

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

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Date of decision: 13th December, 2012

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LPA No.1115/2004

STEEL AUTHORITY OF INDIA LTD.

..... Appellant

Through: Mr. H.S. Phoolka, Sr. Adv. with Ms.
Gursimranjit Singh & Mohd. Aaqil,
Advs.

Versus

PUNJAB & SIND BANK & ORS.

..... Respondents

Through: None.

CORAM :-

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. This intra-court appeal impugns the judgment dated 20.09.2004 of a learned Single Judge of this Court of dismissal of W.P.(C) No.5678/1998 preferred by the appellant for the reason of entailing disputed questions of fact incapable of adjudication in writ jurisdiction and relegating the appellant to the remedy of a suit and further holding the appellant entitled to avail of the time spent in prosecuting the writ petition, if the suit were to be filed within 30 days of the dismissal of the writ petition.

2. Notice of the appeal was issued. Vide order dated 24.04.2006, the respondents No.3 &4 were proceeded against *ex-parte* and the appeal admitted for hearing. None has appeared for the respondents No.1&2 Punjab & Sind Bank today inspite of the matter having been held over for some time. Considering that the appeal is of the year 2004, it is not deemed expedient to await the respondents No.1&2 any further and we have heard the senior counsel for the appellant.

3. It is the case of the appellant that the respondents No.3&4, in consideration of purchase of steel from the appellant, had furnished Bank Guarantees issued by the respondents No.1&2 Bank to the appellant; on default by the respondents No.3&4, the said Bank Guarantees were invoked; however the respondents No.1&2 Bank instead of honouring and encashing the Bank Guarantees averred that the Bank Manager who had issued the same had no authority and thus repudiated the Bank Guarantees. Impugning the said repudiation, the writ petition from which this appeal arises was filed, seeking a direction to the Bank to make payment under the Bank Guarantees.

4. The respondents No.1&2 Bank contested the writ petition *inter alia* pleading as under:

- “3. *That as the matter involves fraud and conspiracy, not only the manager of the Bank, but other people are also involved and the conduct of the employees of the petitioner and other respondents is full of suspicion and their involvement is subject to investigation. The question of fraud, cheating and forgery has been referred by the bank to the police authorities which is under investigation and this is not a proper forum to decide and adjudicate upon various allegations of fraud, cheating and conspiracy made by the Bank.*
4. *That since the matter is subject matter of police investigation, on the F.I.R. lodged by the Bank for investigation of fraud, cheating and forgery and various other serious offences under Indian Penal Code, in which the element of conspiracy is very material and as such, these aspects in question cannot be a extraordinary subject matter of Writ / jurisdiction of the High Court.*
6. *That there are disputed questions of fact which cannot be decided in Writ jurisdiction. More so, when the*

matter is under police investigation of serious offences under I.P.C.

7. *That the question of issue of Bank Guarantees, whether legally valid or not, is contractual obligation of the parties and as such cannot be adjudicated in the writ forum and as such, the writ is not maintainable.*
8. *That the writ is not maintainable even otherwise since there is an efficacious remedy available to the petitioner by way of Civil suit in which the various questions can be adjudicated on the basis of evidence. The question of connivance and involvement of Bank Manager, petitioner and respondent No.3&4 has to be adjudicated and if it is proved that it is a sheer question of fraud, forgery and cheating, then the entire claim of the petitioner stands vitiated.*
9. *That the respondent Bank came to know of fraud and forgery in issuing of alleged bank guarantees by Shri B.S. Kamra, the then Officer of Rajouri Garden Branch, New Delhi, of the Bank on 22.7.97, after his transfer from the said branch to the accounts branch of Head Office. The bank immediately reported the matter to the police on 24.7.97 and two F.I.Rs No.654 and 655 of 1997 were lodged. Copy of the F.I.Rs are enclosed*

herewith marked "A" and "B". the investigation by the police is still continuing.

