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

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Judgment Reserved on: January 17, 2014

Judgment Delivered on: January 28, 2014

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RFA(OS)91/2012

JAMMU & KASHMIR BANK LTD. & ANR. Appellant

Represented by: Mr.G.M.Kawoosa, Advocate

versus

M/S.ARAVALI INTERNATIONAL Defendant

Represented by: Mr.Janendra Lal and Ms.Yasmin
Tarapore, Advocates

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. The present Regular First Appeal is filed under Section 96 CPC seeking to challenge the decree dated 13.4.2012 passed in favour of the respondent for a sum of ₹23,73,364.38 alongwith pendent lite and future interest @ 9% per annum with quarterly rests and costs.
2. The present suit was filed by the respondent for recovery on account of non receipt of payment from the appellant pursuant to invocation of Bank Guarantee issued by the appellant in favour of the respondent being Bank Guarantee No.18/94 dated 14.5.1994 for a sum of ₹21,50,000/-.
3. As per the plaint filed by the respondent, on 19th April, 1994, M/s.Chittagong Cement Clinkers & Grinding Co.Ltd., South Halisher,

Chittagong entered into two separate agreements for supply of 25,000 metric ton of cement clinkers, one with the respondent and the second agreement with M/s.Projects & Equipment Corporation of India Limited. The said M/s.Projects & Equipment Corporation of India Limited assigned the said contract also in favour of the respondent on the same terms and conditions as contained in the principal agreement entered into with M/s.Chittagong Cement Clinker & Grinding Co.Ltd.

4. The respondent thereafter further entered into two contracts for supply of the said 25,000 metric ton of cement clinkers each with M/s.Impression International India in whose favour the said two contracts were assigned by the respondent in consideration of the commissions to be paid by the said Impression International India.

5. As per the stipulations in the principal contract, the respondent was under an obligation to furnish an unconditional performance Bank Guarantee. A similar clause regarding performance Bank Guarantee was also stipulated in the contract between the respondent and Impression International India. The said Impression International India was hence to furnish a Bank Guarantee in favour of the respondents.

6. Keeping in mind its said obligation, the said Impression International India gave a single performance/Bank Guarantee against both the contracts. The Bank Guarantee was issued by the appellant dated 14.5.1994 bearing No.18/1994 for due performance of the export obligation cast on the said Impression International India in terms of the two contracts assigned in its favour. The bank guarantee (Ex.PW-1/11)provided that in case Impression International India (sellers) defaults in due performance of the export obligation for export of 50,000 Metric Ton of Cement Clinkers, the

appellant bank shall on demand pay to the respondent (buyers agents) the sum of ₹21,50,000/-. Paragraph 2 of the Bank Guarantee reads as follows:-

“2. This GUARANTEE shall become effective and shall bind the BANK Provided the IRREVOKABLE LETTER OF CREDIT for sale of 50,000 mts of CEMENT CLINKER valuing US Dollors 22,95,750/- CONFIRMED by a PRIME BANK in Delhi and stipulating payment at SIGHT on presentation of documents expeditiously by transfer of funds in US Dollors from the Confirming Banks Accounts in Newyork, complete, valid and without any discrepancies is received by the BANK in original within FIFTEEN days from the date of this Guarantee i.e. not later than _29_May 1994. The Date of receipt of the valid and discrepancy free Irrevokable Confirmed Letter of Credit shall be confirmed by the Bank to BUYERS AGENTS in writing. In the event of the non-receipt of the said Irrevokable(sic) and confirmed Letter of Credit by the day stipulated heretofore this Guarantee shall become inoperative and shall not be enforceable against the Bank in any manner.”

7. In view of the said Clause 2 of the Bank Guarantee, the said Bank Guarantee was to become effective on receipt of an irrevocable letter of credit for sale of 50,000 MTS of cement clinkers by 29.5.1994.

