

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION PETITION NO.1076 OF 2011

Punjab and Maharashtra Co-op.)
Bank Ltd. Recovery Department,)
MMRDA Bldg., A-1, Gala NO.203,)
2nd Floor, Unit No.205, Anik Link Road,)
Wadala Truck Terminal,)
Mumbai – 400 037) .. Petitioner

Vs.

1. Puri International (P) Limited)
601-B, Vishnu Commercial Complex,)
Sector 15, Plot No.36, CBD Belapur,)
Navi Mumbai- 400 614.)

2. Surinder Singh Puri)
Flat No.101, Richoux,)
Bandra (W), Mumbai- 400 050.)

3. Sudesh Puri)
Flat No.101, Richoux,)
Bandra (W), Mumbai- 400 050.)

4. Sumeet Singh Puri)
Flat No.101, Richoux,)
Bandra (W), Mumbai- 400 050.) .. Respondents

Mr.Snehal Shah a/w Ms. Dipti Panda a/w Ms.Megha Martins i/by
M/s.Purnanand & Co. for the petitioner.

Mr.Sharan Jagtiani a/w Mr.Chirag Kamdar a/w Mr.Omprakash Jha i/by
Mr.Himanshu V. Kode for respondent nos.1 to 4.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 27th February 2015
PRONOUNCED ON : 11th March 2015

JUDGMENT :-

. By this petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short "the said Arbitration Act), the petitioner has impugned the arbitral award dated 6th September 2011 rejecting the claim made by the petitioner. Some of the relevant facts for the purpose of deciding this petition are as under :

2. The petitioner was the original claimant in the arbitration petition whereas the respondents herein were the original respondents. On 19th January 2001, Mr.Surinder Singh Puri became a member of the petitioner-Bank. It was the case of the respondents that one M/s. Combine Group Company (CGC) awarded a contract to undertake Kuwait Sewerage Renovation Project -Phase VII. The said M/s. Combine Group Company had appointed one M/s. A1 Salhiya General Trading and Contracting Company (A1 Salhiya) as sub-contractors for supply and construction of micro tunneling works including supply of all materials, equipments, labour etc. The said M/s.A1 Salhiya General Trading and Contracting Company had further sub-contracted the aforesaid work to the respondent no.1.

3. On 9th September 2002, the respondent no.1 approached the petitioner for issuance of a counter guarantee in the sum of KD 1,20,245 favouring Export and Import Bank of India (for short 'the said EXIM Bank') on the strength of the counter guarantee. The EXIM Bank had agreed to furnish a performance guarantee in favour of M/s.A1 Salhiya General Trading and Contracting Company with whom the respondent no.1 had transaction.

4. On 21st September 2002, the respondent no.1 gave an undertaking to the petitioner to repatriate the required percentage of the contract value of the project export norms applicable which included ECGC premium, bank charges and at least 15% on the wage component. The respondent no.1 gave further undertaking to arrange mobilization advance of around 15% of the contract value and to arrange payment for procurement of the raw materials etc.

5. On 25th September 2002, the petitioner addressed a letter to the respondent no.1 thereby sanctioning the proposal of respondent no.1 for issuance of performance guarantee through the EXIM Bank on the terms and conditions mentioned therein. The guaranteed amount under the said sanctioned letter was of Kuwait Dinar (KWD) 1,20,425 which was equivalent to Rs.2,07,13,100/-, being 10% of the contract value. The name of main Contractor mentioned in the said sanctioned letter was Combined Group Co. for Trading & Construction W.L.L., Kuwait and name of the Sub-Contractor was mentioned therein as M/s. A1-Salhiya Combined General Trading Co. W.L.L., Kuwait. In clause 10 of the said sanctioned letter, it provided that the said counter guarantee executed by respondent no.1 to the petitioner was an unconditional guarantee payable by the respondent no.1 to the petitioner without demur or protest on demand by the petitioner. It also provided that in case of invocation of guarantee by the EXIM Bank, it shall be liable to make payment to EXIM Bank without demur or protest on demand by the said EXIM Bank.

6. By letter dated 27th September 2002 addressed to the EXIM Bank, the petitioner enclosed the DPX 2 and PEX 2 forms duly executed for issuance of the performance guarantee as requested by the respondent

no.1. The petitioner informed that a draft copy of the counter guarantee was already provided to the EXIM Bank by the petitioner. The petitioner informed that the respondent no.1 was experienced and the petitioner's experience with them was satisfactory. The petitioner recommended issuance of performance foreign guarantee. On 27th September 2002, M/s.A1 Salhiya Combined General Trading Co. W.L.L. addressed a letter to the respondent no.1 thereby issuing an addendum for the contract under reference mentioned therein and suggested that the said addendum shall form an integral part of the contract agreement that would be entered into by and between M/s. A1 Salhiya Combined General Trading Co. and the respondent no.1.

7. On 9th October 2002, the respondent no.1 addressed a letter to the petitioner thereby rendering an undertaking unconditionally and irrevocably guarantee to the petitioner that if in the sole and unfettered opinion of the overseas contractor, overseas Bank or EXIM Bank, the respondent no.1 had failed to perform its obligations regarding work in question awarded by the Sub-Contractor I to Sub-Contractor II and/or any amendment or modification thereof, the respondent no.1 shall upon demand of beneficiary, forthwith pay to the petitioner in Rupees equivalent to Kuwait Dinars at the prevailing exchange rate, without demur or disputing the amount stated therein, in case the bank guarantee was invoked. On 9th October 2002, the respondent no.1 had kept in Fixed Deposit an amount of Rs.27,32,694/- at Koparkhairane Branch of the petitioner.

8. On 10th October 2002, the EXIM Bank issued a performance guarantee to M/s.A1 Salhiya through the said NBK. On 10th October

2002, the petitioner issued a counter guarantee to the EXIM Bank payable in Indian Rupees equivalent to the amount of KWD 1,20,425 against the guarantee to be issued in favour of NBK on behalf of the respondent no.1.

9. By a letter dated 14th October 2002 addressed to the EXIM Bank Ltd., the petitioner forwarded a counter guarantee along with foreign guarantee to be issued by the EXIM Bank to the National Bank of Kuwait (NBK) on behalf of the respondent no.1.