- 10. That prior to the filing of the writ petition, the petitioner lodged complaint bearing No.401/97/98 with sanding ombudsman to which the bank submitted its reply of dated 18.11.97, Copy of which is enclosed marked "C". The Bank, in its reply highlighted the controversial issues bringing out the fraud, forgery and cheating in detail.*

After hearing both the parties, the learned Ombudsmen rejected the claim of the petitioner and refused to intervene in view of the serious allegations of fraud, cheating and forgery which is subject matter of investigation by the police.

- 11. That Shri B.S. Kamra, Scale-II officer of the bank, deserted his post and made an attempt to obtain anticipatory bail from the Court of District & Session Judge, Delhi which was rejected and the culprit is still avoiding arrest who had subsequently been dismissed from service.*
- 12. That the Ministry of Economic Affairs (Banking Division) had issued a circular dated 19.6.84, directing all the Govt. Departments to get confirmation of Bank*

Guarantees submitted by private parties from the banks. The object of the said circular has been to avoid issuing of bogus Bank guarantees by private parties by dubious means. In the present case, the Steel Authority of India did not get confirmation with respect to any of the bank Guarantees knowing it fully well that the respondents No.3&4 do not have financial capacity to obtain bank Guarantees of such enormous value. The whole system was subverted and a big fraud was played by various interested parties in order to cheat the Bank.

REPLY ON MERITS:

7. *Contents of para 7 of the petition are denied and not admitted correct. It is further denied that the Bank had authorized any officer of the branch to issue any Bank Guarantee alleged to be of No.5/96 dated 13.5.96 as stated in the said para 7 of the petition. The Bank has no record with respect to the issue of the said Bank guarantee as claimed by the petitioner in para 7 of the petition. It is sheer forgery which seems to have been perpetuated by various persons intending to be benefited. This aspect is under the investigation of the police.*
7. *(2nd Time) contents of para 7 (2nd time) are denied and not admitted correct. The Bank did not issue any*

confirmation with respect to the said alleged Bank Guarantee by letter dated 14.5.96, as claimed by the petitioner in para 7 (2nd time) of the petition. The confirmation letter is forged and seems to have been procured without the knowledge of the Bank and its other higher authorities.

The procedure adopted is totally irregular and it seems number of agencies and parties are involved in this scandalous transaction. These are all bogus Bank guarantees with bogus confirmations.

- 8. Contents of para 8 of the petition are wholly misconceived, fabricated and are denied. These are bogus / documents and cannot bind the bank in any right when apparently number of persons are involved who have conspired to play fraud on the bank.*
- 9. Contents of para 9 of the petition are denied and not admitted correct. The respondent bank has issued no such bank guarantee alleged to be of No.14/96 dated 24.6.96 and No.21/96 dated 14.10.96. The Bank has no record of any such bank Guarantees as claimed by the petitioner.*

It seems that the alleged confirmatory letters with respect to the alleged Bank Guarantees were procured

in a clandestine manner either from the Manager of the Bank or in connivance with the parties on whose behalf the alleged Bank Guarantee was issued. Accordingly, the contents of para 10 of the petition are wholly denied and it is also denied that any such letter purported to be of dated 25.6.96 or of any date was issued by the branch of the bank as claimed in this para alleged to be marked as Annexure P-6, though there is no such letter in the record of the petition.”

5. In the aforesaid state of pleadings, the learned Single Judge relying on ***Haryana Urban Development Authority Vs. Anupama Patnaik*** (2000) 10 SCC 649 and ***ABL International Ltd. Vs. Export Credit Guarantee Corporation of India Ltd.*** (2004) 3 SCC 553 held that there were highly contested questions of fact which cannot be adjudicated in a writ petition and that the defence of the respondent Bank could not be viewed as vexatious or imaginary or raising disputes only to frustrate the writ petition.

