

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

% *Judgment reserved on: 27.02.2013*
Judgment delivered on: 06.03.2013

W.P.(C) No.461/2012

STATE TRADING CORPORATION OF INDIA LTD.

....Petitioner

Through: Mr.Rakesh Tiku, Sr. Advocate
with Ms.Manjusha Wadhwa,
Mr.Arpan Wadhawan, Mr.Vivek
Ojha & Mr.Amit Panigrahi,
Advocates.

versus

STATE BANK OF INDIA & ORS.

.....Respondents

Through: Mr.Sanjiv Kakra and Mr.Atul
Kumar & Mr.Bharat Arora for
R-1.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MS. JUSTICEINDERMEET KAUR

INDERMEET KAUR, J.

1 On 20.01.1997 the State Trading Corporation (hereinafter referred to as the petitioner) invited tenders for purchase of argentine wheat. The offer made by Tradigrain (hereinafter referred to as the respondent no.3) was accepted by the petitioner.

2 Parties entered into a contract on 04.02.1997. In terms of this contract respondent no.3 was to give a Performance Guarantee to the petitioner to ensure the due performance of its obligation under the contract. It was agreed that in case of disputes matter would be referred to the Grain and Feed Trade Association (GAFTA). Respondent no.3 approached its Swiss Banker-UBS AG (hereinafter referred to as the respondent no.2) who in turn approached the State Bank of India (hereinafter referred to as the respondent no.1) and requested it to issue a performance guarantee on behalf of respondent no.3 in favour of the petitioner. Respondent no.1 asked for a counter guarantee in its favour from respondent no.2. Accordingly respondent no.2 issued a counter guarantee on 13.02.1997 which was subsequently amended on 14.02.1997, in terms whereof parties were to be governed by the Indian law. Pursuant thereto respondent no.1 issued a performance bank guarantee in favour of the petitioner valid up to 04.8.1997 which was extended up to 04.11.1997 and finally up to 19.11.1997.

3 A dispute arose qua the discharge money claimed by the petitioner which as per the petitioner was wrongly calculated by respondent no.3. On 25.9.1997 the petitioner invoked the performance guarantee; submission being that respondent no.3 has failed to perform its obligation under the contract and called upon respondent no.1 to immediately remit an amount in US Dollar 908250 and credit the payment in their account. Respondent no.1 vide telex of the same date i.e. 25.9.1997 called upon respondent no.2 to pay the aforesaid sum

against the counter guarantee issued by it in favour of respondent no.1. Respondent no.2 vide a telex message dated 26.9.1997 informed respondent no.1 that the Swiss Court (in proceedings initiated by respondent no.3 against respondent no.2) had vide an order of the same date injunctioned respondent no.2 from making any payment of the guarantee amount. On 21.01.1998 respondent no.1 paid Rs.3,27,87,825/- (equivalent to US \$ 908250 at the prevailing exchange rate) to the petitioner vide a cheque dated 21.1.1998.

4 The interim order of the Swiss Court of First Instance dated 26.9.1997 injunctioning respondent no.2 from disbursing any amount under the counter guarantee to respondent no.1 was upheld by the Judiciary Court of First Instance Geneva on 31.3.1998 and endorsed by the Judiciary Court of Justice Geneva on 18.6.1998. The Swiss Federal Supreme Court had also endorsed this judgment on 17.12.1998.

5 On 22.12.1997 arbitration proceedings were invoked by respondent no.3 against the petitioner. The GAFTA pronounced its Award on 06.11.2000. It held that the petitioner was entitled to a sum of US \$100,669.55 alone which was the amount initially agreed to be paid by respondent no.3. The appeal filed by the petitioner against this Award was dismissed by the Appellate Tribunal on 19.11.2004 with certain modifications. The Queen's Bench Division at London allowed the appeal filed by respondent no.3 on 19.10.2005 and held that respondent no.3 was entitled to a sum of US \$ 807,580.45 from the petitioner (908,250-100,669.55). These foreign Awards were challenged

by the petitioner by filing a petition under Sections 48 and 49 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act). A single Bench of this Court on 12.10.2012 in OMP No.486/2012 dismissed this petition as not maintainable noting that the essential conditions for entertaining a petition under Section 48 were not present.