10. It is the case of the respondent no.1 that by letter dated 4th December 2002, the Combined Group Co. for Trading and Contracting W.L.L. (CGC) informed the respondent no.1 that the performance guarantee furnished by it was unacceptable as the same was a conditional guarantee. The respondent no.1 was informed that it had to give to the said CGC an unconditional guarantee as per the terms of the Letter of Intent. The respondent no.1 was caused to make necessary amendments to the performance guarantee and to submit the same in order to complete their contractual obligations. In the said letter, CGC suggested two amendments to the performance guarantee. One of the amendments was regarding the subject and the second amendment was regarding deletion of the words stating that the applicant has defaulted in performance of the contract and.

11. On 9th December 2002, the Export Credit Guarantee Corporation of India Ltd. (ECGC) issued a policy in favour of the petitioner for the period from 16th October 2002 to 31st January 2004.

The insured amount under the said guarantee was in the sum of Rs.1,80,00,000/- (One Crore Eighty Lacs only).

12. By letter dated 8th January 2003 addressed to the EXIM Bank, the respondent no.1 forwarded a copy of the Sub Contract Agreement signed between the respondent no.1 and the said M/s.CGC. The EXIM Bank was informed that the bank guarantee submitted by the respondent no.1 was unacceptable to the said M/s. CGC as the guarantee submitted by the respondent no.1 was a conditional guarantee while the Letter of Intent specifically mentioned as unconditional guarantee. By the said letter, the respondent no.1 informed the EXIM Bank that as a result thereof, there was a delay in signing the Sub Contract Agreement, running account bills raised by the respondent no.1 for the work done were not paid and mobilization advance guarantee would not be paid till the guarantee was made unconditional. The respondent no.1 informed that they had succeeded in securing further contract /commitments from M/s.Mohammed Abdul Moshin A1-Kharafi & Sons for Trading & Contracting W.L.L.The respondent no.1 requested that the EXIM Bank shall amend the said bank guarantee to that effect.

13. By a letter dated 14th January 2003, the respondent no.1 sent reminder to the EXIM Bank for early issuance of amended guarantee.

14. By a letter dated 5th October 2003, the respondent no.1 informed that based on Article 4 of the General Conditions of the Contract signed between them, the said CGC shall terminate the contract one week after the date of the said notice. In the said notice, it was alleged that there was a continuous delay in performing the works

assigned to the respondent no.1 on account of the respondent no.1. The respondent no.1 had only completed the works equal to 17.5% of the total works. Therefore, it caused delay and confusion of the works of the project, despite their continuous assistance and warnings through several previous notifications but all their efforts were useless.

15. On 9th October 2003, the said NBK invoked the counter guarantee of the EXIM Bank and called upon the EXIM Bank to pay KWD 1,20,425. On 10th October 2003, the respondent no.1 addressed a letter to the EXIM Bank forwarding a copy of the letter dated 5th October 2003 from CGC giving 7 days' notice of termination and alleged that a fraudulent action was initiated on the part of the said CGC which was in variance with the recent and ongoing discussions between the respondent no.1 and the said CGC for extension of time and revision of rates. The respondent no.1 informed that they had been given to understand that the CGC had lodged a claim with NBK for encashment of performance guarantee dated 28th November 2002 issued by the said NBK for which the EXIM Bank issued counter guarantee dated 18th October 2002 for KWD 1,20,425.

16. The respondent no.1 stated that in case the amount of guarantee was paid by the said NBK, they would treat it as collusion between CGC and the said NBK. The said NBK had already been informed by the respondent no.1 of the fraudulent action taken by CGC and a legal notice to that effect was being sent on 12th October 2003 to the said NBK. The EXIM Bank was further informed that the respondent no.1 was proceeding with taking of appropriate action in Kuwait Court against the claim lodged by the CGC. The legal

developments would be known within the next two working days. The respondent no.1 informed the EXIM Bank that they would keep the EXIM Bank informed of the developments. The respondent no.1 requested the EXIM Bank to take prudent steps to save the respondent no.1 from becoming victims of fraud and to take appropriate action in the matter. A copy of the said letter was also forwarded to the petitioner by the respondent no.1.

17. By another letter dated 10th October 2003 addressed to the EXIM Bank, the respondent no.1 forwarded copies of the letters dated 15th September 2003 and 22nd September 2003 from respondent no.1 to CGC, letters dated 7th August 2003 and 17th August 2003 from CGC, letter dated 24th July 2003 confirming that no contract existed between the respondent no.1 and the said CGC, letter dated 4th December 2002 from CGC stating that the conditional performance guarantee was not acceptable, letter dated 28th December 2002 regarding mobilization of equipment to carry out the work etc. for study and perusal of the EXIM Bank alleging the fraud and the illegal action on the part of the CGC in absence of a valid signed contract. Copies of the said letters also forwarded to the petitioner.

18. In response to the said letter dated 10th October 2003, the EXIM Bank informed the respondent no.1 that the said NBK had, in turn, called upon EXIM Bank under its counter guarantee issued on behalf of the respondent no.1 to pay KWD 1,20,425 to the said NBK. The said counter guarantee in favour of NBK had been issued by the EXIM Bank at the request of the respondent no.1 in the format provided

by the respondent no.1. It was an unconditional on demand guarantee and as such, EXIM Bank was bound to honour its commitment thereunder. The EXIM Bank mentioned that the said bank had invoked the counter guarantee of the banker of the respondent no.1 i.e. petitioner herein issued by it in favour of EXIM Bank on back-to-back terms. By the said letter, the EXIM Bank also invited attention to the Agreement of Indemnity dated 16th October 2003 executed by the respondent no.1 in favour of the EXIM Bank whereby the respondent no.1 had unconditionally and unequivocally agreed and confirmed that the EXIM Bank shall be at liberty to admit, compromise or pay any claim or demand made on it under the guarantee, without reference to the respondent no.1 and without being required to ascertain whether any amount claimed from the EXIM Bank under the guarantee was in fact due, and notwithstanding that, any direction to the contrary may be given by the respondent no.1 on the ground of any dispute between the respondent no.1 and the beneficiary of the guarantee. The EXIM Bank called upon the respondent no.1 to forthwith put the EXIM Bank in funds towards the liability under the Indemnity and to ensure that the Rupees equivalent to KWD 1,20,425 were remitted to EXIM Bank, failing which, the EXIM Bank would have no option but to remit the said amount to the said NBK in response to its demand, entirely at risks as to costs and consequences of the respondent no.1.