6. The senior counsel for the appellant has contended that though in the counter affidavit, the respondent Bank had pleaded collusion of the appellant and its officials also in issuance of the Bank Guarantees but in the First Information Report (FIR) which was ultimately filed, the case is

only against the official of the respondent Bank and not against any official of the appellant. It is argued that when the customers / persons with whom the appellant has been dealing, in pursuance to their transactions / dealings with the appellant produce a Bank Guarantee and on the basis whereof the appellant supplies goods or lends other facilities to them, the Bank cannot be so permitted to wriggle out of its obligation under the guarantee on the plea that its officer who has issued the Bank Guarantee was not authorized or for the reason of any other neglect / fraud of its own officers; it is contended that the appellant is not concerned with the said pleas and the appellant having changed its position on the basis of such Bank Guarantees, the Bank is bound to honour the same. The contention is that where the fraud alleged is on the part of the employees of the Bank only, with the beneficiary of the Bank Guarantee i.e. the appellant having no role therein, the Bank is liable under the Bank Guarantee. Reliance in this regard is placed on ***Indian Bank Vs. Godhara Nagrik Cooperative Credit Society Ltd.*** JT 2008 (5) SC 575.

7. We however on careful consideration of the judgment ***Indian Bank*** (supra) find the same to be against rather than in favour of the appellant. Paras No.16, 16.1 and 17.2 of the said judgment are as under:

“16. A writ court exercising the power of judicial review has a limited jurisdiction. A writ petition would lie against a State within the meaning of Article 12 of the Constitution of India. Indisputably, exercise of jurisdiction by the High Court is permissible in a case where action of the State is found to be unfair, unreasonable or arbitrary. The question which should have been posed by the High Court was as to whether the action of the bank was so arbitrary so as to invoke the public law jurisdiction. If the answer to the said question was to be in the negative, the High Court should have refused to exercise its jurisdiction.

16.1. A fraud has been practiced on the banks. Primary accused may be the bank officers but a conspiracy with them by the outsiders has also been alleged. The original FDRs only in some cases are available; in most of the cases they are not. Even the Committee could not decide for as to which one was the original FDR and which was not. It could not distinguish between an original FDR and the Xerox copy thereof.

17.2 Would the ratio laid down therein apply in the instant case? We do not think so. The question as to whether fraud has

been committed by the officers of the bank is pending consideration before a competent criminal court. There are other various disputed questions which are required to be gone into in the said proceeding. The role played by some of the writ petitioners - respondents is also in issue. Such a seriously disputed questions of fact, in our opinion, could not have been gone into by the writ court.”

The Paras No.20 to 22 of the said judgment on which the senior counsel for the appellant places reliance cannot be said to be precedent, intended to be binding on the Courts. The Supreme Court, after having held that the writ petition was not maintainable, finding that the affected parties therein were Cooperative Societies / Cooperative Banks, who the Supreme Court felt should not be pushed to institute civil suits, issued certain directions in Paras No.20 to 22 but in Para No.23 clarified that no law was intended to be laid down therein and the said directions should not be treated as precedent as the same were issued only for the reason of the hardships which the Cooperative Societies would have suffered.

8. We may also notice that the Supreme Court ***Godavari Sugar Mills Ltd.*** Vs. ***The State of Maharashtra*** (2011) 2 SCC 439, after consideration of the entire case law including ***ABL International Ltd.***

(supra) referred to by the learned Single Judge in the impugned judgment, has made the legal position as to the maintainability of the writ petition clear as under:

- (i) Normally, a petition under Article 226 of the Constitution of India will not be entertained to enforce a civil liability arising out of a breach of contract or a tort to pay an amount of money due to the claimants. The aggrieved party will have to agitate the question in a civil suit. But an order for payment of money may be made in a writ proceeding, in enforcement of statutory functions of the State or its officers;
- (ii) If a right has been infringed--whether a fundamental right or a statutory right and the aggrieved party comes to the Court for enforcement of the right, it will not be giving complete relief if the Court merely declares the existence of such right or the fact that existing right has been infringed. The High Court, while enforcing fundamental or statutory rights, has the power to give consequential relief by ordering payment

of money realized by the Government without the authority of law;

- (iii) A petition for issue of writ of mandamus will not normally be entertained for the purpose of merely ordering a refund of money, to the return of which the petitioner claims a right. The aggrieved party seeking refund has to approach the Civil Court for claiming the amount, though the High Courts have the power to pass appropriate orders in the exercise of powers conferred under Article 226 for payment of money;
- (iv) There is a distinction between cases where a claimant approaches the High Court seeking the relief of obtaining only refund and those where refund is sought as a consequential relief after striking down the order of assessment etc. While a petition praying for mere issue of writ of mandamus to the State to refund the money alleged to have been illegally collected is not ordinarily maintainable, if the allegation is that the assessment was without a jurisdiction and the tax collected was without authority of

law and therefore the respondents had no authority to retain the money collected without any authority of law, the High Court has the power to direct refund in a writ petition;