8. The plaint further states that on 20.5.1994 an amendment (Ex.P-3) was carried out in the said Bank Guarantee extending the period for receipt of Letter of Credit upto 6.6.1994 as stipulated in Clause ‘2’. Subsequently, the said period was extended upto 20.6.1994 (Ex.P-4) and on 30.6.1994 the validity as per Clause ‘2’ of the Bank Guarantee was extended upto 7.7.1994 (Ex.P-5). On 01.08.1994 another amendment (Ex.P-6) was carried out to

the Bank Guarantee whereby Clause 3 and Clause 6 of the original Bank Guarantee were amended and the dates in the respective clauses were extended to 30.8.1994 and 30.9.1994.

9. It is further averred in the plaint that two letters of credit bearing L/C No. 00000/C/11/0071 and C/11/0070 both dated 15.6.1994 were issued by Bank Indo Suez on behalf of Chittagong Cement Clinkers & Grinding Co.Ltd., in favour of the respondent. Various amendments later were carried out in the letters of credit and the said amended letters of credit were stated to have been transmitted in the name of M/s.Impression International India on 4.7.1994, who forwarded the same to the appellants. Hence, as per the respondent, Clause 2 of the Bank Guarantee stood duly complied with.

10. It is further averred that the last amendment in the Bank Guarantee (Ex.P-6) dated 1.8.1994 merely extended the date as stipulated in Clause 3, namely, the date of discharge of the liability to 30.8.1994 and the last date for the claim period stood extended to 30.09.1994. This was so as on the said date of amendment, the Letter of Credit had already been received by the appellant.

11. It is further averred that Impression International India did not carry out the export obligation and on account of the said default respondent suffered financial loss and invoked the Bank guarantee in question calling upon the appellant to make payment of ₹21,50,000/- in compliance of the said Bank Guarantee. However, the appellant bank denied its liability vide letter dated 3.10.1994. Various correspondences took place between the parties but no payment was received. Hence, the present suit was filed by the respondent on 15.3.1995.

12. In the written statement filed by the appellant it is averred by the

appellant that the Bank Guarantee dated 14.5.1994 was a conditional guarantee and could not be invoked unless the condition stipulated in paragraph 2 of the guarantee were fulfilled. It is stated that no letter of credit was received by the appellant and, therefore, the guarantee never became effective and never bound the appellant. Hence the invocation of Bank Guarantee was invalid and therefore there was no liability on the appellant bank.

13. Issues were framed on 22.08.1997 which read as under:-

- “1. Whether the plaint has been signed and suit instituted by a duly authorized person?*
- 2. Whether the suit of the plaintiff is misconceived and not maintainable as alleged in the written statement?*
- 3. Whether the guarantee No.18/94 dated 14th May, 1994 was not conditional and as such could not be invoked without satisfying the terms stipulated therein?*
- 4. Whether the guarantee could be enforced despite the fact that it was stipulated that the payment shall be made in U.S. Dollars and not in Indian rupees?*
- 5. Whether the guarantee never became operative? If so, to what effect?*
- 6. Whether the guarantee could be invoked without fulfilling the terms of the guarantee which were clearly stipulated in the guarantee itself? To what rate of interest, the plaintiff is entitled to?*
- 7. Whether an irrevocable Letter of Credit in the sum of 22,95,750 U.S. Dollars was received by the defendant within stipulated period? If not, to what effect?*
- 8. Relief.”*

14. The impugned order has clubbed issues 2 to 7 above and recorded a

common finding. The order holds that the appellants are bound to make payment under the guarantee and that the appellant bank has been raising pleas to evade payment which are unsustainable and unsubstantiated.

15. The controversy clearly revolves around as to whether in terms of Clause 2 of the Bank Guarantee the appellant bank received the irrevocable letter of credit for the sum of US\$22,95,750 within the stipulated period.

16. Learned senior counsel appearing for the appellant has vehemently urged that the letter of credit as stipulated in Clause 2 of the Bank Guarantee, was received only partly and that too after the stipulated period. It is stated that the last date for receiving the full value/letter of credit was at best 30.8.1994. It is urged that one letter of credit for partial amount was received on 1.9.1994. Hence, clause 2 of the Bank Guarantee was not fulfilled and the Bank Guarantee was not enforceable. Hence, it is submitted that the impugned decree is liable to be set aside as it erroneously holds that Clause 2 of the Bank Guarantee was fulfilled and the appellant was bound by the said Guarantee.