19. By letter dated 11th October 2003 addressed to the respondent no.1, the petitioner informed the respondent no.1 that the petitioner had received the letter dated 10th October 2003 from EXIM Bank invoking the counter guarantee of the EXIM Bank following

invocation of the NBK's guarantee by the beneficiary and claim from EXIM Bank for immediate payment of KWD 1,20,425. The petitioner informed the respondent no.1 that as per demand of the EXIM Bank, the petitioner was instructed to remit an amount of Rs.1,90,27,150/- before 10.30 a.m. on 13th October 2003. Hence, in order to remit the funds to EXIM Bank, the petitioner requested the respondent no.1 to make arrangement of funds by crediting the account of the petitioner with Koparkhairane Branch before 10.30 a.m. on 13th October 2003 to enable the EXIM Bank to honour its claim under its counter guarantee to NBK.

20. On 12th October 2003, the respondent no.1 informed the EXIM Bank that they had filed the petition against the said CGC in Kuwait and the said petition had been admitted on 12th October 2003 and would come up for hearing on 13th October 2003. The respondent no.1 requested the EXIM Bank not to release any payment to the NBK till the Court directives were received on 13th October 2003. The respondent no.1 agreed to communicate the Court directives to the EXIM Bank. In the said letter, it was also mentioned that the said NBK would be obliged to inform the EXIM Bank about the Court directives and requested the EXIM Bank to communicate the same to the petitioner. It is a matter of record that neither the respondent no.1 nor the said NBK informed the EXIM Bank or to the petitioner about the Court directives, if any, restraining the said NBK from recovering any amount under the said guarantee.

21. On 19th October 2003, the petitioner remitted an amount of Rs.1,90,27,150/- to the EXIM Bank. By letters dated 28th October

2003 and 21st November 2003 addressed to the EXIM Bank, the respondent no.1 alleged that inspite of its protestation, the said NBK had paid the bank guarantee funds to CGC for bank guarantee which was not acceptable to CGC by their own letter. The respondent no.1 alleged that a blatant fraud was played by the CGC on the NBK along with its old agent M/s.A1 Salhiya.

22. On 12th January 2004, the petitioner made a claim of Rs.1,90,27,150/- to the ECGC under the policy executed in favour of the petitioner by the said ECGC. On 12th August 2004, the ECGC made the payment of Rs.1,58,61,632/- to the petitioner along with covering letter. In the said letter, the ECGC requested the petitioner to expedite recovery steps including legal action against the respondent no.1-company and against its guarantors, if any, and any amount so recovered shall be shared with ECGC in the ratio of 9:1 as per clause 6 (b) of the guarantee cover. The petitioner was asked to send receipt of acknowledgment of the payment as per the specimen enclosed to the said letter.

23. Under Section 84 of the Multi-State Co-operative Societies Act, 2002, the learned arbitrator came to be appointed for the purpose of adjudicating the claims made by the petitioner. Pursuant to the directions issued by the learned arbitrator, the petitioner filed a statement of claim dated 20th July 2006 against the respondents to pay a sum of Rs.2,04,73,761.01 with future interest thereon @13.5% p.a. from 1st July 2006 upto the date of payment and for other reliefs. On 7th October 2006, the respondents filed a written statement raising various issues before the learned arbitrator resisting the claims made by the petitioner.

24. Before the learned arbitrator, a witness summons was issued to the ECGC on the application of the respondents. Pursuant to the said witness summons issued at the instance of the respondents, the authorised representative of the said ECGC filed an affidavit dated 5th January 2011 placing various facts on record. In the said affidavit, the ECGC placed on record that the claim of the petitioner was settled by the ECGC for Rs.1,58,61,632/- on 13th August 2004 as against the claim of Rs.1,90,27,150/-. It was deposed that the petitioner was required to take recovery measures against the defaulting opponent and to share the recoveries with ECGC under clause 6 (a) of the policy.

25. Before the learned arbitrator, both the parties led oral as well as documentary evidence. By an arbitral award dated 6th September 2011, the learned arbitrator rejected the claims made by the petitioner and directed the petitioner to credit the amount received from ECGC in the account of the respondents by giving effect on the date of receipt of payment from ECGC. This arbitral award has been impugned by the petitioner in this petition filed under Section 34 of the said Arbitration Act on various grounds.

26. Mr.Shah, learned counsel for the petitioner submits that the view of the learned arbitrator that the ECGC should have been joined as party-respondent to the dispute before the learned arbitrator and the said ECGC should have taken steps against the respondents if they were at fault is totally perverse and contrary to the provisions of the Arbitration and Conciliation Act, 1996. Learned counsel submits that since the said ECGC was not a party to the agreement entered into between the

petitioner and the respondents, the said ECGC could not be a party to the arbitration proceedings.

27. Learned counsel for the petitioner submits that the learned arbitrator could not have rendered any finding on the issue that there was no valid contract by and between the respondents and the said CGC without the same being an issue and without any evidence being led on the said point as also without the said parties being parties to the reference. The finding and conclusion of the learned arbitrator that the respondents were victims of an alleged fraud committed by the CGC and NBK was also without jurisdiction. No finding against the third party could have been rendered by the learned arbitrator in this petition between the petitioner and the respondents. The learned arbitrator could not have made any adjudication on the underlying contract between the respondents and the said CGC. The learned arbitrator has exceeded his jurisdiction by adjudicating upon the allegations made by the respondents against the third parties who were neither party to the agreement between the petitioner and the respondents nor were the party to the arbitration proceedings before the learned arbitrator. Similarly, no finding on fraud could have been rendered by the learned arbitrator against the third parties.

28. He submits that in any event, the petitioner was not concerned with the fraud alleged to have been committed by third parties against the respondents in so far as the subject matter of the dispute is concerned. No allegations of fraud whatsoever were admittedly pleaded by the respondents against the petitioner. Even if the findings rendered by the learned arbitrator against the third parties are correct, on that

ground, the claim of the petitioner could not have been rejected by the learned arbitrator.