6 Meanwhile respondent no.1 vide communications dated 27.9.1997 and 29.9.1997 protested against the act of respondent no.2 in not making payment upon the counter guarantee. As noted supra on 21.01.1998 respondent no.1 released an amount of Rs.3,27,87,825/- to the petitioner in terms of the invocation made by the petitioner on 25.9.1997. In September, 2000 respondent no.1 filed an OA (Original Application) before the Debt Recovery Tribunal (DRT) to reimburse its debt i.e. the amount which had released to the petitioner. This claim was set up before the DRT against the Swiss Bank (defendant no.1), Tradigrain (defendant no.2) and the State Trading Corporation of India Limited (defendant no.3). Submission being that the Swiss Bank and Tradigrain (respondents no.2 and 3) were co-jointly liable to respondent no.1(State Bank of India) as respondent no.3 could not have invoked the jurisdiction of the Swiss Court when the terms of the amended counter guarantee specifically provided that the parties are to be governed by the Indian law, respondent no.1 has been constrained to make payment to the petitioner under a misrepresentation; the aforementioned amount of Rs.3,27,87,825/- was released under a fraud and misconception; for

which all the aforementioned persons i.e. respondent no.2 and 3 jointly and respondent no.1 separately are liable.

7 The DRT vide its order dated 03.3.2006 issued a recovery certificate in favour of the respondent no.1 bank; respondents no.2 and 3 (Swiss Bank and Tradigrain) were exonerated; petitioner (State Trading Corporation) was held liable to pay a sum of US Dollars 807580.45 along with interest at 21.75 % totaling a sum of Rs.6,30,85,220/- . The DRT was of the view that as far as respondent no.2 (Swiss Bank) was concerned it had been enjoined by the Swiss Court from releasing any amount against the counter guarantee which judgment of the Swiss Court has since attained a finality, the claim of the respondent no.1 bank against the respondent no.2 (Swiss Bank) could not thus be sustained. Qua respondent no.3 the view taken by the DRT was that there was no default in its performance as far as the quality was concerned and if there was any marginal breach the same could have been resolved through a negotiation but respondent no.3 was never called upon for negotiation. In these circumstances in the absence of first calling for a negotiation the petitioner could not have invoked the bank guarantee; it was wrongly invoked as cause of action had not arisen for its liability qua payment by respondent no.1 bank which liability was accordingly fastened upon the petitioner.

8 The findings of the DRT were endorsed by the impugned order of the DRAT. This judgment is the subject matter of the present writ petition.

9 On behalf of the petitioner lengthy arguments have been addressed. Attention has been drawn to the provisions of Section 126 of the Contract Act; submission being that the petitioner bank is a creditor within the parameters of the aforementioned section; he being a creditor cannot become a debtor before the DRT; his status cannot change; respondent no.1 bank had no occasion to file the present proceedings before the DRT as no “debt” was payable by the petitioner within the meaning of Section 2(g) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDBFI); the amount released to the petitioner by respondent no.1 in terms of the bank guarantee cannot be envisaged as a “debt”. Reliance has been placed upon Marina World Shipping Corporation Ltd. Vs. Jindal Exports (P) Ltd. (2004) 2 Comp. LJ 50 (Del); submission being that unless and until the foreign award was enforced it could not crystallize into a debt and as such in the instant case the Original Application (OA) filed by the respondent no.1 is liable to be dismissed on this ground alone. Reliance has also been placed upon Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd. AIR 2003 SC 2629 to canvas an argument that an award which is against the fundamental policy of the Indian law would be encompassed within the definition of public policy and the present Award is liable to be set aside on this ground as well. Further submission being that the parties were not bound by the orders of the Swiss Court for the explicit reason that the amended terms of the counter guarantee provided that the parties to the guarantee would be governed by the Indian law; in these circumstances the defence of respondent no.2 that it had been enjoined

by the Swiss Court from releasing the amount of the performance guarantee was an invalid defence. Respondent no.2 has failed to honour its commitment. Submission being that in view of the pronouncement of the Apex Court in Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engg. Works (P) Ltd., AIR 1977 SC 2477 respondent no.1 and respondent no.2 Bank were under obligation to honour their commitment which could not have been avoided. Section 13 of the Code has been pressed; submission being that a foreign judgment is not conclusive if it is against public policy; the judgment of the Swiss Court being against public policy is not binding inter se the parties. Neither respondent no.2 nor respondent no.3 could wriggle out of their liability. The GAFTA Award was also not binding as the proceedings under Section 48 and 49 of the said Act had to be adhered in the first instance, in the absence of which a foreign award could not be enforced.