17. The learned counsel appearing for the respondent has on the other hand vehemently argued that the submissions of the appellant are misconceived. Heavy reliance is placed on the evidence of PW-1 Shri Davinder K. Bhalla who it is stated has proved dispatch of two letters dated 4.7.1994 being Ex.PW-1/21 and Ex.PW-1/22 forwarding the two letters of credit for supply of 25000 MTS cement clinkers respectively. Receipt of these letters is duly acknowledged in original by Impression International India. The said witness has also stated to have proved communication dated 4.7.1994 Ex.PW-1/23, copy of which was marked to the appellant bank forwarding certain amendments to the L/C. It is further urged that in his

evidence PW-1 has clearly stated that the original letters of credit were, after receipt by the appellant duly negotiated by the appellant and certain discrepancies were pointed out by the ensuing banks i.e. the issuing bank Indo Suez Chittagong. Subsequently after taking instructions from the Chittagong Cement Clinkers and Grinding Company Limited the said Bank/Banque Indo Suez, Chittagong informed that Chittagong Cement Clinkers & Grinding Co. have not waived the discrepancies. Relying on this evidence, it is strenuously urged that this unrebutted evidence unequivocally demonstrates that appellants have received the original letters of credit within the time stipulated by the Bank Guarantee (Ex.PW-1/11) and hence appellants were bound by the Bank Guarantee.

18. He has also stressed that the amendment to the letter of credit carried out by the appellant on 1.8.1994 (Ex.P-6) would clearly show that on that date the appellant bank had received the two letters of credit as envisaged in the Bank Guarantee, as the said amendment (Ex.P-6) does not unlike the earlier amendments seek to change the last date of receipt of the letter of credit as contained in Clause 2 of the Bank Guarantee. He has stressed that earlier amendments to the Bank Guarantee, namely, Ex.P-3 to P-5 had sought to amend the last date of receipt of letter of credit as contained in Clause 2. Ex.P-6, however, merely amends Clause 3 and Clause 6 of the Bank Guarantee, namely, the date of discharge of Bank Guarantee and the date of the claim period implying that the appellant at that stage had received the letter of credit.

19. It is further strenuously urged by learned counsel for the respondent that the best documents regarding the entire transaction were available with the appellant bank. It is urged that the said appellant bank has deliberately

and mischievously not placed on record the said evidence and documents pertaining to the bank guarantee and the letters of credit in question. It is pointed out that on 20.09.2000, a direction was passed by this Court to the appellant bank to place on record the original letter of credit. In response to this order the appellant merely stated on affidavit dated 22.04.2002 that it received one letter of credit for US\$11,43,750 on 1.9.1994 after expiry of the extended period of bank guarantee. It was claimed that after negotiations the LC was returned to M/s.Impression International India and that the appellant bank is not in possession of the original and nor is the record of dispatch of the same available in the records of the bank.

20. Reliance is next placed on orders of this Court passed in IA 5700/2004 filed by the respondent under Order 11 Rule 12 CPC for discovery and inspection of documents. By this application directions were sought to direct the appellant to discover all the documents which are or have been in his power or possession pertaining to the irrevocable letter of credit received by it, the dates on which documents were negotiated by the said bank under the said irrevocable letter of credit and the correspondence with Reserve Bank of India including furnishing of GR-I forms. This application was allowed by the Court on 11.07.2005 with the directions to the appellants to discover the documents regarding receipt of letter of credit by filing an affidavit in accordance with the rules. In compliance with the said order the appellants filed an affidavit dated 26.7.2005 where it is stated that on 1.9.1994 the appellants received one export documentary bill from M/s.Impression International India as partial shipment was allowed for a sum of US\$11,43,750. It is stated that no LC within the validity period i.e. 30.8.1994 was received and only admittedly a sum of ₹88,14,468 had been

credited to the loan account of M/s.Impression International India. The affidavit further states that the entry has been reported to RBI under GR-1 form. It is further stated that the appellant is now not in possession, power or custody of the copy of GR-1 as it is not mandatory to preserve this record and that further no correspondence with RBI in relation to this letter of credit is available with the appellant bank.