29. Learned counsel for the petitioner submits that the conclusion of the learned arbitrator that the petitioner could not have released any amount under the guarantee issued by the petitioner in favour of EXIM Bank is also perverse since there was no injunction obtained by the respondents against release of any amount under the said guarantee by the petitioner or against the said EXIM Bank from recovering any amount under the said guarantee. He submits that the learned arbitrator ignored the fact that petitioner or the said EXIM Bank was not at all concerned with underlying transaction between the contracting parties and that the petitioner had given an unconditional guarantee in favour of the EXIM Bank and upon invocation of the bank guarantee made by the EXIM Bank, the petitioner was bound to honour the said guarantee.

30. Learned counsel submits that the finding of the learned arbitrator that the ECGC ought to have proceeded against the respondents directly or against the CGC and NBK for the alleged fraud committed by those third parties against the respondents is totally perverse. Neither the said ECGC nor the third parties were before the learned arbitrator nor third parties could be made parties in these arbitration proceedings as they being not the parties to the arbitration agreement. He submits that though the learned arbitrator held that subrogation is permitted under the law has come to the contradictory finding that the ECGC ought to have proceeded against the respondents and against the third parties. He further submits that the finding of the learned arbitrator that once the

petitioner had already received its dues from the ECGC, the petitioner was not entitled to proceed and recover the dues from the respondents is also perverse and contrary to the law of subrogation.

31. It is submitted that under the Policy obtained by the petitioner from ECGC under Export Performance Guarantee and more particularly clauses 6 (a) and 6 (b) thereof, upon payment by the said ECGC to the petitioner, the petitioner was under an obligation to take all steps which might be necessary or expedient or which the said ECGC may at any time required to effect recoveries whether from the Exporter or from any other person from whom such recoveries may be made by instituting legal or other proceedings and upon recovery by the petitioner who was insured by the ECGC, the amount recovered was liable to be divided between the petitioner and the said ECGC in the proportion of 1:3/1:9. The petitioner was liable to file arbitration proceedings against the respondents for recovery of its dues. The finding of the learned arbitrator is thus totally perverse and contradictory.

32. Learned counsel for the petitioner submits that the learned arbitrator has rendered the award in total ignorance of law relating to the bank guarantee. He submits that the bank guarantee is distinct and independent of the underlying contract, the performance of which it seeks to secure and that the petitioner was required to honour the guarantee according to its terms. Even if the respondents had alleged that a fraud had been committed by the CGC and/or NBK and had requested the petitioner not to release any amount, the petitioner having executed an unconditional counter guarantee in favour of the EXIM Bank and once such unconditional bank guarantee had been invoked by the

EXIM Bank, the petitioner was liable to release the amount under the said guarantee. Learned counsel submits that it is not in dispute that the EXIM Bank had also similarly released the amount under the said bank guarantee issued by the EXIM Bank in favour of the NBK.

33. Learned counsel submits that pursuant to the witness summons issued to the ECGC at the instance of the respondents, the ECGC had produced the relevant documents and had examined the witness who was cross-examined by the respondents and it was deposed that though the petitioner was paid certain amounts by the ECGC under the said Export Performance Guarantee, the petitioner was liable to take appropriate steps for recovery of the said amount from the respondents. The learned arbitrator has totally failed to consider these crucial documents and evidence led by the witness of the ECGC who had led evidence pursuant to the witness summons issued by the respondents.

34. Learned counsel for the petitioner placed reliance on the judgment of this Court in the ***Raigad Concrete Industries and Anr. Vs. ICICI Bank Ltd. and Ors.*** reported in ***2009 (4) Mh.L.J. 923*** and in particular paragraphs 3, 6, 9 and 11 to 17 in support of the aforesaid submissions which read thus :-

“3. The scope of this appeal is very limited. Mr. Godbole, the learned Counsel appearing on behalf of the appellant's, limited his challenge to the judgment of the trial court to two grounds. He submitted that the first respondent was not entitled to recover the amounts due to it in view of it having already recovered amounts under the DICGC scheme. He also challenged the rate of interest granted by the trial court contending that this Court ought to exercise its jurisdiction and reduce the rate of interest granted by the trial court. Mr. Godbole had initially challenged the admission of certain

documents on the ground that they were not duly stamped. He however gave up that contention in view of the fact that the documents had been admitted with the consent of the parties. In any event a challenge to the admissibility of documents on the ground that they were not duly stamped does not lie once the documents had been admitted in evidence in view of the provisions of the Bombay Stamp Act and the Indian Stamp Act.

6. *Mr. Godbole submitted that having recovered the said amount under the DICGC scheme the first respondent is now barred from recovering the same amount over again from the appellant's and the other respondents. He submitted that the contract between the first respondent and the DICGC is a contract of indemnity and to the extent that the first respondent is reimbursed by the Corporation the benefit to the extent thereof must be passed over to the appellant's since it is an admitted position that the premium had been debited to the loan accounts and had not been paid by the first respondent.*

9. *In a contract of indemnity the indemnity holder is not bound to sue the indemnifier. The indemnity holder may sue only the debtor or only the indemnifier or both. In law there is nothing that prevents an agreement or arrangement between an indemnity holder and the indemnifier as to the manner or circumstances in and the conditions on which the contract of indemnity may be enforced. In particular we do not find anything that prohibits arrangement whereby the indemnifier pays the amount due under the contract of indemnity subject to the condition or on an understanding between the indemnity holder and the indemnifier that the indemnity holder will continue to pursue its remedies against the debtor and in the event of it recovering the amounts from the debtor it would refund the same to the indemnity holder. This is precisely what has been done in the present case by the first respondent, the indemnity holder by having accepted the amounts from the indemnifier, the DICGC, and placed the same in a suspense account. The fact that the amounts had been placed in a suspense account establishes that the first respondent had not accepted the same in discharge of the liabilities of the debtor's namely the appellants and the other respondents leaving it to the DICGC to in turn recover the same from them.*

11. *Firstly in the event of the amounts placed in the suspense account being returned to the DICGC they would clearly fall within the ambit of Section 23A(1)(c) as they would constitute amounts received by the Corporation in respect of the indemnity given by it. That the amounts may not have been so received pursuant to any action on the part of the Corporation qua the debtors would make no difference. The section does not limit the ambit of the provision in that manner.*

12. *Secondly there is nothing in the Act that prohibits the Corporation from receiving the amounts lying in the suspense account or from any other source. Section 23A does not prohibit the Corporation from receiving amounts in any other manner or to the credit of any other of its accounts or generally. The appellants in any event cannot possibly be concerned with the same if in law the Corporation is entitled to a refund of the said amounts from the first respondent.*