10 Arguments have been countered. Learned counsel for the respondent points out that the petitioner had submitted himself to the jurisdiction of the Swiss Court and at every stage before the Swiss Court he had been contesting the matter on merits; he had actively participated in the said proceedings. Attention has been drawn to the order passed by the Swiss Court on 26.9.1997 where on the objections by respondent no.3, respondent no.2 had been restrained from making payment on the bank guarantee. Attention has also been drawn to the order passed by the Swiss Supreme Court wherein the appeal filed both by the petitioner and respondent no.1 had been dismissed with costs. Even in the

arbitration proceedings after the GAFTA had pronounced its Award on 06.11.2000 the matter had been assailed and the Queen's Bench Division at London on 19.10.2005 had returned a finding that the invocation of the bank guarantee by the petitioner was in breach of the contract. Reliance has been placed upon State Bank of Karnataka Vs. All India Manufacturers Organization AIR 2006 SC 1846, B.T. Corporation of Monrovia Bermuda Vs. Orient Middle East Lines Ltd. AIR 1994 SC 1715 to support this line of argument; submission being that a foreign Award is recognized even if not enforced; such a recognition is a shield against a re-agitation of the issue with which the Award deals. Further submission being that the petitioner has himself acted upon the Award and to advance this submission attention has been drawn to the letters written by the petitioner to respondent no.3 claiming the amount of US \$ 100,669.55 (pages 554,557 & 569 of the paper book); the petitioner is now estopped from setting up a counter submission that he was not bound by the Award. To support this submission learned counsel for the respondent has placed reliance upon Zhumaklal Motiram Vs. Fulchand Tarachand AIR 1941 Bombay 20, Vishram Manji Vs. Gangaram Ladha AIR 1935 Sind 235. Further submission being that the debt from the petitioner stood crystallized on the date of the filing of the O.A.; it had become a liability which the petitioner had to liquidate qua respondent no.1. Attention has been drawn to the definition of "debt" as expounded by the Supreme Court in Eureka Forbes Limited Vs. Allahabad Bank & Ors. (2010) 6 SCC 193. Submission being that the legislature had not intended to give it a

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restricted meaning. Last submission of the learned counsel for the respondent being that the petitioner unjustly enriched himself as he had not only invoked the bank guarantee and was in possession of the money but had also kept the goods with himself. Reliance has been placed upon Sahakari Khand Udyog Mandal Ltd. Vs. Commissioner of Central Excise and Custom AIR 2005 SC 1897; the doctrine of unjust enrichment based on equity can be invoked to deny the benefit to which a person is not otherwise entitled. On all counts the impugned judgment suffers from no infirmity.

11 Record shows that the petitioner had first invoked the bank guarantee from respondent no.1 on 25.9.1997. On 26.9.1997 a message was sent by respondent no.2 to respondent no.1 informing him that the Swiss Court of First Instance had prohibited respondent no.2 to pay the money against the performance guarantee to respondent no.1. The Swiss Court had noted that the petitioner by invoking the bank guarantee had acted in a manner which was prima facie abusive as respondent no.3 had performed its part of the contract correctly. It is a matter of record that respondent no.1 had sought permission to be impleaded as a party before the Swiss Court which permission had been accorded to him and he had contested the aforementioned stand set up by respondent no.3. It is also matter of record that the petitioner had also submitted itself to the jurisdiction of the Swiss Court and he had contested the proceedings in all the Swiss Court on merits. After the order passed by the court of first instance at Geneva on 26.9.1997 the matter was taken up in appeal

which was order was upheld by the Judiciary Court at Geneva on 31.3.1998. On 18.6.1998 the Judiciary Court of Justice upheld the order dated 31.3.1998 which against attained a finality by the Swiss Federal Supreme Court on 17.12.1998. The Swiss Federal Supreme Court had returned a finding that the invocation of the guarantee by the petitioner was abusive. In all these proceedings which had travelled up to the Supreme Court the petitioner was a party and the judgments had been answered on merits. Appeal filed by both the petitioner and respondent no.1 had been dismissed with costs. It definitely does not now lie in the mouth of the petitioner to say that he had not submitted himself to the jurisdiction of the Swiss Court or that the proceedings before the Swiss Court were not binding upon him or that in these circumstances the Indian law should prevail.