21. It is further urged by the learned counsel that this Court on 21.11.2005 pointed out that the affidavit filed by the appellant dated 26.7.2005 does not state as to whether the balance documents were destroyed and if so on what date. Counsel for the appellant had sought time to file the requisite affidavit containing the said information. Another affidavit of Mohd.Yaseen Bhat, Assistant General Manager, Jammu and Kashmir Bank Ltd. was filed dated 20.12.2005. As per the affidavit the form GR-1 in original is forwarded to RBI and that it is not mandatory to preserve a copy of GR-1 by the bank. It is reiterated that it is not mandatory to preserve its record permanently. It is stated that the said copy of the said GR-1 is not available.

22. Learned counsel for the respondent further reiterates that given the evasive nature of affidavits filed by the appellant bank, the respondent filed another IA being 9373/2006 seeking the relief to strike out the defence of the appellant due to non compliance of the orders of this Court. This Court on 25.8.2006 disposed of the application clarifying that the issue of consequences of the appellant not filing the requisite affidavit of discovery of documents would be taken into consideration when disclosure affidavit is taken up for consideration.

23. Learned counsel for the respondent has further stressed that the entire stand of the appellant bank has been vague and evasive and contradictory.

He relies on various parts of the written statement to argue that the appellant has been making incorrect and misleading averments, changing its stand repeatedly. Reliance is placed on paragraph 2 of the preliminary objections to the written statement and paragraphs 11 and 18 of the written statement to show the changing stands of the appellant. Hence it is urged that the impugned order is valid and there are no reasons to set it aside.

24. We have heard the learned counsel for the parties. On 17.1.2014 an opportunity was given to the learned counsel for the appellant to file written submissions within three days. No submissions have been filed.

25. We may first look at the evidence of PW-1 Sh. Davinder K. Bhalla. He has proved 25 documents being Ex.PW-1/1 to Ex.PW-1/25. Eight documents were proved in admission/denial i.e. Ex.P-1 to P-8. PW-1 has apart from other document, proved the covering letter evidencing dispatch of two letters of credit respectively to M/s.Impression International India as Ex.PW-1/21 and PW-1/22 both dated 4.7.1994. He has also proved a communication dated 04.07.1994 sent to M/s.Impression International India as Ex. PW-1/23 copy of which is also marked to the appellant. The relevant portion of his evidence being paragraph 28 of his affidavit by way of evidence reads as follows:-

“28. I say that by two letters dated 4th July, 1994 the plaintiff forwarded to the said M/s. Impression International India the Letters of Credit and amendments duly transferred in their names. The said M/s. Impression International India were requested to have the guarantee issued by the defendant extended and to furnish a letter confirming payment by cheque. The said letters and enclosures were delivered by hand and bear the acknowledgement of receipt as also the

signatures of Shri Surinder Kumar, which I identify and appear at pages 9 and 10 of the documents filed with this affidavit and may be marked as Exhibits PW1/21 and PW 1/22 respectively. I say that copy of the letter was also sent to the defendant which appears at page 11 of the documents filed with this affidavit and bears the signatures of Shri Surinder Kumar which I identify and may be marked as Exhibit AW1/23. (sic) ”

26. His cross examination on this part of his testimony reads as follows:

xxx dated 26.2.2009

“Plaintiff has not filed any recovery suit against M/s.Impression International Ltd. in pursuance to Ex.PW1/D1. I have not recorded about the delivery of LC to the bank in my office record. Both the LCs including LC no.71 were delivered to M/s.Impression International by hand. Acknowledgment was taken from M/s.Impression International. Acknowledgment is already on record and is Ex.PW1/21 and PW1/22. We have not obtained any other separate receipt. I know Ranvir Singh as he was one of the employees of M/s.Impression International. But I do not know his designation. Ex.PW1/21 and Ex.PW1/22 bears the signatures of Mr.Surender Kumar, the then Vice President of the plaintiff company. It is wrong to suggest that Ex.PW1/21 and PW1/22 are forged and fabricated documents. No dispatch number was given on the said two documents. Vol. But letter number is given to both the documents. Mr.Surender Kumar, the then Vice President of the company was dealing with the transaction regarding issue of Bank Guarantee.”