13. *Further upon the amounts presently placed in the suspense account being returned to the Corporation they would obviously continue to remain with the Corporation in the same character in which they were prior to the payment thereof by the Corporation to the first respondent. This is for the reason that the payment by the Corporation to the first respondent was subject to the condition and in the circumstances we have referred to earlier. In the facts of this case the amounts would be merely returned to the Corporation which is free to credit the same back to the same account. Thus the character of the amounts would not undergo any change as the source thereof would be the original source. The return from the suspense account would not be a fresh induction of credit to the credit guarantee fund. Such refund would not constitute a fresh induction or investment or credit into the credit guarantee fund referred to in Section 23A.*

14. *The first respondent was and is therefore entitled to retain the amounts in a suspense account and to treat the same as payment under the contract of indemnity only in the event of it ultimately being unable to recover the amounts from the debtor's.*

15. Mr. Patwardhan reiterated that in the event of the first respondent recovering the amounts or any part thereof from the appellant's or the other respondents it would refund the same to the DICGC. The statement is accepted. There is therefore no question of the first respondent having unjustly enriched itself. It has not. It is not necessary therefore for us to consider the judgments cited by Mr. Godbole in support of the submission that the first respondent is not entitled as a matter of law to enrich itself.

16. Mr. Godbole submitted that the consideration for the indemnity having been paid by the first appellant it was entitled to the benefits of the amounts paid by the DICGC to the first respondent.

17. We are with respect, unable to understand this submission. There is nothing unusual in a bank/lender insisting on the customer/debtor paying the commission/consideration for a guarantee or indemnity. That would not in any manner whatever reflect upon the rights of the creditor qua the guarantor or the debtor. It is difficult to understand how the payment of such commission or considered by the debtor entitles the debtor to the amounts paid by the guarantor or the indemnifier to the creditor. The two are totally unrelated and unconnected.”

35. In support of the submission that in case of unconditional bank guarantee, the petitioner was liable to honour the terms of guarantee without any demur and free from interference from the Court, learned counsel placed reliance on the judgment of the Division Bench of this Court in the case of **Kisan Saharkari Chini Mills Limited Vs. Richardson and Cruddas (1972) Ltd. and Anr.**, reported in **AIR 1997 Bombay 35**. The relevant part of paragraph 17 of the said judgment of this Court in the case of *Kisan Saharkari Chini Mills Limited (supra)* reads thus:-

“17. The principles that emerge from the above decisions of the Supreme Court can be summed up thus :

(i) That a bank guarantee is ordinarily a contract quite distinct and independent of the underlying contract, the performance of which it seeks to secure and the bank is required to honour the guarantee according to its terms. The rule is well established that a bank issuing a guarantee is not concerned with the underlying contract between the parties to the contract. The duty of the bank under a performance guarantee is created by the document of guarantee itself. Once that document is in order, the bank giving the guarantee must honour the same and to make payment.

(ii) The commitments of the banks under a bank guarantee must be honoured free from interference by the Courts. Otherwise trust in commerce, internal and international, would be irreparably damaged.

(iii) It is only in exceptional cases, that is to say in case of irretrievable injustice or fraud, that the Court should interfere.

(iv) The nature of fraud is fraud of an egregious nature as to vitiate the entire underlying transaction. It is fraud of the beneficiary, not the fraud of somebody else. There must be a specific plea of fraud. The party alleging fraud must necessarily plead and produce all necessary evidence in proof of the fraud in execution of the contract of guarantee. Moreover, fraud like any other charge of a criminal proceeding must be established beyond reasonable doubt. A finding as to fraud cannot be based on suspicion and conjecture, The material and evidence have to show it.

(v)

(vi)”

36. Mr.Jagtiani, learned counsel for the respondents invited my attention to some of the correspondence exchanged between the respondents, CGC, EXIM Bank and also the petitioner and would submit that the petitioner as well as the EXIM Bank were put to the notice that the bank guarantee and the counter guarantee given by the petitioner and the EXIM Bank were not acceptable as the same were conditional

guarantees. He submits that the said CGC had insisted for amendment of the bank guarantee by making the said bank guarantee as unconditional bank guarantee which demand of the said CGC was brought to the notice of the petitioner from time to time with a request to amend the said bank guarantee.

37. Learned counsel submits that the petitioner was also informed about the fraud played by the respondents on the said CGC and the said NBK and had requested not to release any amount under the said bank guarantee. The petitioner neither issued any amendment as desired by the said CGC nor complied with the instructions issued by the respondents and released the amount under the said bank guarantee in favour of the EXIM Bank. Learned counsel submits that since the petitioner ignored the instructions issued by the respondents and released the amount under the said guarantee to the EXIM Bank, the learned arbitrator has rightly held that the petitioner was not entitled to recover any amount from the respondents under the said guarantee.

38. Learned counsel submits that since the bank guarantee was not amended by the petitioner as desired by the CGC though repeatedly demanded by the respondents, the said CGC ultimately terminated the contract signed between the respondent no.1 and the CGC by letter dated 5th October 2003. The said CGC also did not release various amounts due and payable by the said CGC to the respondent no.1 in view of the termination of the contract. The petitioner was solely responsible for the same. Learned counsel submits that the petitioner should not have made any payment when the CGC had not accepted the

unamended bank guarantee and had not paid any mobilization advance to the respondent no.1. Learned counsel submits that the payment released by the petitioner ought to have been just and fair to make the petitioner entitled to recover the said amount from the respondents which, in this case was not so. The respondents had suffered because of the petitioner not having issued amended counter guarantee. The CGC did not accept the unamended guarantee and terminated the contract.