12 Section 13 of the Code does not advance the case of the petitioner. Section 13 deals with six situations i.e. clauses (a) to (f) where a foreign judgment is not conclusive. The petitioner has not been able to place himself in any of the aforementioned categories. Unless and until the decree falls in any one of the grounds so enumerated in Section 13, the validity of the foreign decree is beyond pale of any challenge. The plea that the judgment of the Swiss Supreme Court was against public policy has not been advanced beyond its mere statement. Thus the judgment in Oil and Natural Gas Corporation Ltd.(supra) will not help the case of the petitioner. This judgment of the Swiss court in fact created a *res judicata* between the parties; the judgment having

been rendered on merits and the petitioner admittedly having submitted itself to the jurisdiction of the said foreign court. A contrary plea cannot certainly now be set up. The matter directly and substantially in issue before the Swiss court and in the proceedings before the GAFTA which stood finally decided could not be re-agitated; the doctrine of *re judicata* would operate.

13 Record further shows that on 22.12.1997 respondent no.3 had invoked the arbitration clause contained in the contract between the parties. In terms thereof disputes between the parties were referred to the GAFTA. The GAFTA had pronounced its Award on 06.11.2000. The proceedings were hotly contested both by the petitioner and respondent no.3. The petitioner was held entitled only to USD 100669 which was the amount initially agreed to be paid by respondent no.3. The appeal filed against this Award was dismissed by the Appellate Tribunal on 19.11.2004. The Queen's Bench Division at London allowed the appeal of respondent no.3; it noted that the invocation of the bank guarantee by the petitioner was an unjustified call; a sum of US \$ 807,580.45 was awarded in favour of respondent no.3 and against the petitioner. The petitioner even then did not allow the matter to rest; he filed OMP No.486/2012. This was a petition under Section 48 of the said Act. This petition was dismissed by single Bench of this Court on 12.10.2012 noting that unless and until a substantive petition seeking enforcement of the foreign award is pending; petition under Section 48 and 49 of the said Act which is in the nature of a declaratory relief in

relation to the validity of the said Award is not maintainable. This order was passed during the pendency of this petition. The proceedings before the GAFTA had thus also reached an ultimate culmination.

14 In Zhumaklall Motiram (supra) a Bench of the Bombay High Court on the principle of estoppel had noted that a party who had himself relied upon the Award is estopped from challenging it subsequently at a later stage. This is further fortified by the fact that the petitioner had thereafter written letters dated 09.7.2011, 27.7.2011 and 31.8.2011 to respondent no.3 claiming a sum of US \$100,669.55 which had been awarded to him by the GAFTA on 06.11.2006. He had in fact acted upon the Award.

15 The petitioner was thus bound by this foreign Award. The Supreme Court in B.T. Corporation of Monrovia, Bermuda (supra) in this context had noted as under:-

“An award may be recognized without being enforced; but if it is enforced then it is necessarily recognized. Recognition alone may be asked for as a shield against reargitation of issues with which the award deals. Where a Court is asked to enforce an award, it must recognize not only the legal effect of the award but must use legal sanctions to ensure that it is carried out.”

16 The bank guarantee in the present case, like in all cases, as is evident from a reading of Section 126 of the Contract Act involves three parties, the creditor, the surety and the principal debtor and a contract to which those parties are privy. The foundation is the contract between principal debtor and the creditor. There is yet another contract between

the creditor and the surety, by which the surety guarantees the debt. In the instant case the principal debtor and the creditor were the seller and the buyer i.e. the respondent no.3 and the petitioner. The surety was respondent no.1; the counter guarantee performance had been given by respondent no.2.