27. The said above testimony of PW-1 on delivery of the letters of credit to M/s.Impression International India has clearly not been shaken in the cross-examination. There is no reason to disbelieve the said testimony. The said documents PW-1/21 and PW-1/22 contain the original endorsement of receipt of Impression International India.

28. It is also apparent from the cross-examination of DW-1 Javed Mustafa Rafique that documents were generally received by the appellant from Impression International India. DW-1 states in his cross-examination dated 10.5.2011 that one LC was received on 1.9.1994 from the said Impression International India. Clearly documents were being forwarded to Impression International India who were thereafter dealing and forwarding the same to the appellant bank.

29. Reference may now be had again to the evidence of PW-1. In his affidavits at paragraph 33 he states as follows:-

“I say that on 12th September, 1994, the Banque Indo Suez, Chittagong by telex informed M/s. Impression International India, that documents for USD 304,146.00 under Letter of Credit C/11/0070 were found discrepant and that M/s.Chittagong Cement Clinkers & Grinding Co.Ltd. had not accepted the discrepancies. In view of the same the question of payment of the documents did not arise. I say that on the 11th September, 1994, the said the Banque Indo Suez, Chittagong by telex informed the Defendant with reference to their message dated 6th September, 1994 that the question of the discrepancies had been taken up with M/s. Chittagong Cement Clinkers & Grinding Co. Ltd. and were waiting instructions. The said Telex clearly shows that the documents were negotiated by the Defendant under Bill

No.LN004104 and the plea that the Letter of Credit was not received is false to the knowledge of the Defendants.”

30. The above testimony of PW-1 shows that the appellants have received the letters of credit and have sought to negotiate the same with the bankers, Banque Indo Suez. There is no cross examination of PW-1 on the said evidence. The unchallenged evidence of PW 1 clearly shows that the appellants have received the two letters of credit for the full agreed amount within the stipulated period. After having received the said letters of credit they have sought to negotiate the same with the bankers Banque Indo Suez. On account of some discrepancy, which discrepancy was not waived by Chittagong Cement Clinkers and Grinding Company Limited, the appellant bank appears to have not received the payments.

31. The above finding is reinforced by the conduct of the appellant pursuant to various orders passed by this court for discovery and inspection of documents. The orders passed by this Court on various dates regarding discovery of documents by the appellant would show that the appellant has evaded in filing the full documents. An adverse inference will have to be drawn against the appellant in this regard.

32. On 20.09.2000, this Court had directed the appellant that the letters of credit be placed on record within four weeks. Instead of placing the same on record, an affidavit was filed dated 22.04.2002 stating that the appellant had received one original letter of credit No.0070 dated 15.06.1994 for US\$11,43,750 on 01.09.1994. Hence, it is claimed that as part-shipment was allowed LC after negotiation for US\$304,146.00 was returned to M/s. Impression International India and as such it is not in possession of the

defendant. Similarly, record of dispatch of LC is also stated to be not available in the records of the bank.

33. Respondent, thereafter, moved an application under Order XI Rule 12 CPC seeking discovery of the documents regarding the receipt of irrevocable letter of credit. This application was allowed on 11.07.2005 and the appellant was directed to discover the documents regarding the receipt of letters of credit by filing appropriate affidavit. An affidavit dated 26.07.2005 was filed by the appellant where it was claimed that the appellant did not receive any LC within the validity period of the Bank Guarantee i.e. 30.08.1994. Regarding GR-1, it is stated that the appellant was not in possession, power and custody of the same as it is not mandatory to preserve the same. It is admitted that the entry has been sent to RBI under GR-1 and it was sent to RBI with relevant returns of realization. It is further averred that no other correspondence with RBI in relation to this letter of credit is available with the appellant bank. The said affidavit has been filed by Mr. Ashok Kapoor, Assistant General Manager of the appellant, which deposed based on the records of the bank.