39. Learned counsel placed reliance on the judgment of the Madhya Pradesh High Court in the case of ***Tarachand Lakhmichand Chuhan Vs. Gopal Lachiramkumar***, reported in ***AIR 1959 Madhya Pradesh 297*** and in particular paragraphs 3 and 4 and would submit that since the petitioner had not released the amount in favour of the EXIM Bank rightfully in view of the respondents having requested to the petitioner not to release any amount to the EXIM Bank, the petitioner could not have filed any proceedings for recovery of any amount under the bank guarantee issued by the petitioner. Paragraphs 3 and 4 of the said judgment of the Madhya Pradesh High Court in the case of ***Tarachand Lakhmichand Chuhan (supra)*** read thus :-

“3. It is common ground that on 28-8-1956 when the plaintiff was said to have made a payment of Rs. 50/- to Nandibai, the claim of Nandibai against both Gopal and Tarachand was barred by time. Mr. Vohra, learned counsel for the applicant, however, argued that the payment made by the plaintiff to Nandibai could not be said to be one not rightfully made under the contract of suretyship merely because Nandibai's remedy against the principal debtor and the plaintiff-surety had become barred by limitation. Learned counsel said that though the remedy by action was barred by limitation, there was no extinction of the debt and that, therefore, the surety was justified in making the payment that he

did to Nandibai. I am unable to accede to the contention advanced by the learned counsel for the petitioner. The matter is governed entirely by Section 145 of the Contract Act which says:

"In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully."

4. *It will be seen from this provision that the implied promise by the principal debtor to indemnify the surety arises only when the surety has rightfully paid any sum to the creditor under the guarantee. The real question for determination, therefore, is whether the sum paid by the plaintiff to Nandibai was rightfully paid under the contract of suretyship. It is no doubt true that the meaning of the expression "rightfully paid" as used in Section 145 of the Act is somewhat obscure. As has been remarked in Mulla's Contract Act the words "rightfully" and "wrongfully" in the second clause of Section 145 of the Contract Act do not seem felicitous. I shall not attempt to define the expression "rightfully paid".*

But to my mind, according to the dictionary meaning of the word "rightful", a payment in order to be a rightful payment must be one in conformity with what is right or just or fair or equitable. The question whether the payment made by the surety was or was not rightful has, therefore, to be adjudged in the context of the circumstances, in which it was made and not by the solitary circumstance whether on the date of payment the claim against the debtor or against both the debtor and the surety was barred by time. No doubt if the claim of the creditor is barred by time against both the surety and the debtor, then prima facie the payment made by the surety to the creditor would not be right or just.

The argument of the learned counsel that if the creditor omits to sue the principal debtor within the period of limitation the surety is not discharged as barring of the remedy by action has not the effect of complete extinction of the debt and that, therefore, likewise the barring of remedy against the surety does not relieve the debtor of his obligation to indemnify the surety is fallacious. It fails to take note of the fact if the remedy against

the principal debtor is barred by time, but is alive against the surety and the creditor reserves his right against the surety, there is no complete extinction of the debt and that where the remedy of the creditor is barred both against the debtor and the surety there is an absolute release of the debt.

That being so, the solitary fact of payment of Rs. 50/- by the plaintiff to Naudibai after the period of limitation against both the debtor and the surety had expired would, in my opinion, be sufficient to hold prima facie that the payment made by the plaintiff was not a rightful payment. The burden of proving that this payment even though it was after the expiry of the period of limitation was yet rightful was on the plaintiff.

But he led no evidence whatsoever to show the circumstances in which the payment was made. The view that a surety cannot recover from the debtor the sum which he has paid to the creditor after the period of limitation as against him as well as the principal debtor finds support in the statement in Chitty on Contracts (Volume-I) at pages 475 and 476 where it has been stated that a surety may recover against the principal all he has paid or any damages he has incurred under, his guarantee, as often as he pays such moneys or incurs such damages, unless the debt paid was statute barred.

The observations of the Bombay High Court in Raghavendra v. Mahipat ILR 49 Bom 202: AIR 1925 Bom 244 also tend to support this view. In that case the surety had kept the liability alive by bona fide payments of interest within time to the creditor and it was because of these payments of interest within time that the Bombay High Court held that the payment made by the surety to the creditor was not wrongful within the meaning of Section 145 of the Contract Act. In Jawala Singh v. Mt. Raj Kaur, AIR 1930 Lah 812 a payment was made by the surety to the creditor after the creditor had instituted a suit against the principal debtor. The payment was made by the surety with the object of assisting the creditor in the prosecution of the suit.

The Lahore High Court held that the payment that the surety made was a wrongful payment within the meaning of Section 145, Contract Act, This case only shows that the question whether the payment made by a surety is rightful or

wrongful within the meaning of Section 145 of the Contract Act does not depend on the fact whether the creditor's claim against the debtor or the surety is within time, but on the surrounding circumstances in which the payment was made. In that case, it was held that a payment made by surety to a creditor before the institution of the suit could be held to be a rightful payment but not one made after the institution of the suit against the principal debtor for the purpose of assisting the creditor in the successful termination of the suit.”

40. Learned counsel placed reliance on the judgment of the Delhi High Court in the case of ***Continental Construction Ltd. and Anr. Vs. Satluj Jal Vidyut Nigam Ltd.***, reported in ***2006 (1) Arb.LR 321 (Delhi)*** and in particular paragraph 15 and would submit that since the petitioner had deliberately not issued amended guarantee in favour of the EXIM Bank as demanded by the said CGC, the petitioner could not have made any payment under the guarantee issued by the petitioner. Paragraph 15 of the said judgment of the Delhi High Court in the case of ***Continental Construction Ltd. and Anr.(supra)*** reads thus :-

“15. Our attention was invited to a number of decisions on this issue/ among them, to Larsen & Toubro Ltd. v. Maharashtra SEB and Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd. as also to National Thermal Power Corporation Ltd. v. Flowmore (P) Ltd. The latest decision is in the case of State of Maharashtra v. National Construction Co. where this Court has summed up the position by stating (SCC p.741, para 13) :

“The rule is well established that a bank issuing a guarantee is not concerned with the underlying contract between the parties to the contract. The duty of the bank under a performance guarantee is created by the document itself. Once the documents are in order the bank giving the guarantee must honour the same and make payment ordinarily unless there is an allegation of fraud or the like. The courts will not interfere directly or indirectly to withhold payment, otherwise trust in

commerce internal and international would be irreparably damaged. But that does not mean that the parties to the underlying contract cannot settle the disputes with respect to allegations of breach by resorting to litigation or arbitration as stipulated in the contract. The remedy arising ex contractu is not barred and the cause of action for the same is independent of enforcement of the guarantee.”

The other recent decision is in Hindustan Steelworks Construction Ltd. v. Tarapore & Co. (1996) 5 SCC 34.”