17 Relevant would it be also to extract the relevant terms of the Bank guarantee:

4803/GUA/21/40
75
15.02.1997

*M/s State Trading Corpn. Of India Ltd.
Jawahar Vyapar Bhawan,
1, Tolstoy Marg,
New Delhi-110001.*

- 1] *Against contract No. STC/WHEAT/IMP/4/97 dated 4.2.1997 [hereinafter called the LOI/contract] entered into between m/s STC [hereinafter called the Buyer] and M/s. Tradigrain S.A., Geneva [hereinafter called the Sellers], this is to certify that at the request of the sellers, we State bank of India, overseas branch, Vijaya Building, 17, Barakhamba Road, New Delhi 110001, having its local head office at 11 Parliament Street, New Delhi-110001, unconditionally and irrevocably guarantee to pay to the buyers immediately on first demand, the amount of USD 908250/- (US Dollars Nine Hundred Eight Thousand Two Hundred Fifty Only) without any protest or demur or reference to the sellers **if the sellers fail to perform all or any of their obligations under the said contract.** The decision of the buyers duly communicated in writing to the bank that the sellers have failed to perform all or any of the obligations under the contract shall not be questioned and be final and conclusive. The said amount of USD 908250/- [US Dollars Nine Hundred Eight Thousand Two Hundred Fifty Only] will accordingly forthwith be paid without any conditions or requirement of our proof whatsoever failing which*

interest of 21.75 O/O P.a. on monthly rest basis shall be due by the Bank of Buyer.

2] It is fully understood that this guarantee is effective for a period of six months from the date of contract i.e. till August, 4th 1997 and that we, State Bank of India, Overseas Branch, New Delhi undertake not to revoke this guarantee during its currently without the consent in writing of the buyers.

3] We, State Bank of India, Overseas Branch, New Delhi further agree that the buyers/sellers shall have the fullest liberty, without affecting in any manner or obligations hereunder to mutually vary any of the terms and conditions of the said contract and shall have the right to extend time of performance by the sellers from time to time but for a maximum postponement of three months or to postpone for any time or from time to time but for a maximum postponement of the said sellers and/or forebear to enforce any of the terms and conditions relating to the said contract and we, State Bank of India, Overseas Branch, New Delhi shall not be released from our liabilities under this guarantee by reasons of any such variations or extension being granted to the said sellers or for any for bearance and/or commission on the part of the buyers, or any indulgence by the buyers, to the said sellers or by any other matter or thing whatsoever which under the law relating to the sureties would but for this provisions have the effect of so releasing us from our liability under this performance guarantee.

4] We, State Bank of India, Overseas Branch, New Delhi further agree that the guarantee herein contained shall not be effected by any change in the constitution of the said sellers/buyers.

5] The guarantee will be governed by Indian Laws and will be subject to the jurisdiction of courts in India alone.

6] For the purpose of indemnification the buyer's request for payment have to be presented through the intermediary of a first rate bank, confirming that the signatures are legally binding the buyer's firm.

Notwithstanding anything contained hereinabove, our liability under this guarantee is restricted upto a sum of USD 908250/- [US Dollars Nine Hundred Eight Thousand Two Hundred Fifty Only] payable in equivalent in Indian Rupees and shall expire on 04.08.1997, all your rights under this guarantee shall be forfeited and we shall stand relieved and discharged from all our liabilities thereunder. This instrument should be returned to us upon its expiry or settlement or claim(s), if any thereunder, whichever is earlier.

For State Bank of India

For State Bank of India

*Sd/-
Deputy Manager
Guarantee Section
Overseas Branch
New Delhi*

*Sd/-
Chief Manager (Service)
Overseas Branch
New Delhi*

18 According to this document, it was clear that the petitioner's liability was only if the terms of the guarantee were not fulfilled by the seller. In this scenario, in view of the finding returned by the foreign courts that there was no breach of contract by the sellers and the quality of the grain which had been supplied by respondent no.3 to the petitioner was as per their contractual obligations, it was incumbent upon the petitioner to have first entered into a negotiation with respondent no.3 before it could have invoked the bank guarantee. The petitioner has received the payment on the bank guarantee from respondent no.1 on 21.01.1998; at this time the order of the Swiss Court (dated 26.9.1997) injunctioning respondent no.2 from making payment to respondent no.1 was in operation. Respondent no.3 has also invoked the arbitration clause against the petitioner on 22.12.1997. All these facts were well within the knowledge of the petitioner but it still insisted upon

invoking the bank guarantee. This was by a concealment and suppression of these aforesaid facts.

