. The learned Single Judge had also noticed that the respondent was not even required to provide any proof of any amount being due from Bhasin Associates by way of refund of advance payment or any loss being caused or damage suffered by L&T by reason of any default on the part of Bhasin Associates. Thus, in our view, the respondent is entitled to be paid Rs.4 crores and consequently we affirm the findings of the learned Single Judge of this Court.

18. We also affirm the finding of the learned Single Judge that the present suit is not barred under sub Rule 4 Rule 1 of the Order 23 of the Code of Civil Procedure as the present suit was filed on 23rd March, 1993 and the appellant was deleted from the array of parties in the suit at Calcutta by a subsequent order dated 12th June, 1993. The rule is clear and can only be applied to a suit instituted after the withdrawal of the previous suit.

The alleged bar under Order 23 of the CPC would not also apply because no relief was claimed against the bank in the suit which subsisted at the Calcutta High Court.

19. The counsel for the appellant had contended that if the decree of the learned

Single Judge is enforced, it would lead to a payment of interest of Rs.9.6 crores on the principal amount of Rs.4 crores. Even if the appellant is entitled to pay the respondent the entire principal amount, he cannot be penalized to pay interest @ 15% p.a. We, consequently direct the appellant to pay to the respondent, a sum of Rs.4 crores with simple interest @ 10% p.a. from the year 1991 till the date of realization.

20. With the above modification on the quantum of interest, the appeal is dismissed and all the pending application stands disposed of accordingly.

(MUKUL MUDGAL)

JUDGE

(V.K. SHALI)

JUDGE

December 19, 2008

s/sk/rkb