41. Learned counsel placed reliance on the judgment of the Calcutta High Court in the case of ***M/s. Banerjee & Banerjee Vs. Hindusthan Steel Works Construction Ltd and Ors.***, reported in ***AIR 1986 Calcutta 374*** and in particular paragraph 11 and would submit that the petitioner ought not to have made payment to the EXIM Bank in view of the petitioner not having issued the amended counter bank guarantee. Paragraph 11 of the said judgment of the Calcutta High Court in the case of *M/s. Banerjee & Banerjee (supra)* reads thus :

“11. The counsel also relies on : (Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.) where Lord Denning M. R. held at page 983:-

"All these leads to the conclusion that the performance guarantee stands on a similar footing to a Letter of Credit. A Bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer, nor with the question whether the supplier is in default or not. The Bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the Bank has notice."

42. Learned counsel placed reliance on the judgment of the Supreme Court in the case of ***Hindustan Construction Co. Ltd. Vs. State of Bihar***, reported in ***(1999) 8 Supreme Court Cases 436*** and in

particular paragraph 21 and would submit that since the CGC had not accepted the unamended bank guarantee as the bank guarantee issued by the petitioner was a conditional bank guarantee and thus those conditions not having been satisfied, the petitioner could not have released any amount under the said bank guarantee and consequently, could not have filed any proceedings for recovery of any amount under the said bank guarantee against the respondents. Paragraph 21 of the said judgment of the Supreme Court in the case of *Hindustan Construction Co. Ltd.(supra)* reads thus :

“21. As pointed out above, Bank Guarantee constitutes a separate, distinct and independent contract. This contract is between the Bank and the defendants. It is independent of the main contract between the HCCL and the defendants. Since the Bank Guarantee was furnished to the Chief Engineer and there is no definition of "Chief Engineer" in the Bank Guarantee nor is it provided therein that "Chief Engineer" would also include Executive Engineer, the Bank Guarantee could be invoked by none except the Chief Engineer. The invocation was thus wholly wrong and the Bank was under no obligation to pay the amount covered by the "Performance Guarantee" to the Executive Engineer.”

43. Learned counsel for the respondents submits that the learned arbitrator has rendered a finding of fact which is not perverse and thus no interference with such finding of fact is warranted and/or permissible under Section 34 of the Arbitration and Conciliation Act, 1996.

44. In the rejoinder, Mr. Shah, learned counsel for the petitioner submits that the bank guarantee issued by the petitioner was allowed to be kept alive by the respondents. The said CGC had not terminated the contract entered into with the respondents on the ground that the

petitioner had not issued any amended bank guarantee as suggested by the said CGC but had terminated on various grounds attributable to the respondents. He submits that though the respondents had adopted the proceedings against the said CGC, the respondents were not successful in recovering any amount from the said CGC. The respondents did not file any proceedings against the petitioner or against the EXIM Bank for injunction restraining the petitioner or the EXIM Bank from making any demand under the respective bank guarantees or did not apply for cancellation of the bank guarantees. The respondents had only addressed a letter on or about 12th October 2003 to the EXIM Bank informing that the respondents had filed a petition against the CGC in Kuwait and shall not release any payment to the NBK till the Court directives were received. No such letter was addressed to the petitioner. He submits that in any event, the respondents could not bring any injunction against the petitioner or the EXIM Bank from releasing any payment. The respondents also did not inform the petitioner about outcome of the said proceedings filed by the respondents against the said CGC.

45. Learned counsel for the petitioner invited my attention to the letter dated 23rd May 2005 from the respondents to the petitioner informing that the respondents would pay a sum of Rs.4,87,335/- being the balance amount to be paid by the respondents to the petitioner to square of the entire transaction in installment of Rs.1 lac every month for five months. Learned counsel submits that though the petitioner did not accept the said proposal of the respondents, the said letter which was addressed by the respondents without prejudice to their rights and contentions itself, would indicate that the respondents never disputed

their liability under the said guarantee issued by the petitioner in favour of the EXIM Bank. The respondents themselves had offered the said sum after deducting the amount recovered from the ECGC. The learned arbitrator did not accept the contention of the respondents that the said amount of Rs.4,87,335/- to be paid by the respondents to the petitioner in the letter dated 23rd May 2005 was in full and final settlement of the claims of the petitioner.

REASONS AND CONCLUSIONS :-

46. Learned arbitrator in the impugned award has come to the conclusion that M/s. Combined Group Company i.e. client of the respondents had not accepted the conditional guarantee and a request was made to make necessary amendments to the said guarantee. He came to the conclusion that the contents of the said letter were not challenged by either side. The learned arbitrator came to the conclusion that since amended performance guarantee was not issued, there was no valid contract entered into between the respondents and M/s. Combined Group Company i.e. CGC and therefore, no conclusion could be drawn that the guarantee was issued for valid contract between the respondents and the said CGC. In my view, the finding rendered by the learned arbitrator that there was no valid contract between the respondents and the said CGC is patently illegal and without jurisdiction. Admittedly, the said CGC was neither a party to the arbitration agreement between the petitioner and the respondents nor a party to the arbitration proceedings before the learned arbitrator. No such finding could be rendered against such party in these proceedings. The bank guarantee issued by the petitioner was an independent, separate and distinct contract. The

petitioner was admittedly not a party to the agreement entered into between the respondents and the said CGC.

47. Whether the contract entered into between the respondents and the CGC was a valid contract or not could neither be adjudicated upon by the learned arbitrator in these proceedings nor any such pleadings and/or issue was raised in these proceedings. Be that as it may, no such conclusion could be drawn by the learned arbitrator against the CGC since the said party was not a party to the arbitration proceedings. The award shows patent illegality on the face of the award.

48. In my view, the learned arbitrator could not have rendered any finding that the guarantee issued by the petitioner was not for a valid contract between the respondents and the CGC. Learned arbitrator could not have made any adjudication on the underlying contract while dealing with the counter guarantee issued by the petitioner in favour of the EXIM Bank which was a separate, distinct and independent contract. In my view, no such finding could be rendered also in view of the fact that the EXIM Bank was not a party to the arbitration proceedings nor to the arbitration agreement between the petitioner and the respondents under the said counter guarantee issued by the petitioner.