34. On 21.11.2005, this Court directed that the appellant has not stated as to whether the documents were destroyed and, if so, on what date. In response to this order, the appellant filed another affidavit of Mr. Mohd. Shaffi, Assistant General Manager. The contentions of the earlier affidavit filed by Shri Ashok Kapoor are more or less reiterated. No explanation is given as to when the records were destroyed and why the same were destroyed. This affidavit is also deposed on the basis of the record of the appellant.

35. Having seen the said affidavits filed by the appellant pursuant to

various orders of this Court, the cross-examination of DW-1 Javed Mustafa Rafique which took place on 10.5.2011 may be looked at relevant portion of which reads as follows:-

“There are different procedures to be followed in different cases, as stipulated in letter of bank guarantee itself. When Letter of credit (L/C) is received, it is entered into our records, but exact records I cannot say. The first L/C was received, as stated by me on 01.09.1994 as per record means the case file prepared by the bank. I would have to check with the bank whether I can produce that file/record or not.”

36. The above testimony of DW-1 clearly shows that the appellant bank has been suppressing the said records. It is obvious that the evidence is being given by its witness based on a mere case filed prepared by the bank and nothing else.

37. Clearly, the appellant bank has been evasive. The best evidence was available with the said appellant bank but has been withheld from this Court. Considering that the present suit was filed on 15.03.1995 i.e., almost shortly after the appellant had refused to honour the bank guarantee, surely the appellant bank cannot feign ignorance and non-availability of records. It was its duty to have retained the records especially as legal proceedings were pending. Accordingly, in view of Sections 106 and 114 of the Evidence Act, the best evidence has been withheld by the appellant. An adverse inference has to be drawn against the appellant.

38. There is also merit in the contention of learned counsel for the respondent that the appellant has been taking evasive and contradictory stand in its written statement. In paragraph 2 of the Preliminary objection to

the written statement, the appellant states that no letter of credit was received by the defendant and, therefore, the guarantee never became effective. In paragraph 11 of the written statement, it is stated that no irrevocable letter of credit was received by the bank by 30.08.1994 and, therefore, the guarantee never became operative. In paragraph 18 of the written statement, it is stated that one letter of credit for US\$11,43,750 was received by the appellant from M/s.Impression International India on 01.09.1994. It is stated that the said letter of credit was not received within the extended period of the guarantee and was not confirmed by a prime bank and it was for the lesser amount than the stipulated amount. Hence, it is claimed that that the guarantee never became operative. Clearly the written statement is contradictory. Further, the testimony of DW-2 in his cross-examination is wholly contrary to the above averments in the written statement. In his cross-examination held on 24.10.2011 he states that no letter of credit against the present guarantee was ever received. The relevant portion of the cross-examination reads as follows:-

“... It is correct that as per my statement in my affidavit no letter of credit against this guarantee of Aravali International was received. We have not received any letter of credit from anybody else as also pertains to this guarantee. It is correct that defendant No.1 bank received letter of credit from impression international. The letter of credit was received from impression international did not pertain to these guarantees in suit.”

Hence DW-2 takes a completely different stand as pleaded in the Written Statement.

39. What follows? The appellant bank does not rebut the evidence of the

respondent that the appellant received the full letter of credit and it has negotiated the letters of credit with Banque Indo Suez and that on account of discrepancies the payments were not received by it. Contradictory stands are being taken in the written statement and evidence sometimes claiming only part of the letter of credit was received and sometimes claiming no letter of credit was received. The witnesses are deposing on records which is a case file prepared by the appellant bank. The appellant bank is completely evasive about the records. In view of the above, the contentions and submissions of the appellant cannot be believed.

40. We have no hesitation to concur with the findings of the learned Single Judge on issues No.2 to 7.

41. On issue No.1 the impugned order has decided the same in favour of the plaintiff by holding that the plaint has been duly signed, instituted and filed by duly authorized person. We see no reason to differ from the said view.

42. In view of the above, we see no reason to interfere with the order passed by the learned Single Judge. The present appeal is dismissed with costs.

(JAYANT NATH)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

JANUARY 28, 2014
n/rb/raj