(v) It is one thing to say that the High Court has no power under Article 226 to issue a writ of mandamus for making refund of the money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each case. For instance, where the facts are not in dispute, where the collection of money was without authority of law, there is no good reason to deny a relief of refund to the citizens;

(vi) Where the lis has a public law character or involves a question arising out of public law functions on the part of the State or its authorities, access to justice by way of a public law remedy will not be denied.

9. Applying the aforesaid principles also, the present petition arising out of a contract of a Bank Guarantee and claiming the effective relief of recovery of money, cannot be said to be maintainable.

10. Though the Supreme Court in ***Indian Bank*** left the question of the vicarious liability of the Bank for the actions of its employees open but we are of the view that if the Banks were to be held to be so vicariously liable, the same will make them vulnerable for liabilities in huge amounts and which if were to be incurred may make the Banks defunct and to the prejudice of the large number of small investors. An institution, like a Bank, in its operations is governed by Rules, Regulations and procedure prescribed under the Banking Regulations Act, 1949 and / or under the directions / circulars / instructions of the Reserve Bank of India and the action of an officer of the Bank, not authorized, if were to be treated as making the Bank liable would expose the Bank to large financial claims. We are therefore of the opinion that the doctrine of indoor management, as applicable to Corporations, cannot be *ipso facto* made applicable to banks and if so made applicable would have much wider ramifications jeopardizing the deposits even of small investors.

11. Notice in this regard may be taken of ***Canara Bank Vs. Canara Sales Corporation*** (1987) 2 SCC 666 where the Supreme Court has held a Bank to be having no mandate to pay out of the monies deposited with it when the signatures of its customers are forged, howsoever good the

forgery may be. The same principle ought to apply when the officials of the Bank, not authorized, purport to act on behalf of the Bank. In fact, we had during the hearing asked the senior counsel for the appellant as to what would have been the position had the officer of the Bank, not authorized, issued a pay order. As per the judgment supra in ***Canara Bank***, the Bank would have been entitled to refuse payment thereunder. The better legal opinion thus appears to be against holding the Banks vicariously liable for unauthorized acts of their employees and for restricting the doctrine of indoor management in its application to Bank.

12. A forged and fabricated document is a nullity and how the document came to be a nullity should be irrelevant. An interesting discussion on this aspect is found in the article titled “Nothing for Nothing: a nullity exception in letters of credit?” by Kieran Donnelly published in Journal of Business Law of the year 2008. Lord Macnaghten in ***Ruben Vs. Great Fingell Consolidated*** 1906 AC 439 held that a fraudulent certificate though bearing the seal of the company and signatures of two Directors of the company but which were forged and authored fraudulently by the Secretary of the company could not give rise to any right or bind or affect the company inasmuch as it is not the

company's deed and there is nothing to prevent the company saying so. This was followed subsequently in ***Kreditbank Cassel Vs. Schenkers Ltd.*** 1927 All ER 425 where Atkin L.J observed that the principal is not precluded from setting up the want of authority of the agent and in ***South London Greyhound Racecourses Ltd. v. Wake*** 1931 1 Ch. 496 where it was held that even when the seal of the company was affixed without authority of the Board of Directors and fraudulently, the company is not precluded from denying the authority of the person who purported to sign thereon on its behalf. The Supreme Court in ***Shrisht Dhawan (Smt.) Vs. Shaw Brothers*** (1992) 1 SCC 534 held that fraud in public law is not the same as fraud in private law. Subsequently, in ***M.R.F Ltd. Vs. Manohar Parrikar*** (2010) 11 SCC 374 it held that suspicion of irregularity has been widely received as an exception to the doctrine of Indoor Management and the protection of the doctrine is not available where circumstances surrounding the contract are suspicious and invite inquiry. It was further held that the principle does not apply where an agent of the company has done something beyond the authority given to him. The Privy Council also, as far back as in ***Bank of Baroda Ltd. Vs. Punjab National Bank Ltd.*** [1944] AC 176 was of the view that the Bank is not