19 The law in relation to bank guarantees has also now attained a wider dimension with the passage of time. Originally the only exception carved out to prevent the encashment of a bank guarantee was fraud. However, subsequent judicial pronouncements have extended this scope by adding other class of cases which would fall in this exception. Cases of irretrievable injury, fraud, extraordinary special equities and invocation of bank guarantee being not in terms of the bank guarantee itself. It is very difficult to draw any straitjacket formula which would universally apply to all the cases. Suppression of facts made by the party against the beneficiary and prima facie there being evidence to show that there is truth in these allegations, would not entitle the party to straightway invoke the bank guarantee. (See Synthetic Foams Ltd. Vs. Simplex Concrete Piles (India) Pvt. Ltd. AIR 1988, Delhi 2007 and Hindustan Construction Co. Ltd. & Anr. Vs. Satluj Jal Nigam Ltd. AIR 2006 Delhi 169. The judgment of Dwarikesh Sugar Industries Ltd.(supra) would have no application; facts of the said case being distinct as admittedly in that case there was no breach of contractual obligation. The ultimate decision of the Swiss Court and the GAFTA having been upheld, it was patently clear that the petitioner had abused his power by invoking the bank guarantee.

20 The wrong payment by respondent no.1 to the petitioner amounted to a “debt” within the meaning of Section 2(g) of RDDBFI. The amount payable by the petitioner to respondent no.1 had stood

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crystallized on the date of the filing of the Original Application before the DRT by respondent no.1 (September, 2000); the Swiss Supreme Court dismissed the appeal of the petitioner on merits much prior in time i.e. on 17.12.1998. The Supreme Court in (2010) 6 SCC 1993 Eureka Forbs Ltd. Vs. Allahabad Bank (supra) has noted that the expression “debt” has to be given a more wider and general meaning; “it would be any liability” as opposed to a determined liability or a definite liability. It cannot be given a narrow or a restricted meaning. This view has been reiterated by the Supreme Court in United Commercial Bank Vs. Bank of India AIR 1981 SC 1426. Thus in no manner can it be said that the amount due and payable to the petitioner would not qualify as a “debt”. This liability of the petitioner clearly falls within the definition of a “debt”.

21 The judgment, relied upon by the learned counsel for the petitioner in this context, of Marina World Shipping Corporation Ltd. Vs. Jindal Exports (P) Ltd. (supra) is of no help. This was a winding up petition which had been filed under Section 433 (e) of the Companies Act; submission was that in terms of the foreign Award passed by the English Court a winding up petition was maintainable against the respondent; this submission was nullified and rightly so as the court had noted that this would be an anomalous situation if thereafter the petition filed for the enforcement of the said Award was refused on one or more of the five conditions set out in Sections 47 and 48 of the Act and as such unless and until the enforceability of the Award was established by

the Civil Court, the Company Court has no jurisdiction to entertain the winding up petition. Facts of the said case are distinct. They would have no application.

22 Last submission canvassed by the learned counsel for the petitioner is on the rate of interest as being excessive.

23 The petitioner had unjustly enriched himself; he not being entitled either to the guarantee amount or to the goods both of which were in his possession. The Supreme Court in Sahakari Khand Udyog Mandal Ltd. (supra) has noted that where a party has “enriched” itself by “receipt of a benefit” which is at the expense of the non-applicant, restitution is justified. These payments had been disbursed to the petitioner in January, 1998. It was in these circumstances that a fair discretion was exercised in the impugned order to grant interest at the rate of 21.75% with monthly rests the transaction admittedly being commercial.

24 The fact findings returned by the two forums below are plausible based on the record. No interference is warranted under Article 226 of the Constitution of India. The petition is an abuse of process of court. It is accordingly dismissed with costs quantified at Rs.25000/-.

INDERMEET KAUR, J.

SANJAY KISHAN KAUL, J.

MARCH 06, 2013
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