bound by the unauthorised acts of its Manager. A Division Bench of the Madras High Court in *The Secretary, Naguneri Peace Memorial Co-operative Urban Bank Ltd., Naguneri Vs. Alamelu Ammal* AIR 1961 Mad 419 also held that the bank is not liable to the depositor holding a Fixed Deposit Receipt purportedly issued by the bank but under the signature of an officer not authorized to issue the same. It was held that a Fixed Deposit Receipt signed by the officer of a bank without authority is only a waste paper and that the doctrine of Indoor Management has no application to fraud and forged instruments as they are simply null and void. Similarly a Division Bench of Patna High Court in *United Bank of India Ltd. Vs. Muhammad Shamsuddin* AIR 1961 Pat 488 held the bank not liable for fraudulent act of its employee. The judgment of the Supreme Court of the United States in *Western National Bank of New York Vs. Armstrong* MANU/USSC/0090/1894 appears to suggest that bank cannot be held responsible for the actions of its officers even if made on behalf of the bank unless a ratification on the part of the bank is shown.

13. We may however notice that a Division Bench of this Court in *Punjab National Bank Vs. Durga Devi* ILR (1977) 2 Del 576 on an

interpretation of the provisions of Negotiable Instruments Act, 1881 and finding the bank to be in breach of its duty of care held it liable for the fraud practiced by its officials. Mention in this regard may be made of ***State Bank of India (Successor to The Imperial Bank of India) Vs. Shyama Devi*** (1978) 3 SCC 399 applying the principle of the employer being liable for his employee's fraud to a bank also. Similarly, the Division Bench of the Gujarat High Court in ***Bank of Baroda Vs. Nadiad Machinery and Electrical Merchant Credit Co-op. Soc. Ltd.*** MANU/GJ/0282/2003 appears to suggest that the vicarious liability of the bank will arise in case of any wrong committed by the bank employee in the course of his employment but with a rider that only if the employee is negligent and the wrongful and not if the act is fraudulent. A Single Judge of this Court also in ***The Peerless General Finance and Investment Co. Ltd. Vs. Punjab and Sindh Bank*** MANU/DE/8272/2007 held that rights under the bank guarantee cannot be held to be adversely affected due to a mistake of the bank in issuing bank guarantee contrary to the terms of circulars of the Reserve Bank of India especially when the said circulars do not provide any consequence in case of issuance of guarantees contrary to the provisions thereof in favour of third parties. The House of

Lords in *United City Merchants (Investments) Ltd Vs. Royal Bank of Canada* [1983] 1 AC 168 also held that fraud such as to entitle a bank to refuse to pay under a letter of credit notwithstanding the strict general rule regarding payment when the documents were in order on their face, did not extend to fraud to which the beneficiary was not a party.

14. The purport of the aforesaid discussion is not to render any final opinion on this subject as discussed in paragraphs 10 to 13 inasmuch as no arguments were addressed by the senior counsel for the plaintiff in this regard and is only to strengthen the reasoning that the adjudication of the dispute in writ jurisdiction is not practical or feasible.

15. We therefore do not find any merit in this appeal and dismiss the same.

16. The senior counsel for the appellant at this stage seeks liberty to institute a suit for recovery of money on the basis of Bank Guarantees against the Bank and for commutation of the time of delay in disposal of this appeal.

17. The learned Single Judge having commuted the time during which the writ petition remained pending, we deem it appropriate to, subject to

the suit being filed within 60 days hereof, also commute the time during which this appeal remained pending. The senior counsel for the appellant on enquiry has further informed that the Bank has instituted suits for recovery of money against the respondents No.3 & 4 and which suits have been decreed but the Bank is facing difficulties in execution of the said decrees.

In the facts aforesaid, no costs.

RAJIV SAHAI ENDLAW, J

CHIEF JUSTICE

DECEMBER 13, 2012
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