49. Supreme Court in the case of *Hindustan Construction Co. Ltd. (supra)* has held that bank guarantee constitutes a separate, distinct and independent contract. It is independent of the main contract. Similarly, the Delhi High Court in the case of *Continental Construction Ltd. (supra)* after adverting to the judgment of the Supreme Court in the case of *Larsen & Toubro Ltd. Vs. Maharashtra State Electricity Board*

and Ors., reported in (1995) 6 SCC 68 and several other judgments has held that a bank issuing a guarantee is not concerned with the underlying contract between the parties to the contract. A duty of the bank under the performance guarantee is created by the document itself. Once the documents are in order the bank giving the guarantee must honour the same and make payment ordinarily unless there is an allegation of fraud or the like. Calcutta High Court in the case of *M/s. Banerjee & Banerjee (supra)* has adverted to the judgment in the case of *Edward Owen Engineering Ltd. Vs. Barclays Bank International Ltd.*, reported in (1977) 3 WLR 764 in which, a quotation from the judgment rendered by Lord Denning M. R. on the issue of bank guarantee has been quoted with approval. It is stated in the judgment that a bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer, nor with the question whether the supplier is in default or not. The Bank must pay according to its guarantee, on demand, if so stipulated without proof or conditions. The only exception is, when there is a clear fraud of which the Bank has notice.

50. In my view, the learned arbitrator has mixed up the contract between the respondents and the said CGC with the counter guarantee issued by the petitioner in favour of the EXIM Bank which were two separate, distinct and independent contracts. The petitioner was not concerned in any manner whatsoever with the contract between the respondents and the said CGC or with NBK. The finding of the learned arbitrator is contrary to the principles laid down by the Supreme Court in the case of *Hindustan Construction Co. Ltd. (supra)*. The judgments of the Delhi High Court and the Calcutta High Court relied

upon by the learned counsel for the respondents do not assist the case of the respondents but on the contrary assist the case of the petitioner. I am in agreement with the views expressed by the Delhi High Court and the Calcutta High Court in the judgments referred to aforesaid. I am respectfully bound by the judgment of the Supreme Court in the case of *Hindustan Construction Co. Ltd. (supra)*.

51. In so far as the letter dated 12th October 2003 addressed by the respondents to the EXIM Bank for not paying any amount of the bank guarantee to the NBK is concerned, the fact remains that the respondents could not obtain any injunction against the EXIM Bank from releasing any amount under the said guarantee issued by the EXIM Bank in favour of the NBK. The respondents had requested only to the EXIM Bank not to release any amount to the NBK under the said bank guarantee in view of the proceedings filed by the respondents against the NBK. In any event, the said request was made to the EXIM Bank only upto 13th October 2003. The respondents did not produce any injunction order against the said NBK from recovering any amount from EXIM Bank or against the petitioner from releasing any amount to the NBK. The respondents did not file any proceedings against the petitioner from restraining the petitioner from releasing any amount under the counter guarantee issued by the petitioner. The respondents did not inform about the outcome of the proceedings filed by the respondents against the NBK in Kuwait Court.

52. A perusal of the impugned award indicates that the learned arbitrator has rendered a finding that the contention of the respondents that the guarantee was executed for non existing contract and that the

fraud is committed was proper and reasonable. Though on one hand the learned arbitrator has rendered a finding that as per banking practice, the EXIM Bank was bound to pay guarantee amount as soon as guarantee was invoked and the petitioner was also liable to pay counter guarantee amount similarly without any protest, the learned arbitrator, on the other hand, held that since the guarantee was not invoked correctly and the respondents were not at all at fault, the petitioner could not have released the amount. This finding of the learned arbitrator is totally perverse and shows patent illegality on the face of the award. The award also shows inconsistencies and non application of mind on the part of the learned arbitrator.

53. A perusal of the award indicates that the learned arbitrator has held that insurance premium was paid by the respondents and no conclusion could be drawn that insurance cover was for benefit of the petitioner herein. He has further held that the guarantee was wrongly invoked, the amount was wrongly paid and thus the respondents were not liable to make good of this amount to the said ECGC. The learned arbitrator has placed reliance on the opinion of a former Judge of the Delhi High Court while holding that in given circumstances as per clause 6 (a) of the agreement between the ECGC and the petitioner, the respondents were not liable.

54. In my view, merely because the petitioner had debited the insurance premium paid to the ECGC in the account of the respondents, the benefit under the said policy obtained by the petitioner from ECGC did not give rise to a transfer in favour of the respondents. The award shows total perversity and illegality on the face of the award. A legal

opinion followed by the learned arbitrator for the purpose of coming to such conclusion was not binding on the learned arbitrator and no reference to it could have been made. The learned arbitrator also followed an opinion of the former Judge of the Supreme Court who had opined that the payment could be refused under the bank guarantee in case of fraud committed by the beneficiaries. In my view, learned arbitrator could not be followed such opinion in the impugned award.

55. The finding of the learned arbitrator that clause 6 (a) of the agreement between the petitioner and the ECGC had no application is totally perverse. No such finding could have been rendered by the learned arbitrator in view of the fact that the ECGC was not a party to the arbitration proceedings. In my view, in so far as the finding of the learned arbitrator that in case the ECGC finds that the respondents had failed to perform contract and guarantee amount was required to be paid, then the ECGC had to proceed against the respondents directly but not by giving a pistol in the hands of the petitioner is concerned, the said finding is totally absurd and contrary to the law of subrogation. The respondents were not the beneficiaries under the said agreement between the petitioner and the ECGC. The said policy was obtained by the petitioner and not by the respondents. The petitioner was under an obligation to take legal steps for recovery of the amount which the petitioner was required to pay to the EXIM Bank on behalf of the respondents. The ECGC could not have filed any proceedings against the respondents directly. Be that as it may, no such finding could be rendered against the ECGC in absence of ECGC in the arbitration proceedings which even otherwise, could not have been brought on record being not a party to the arbitration agreement.

56. In so far as the finding of the learned arbitrator that the petitioner had already received its dues and was not entitled to any further amount or the ECGC was not entitled to any benefit of clause 6 (a) of the agreement between the petitioner and the ECGC is concerned, the said finding is totally perverse and without jurisdiction. Learned arbitrator could not have given any such direction or finding against the said ECGC in these proceedings. The finding of the learned arbitrator that the ECGC should have proceeded with against the NBK and CGC is also perverse and without jurisdiction.

57. The direction of the learned arbitrator that the petitioner shall credit the amount received from ECGC in the account of the respondents is also totally perverse and without application of mind. The respondents were not beneficiaries under the said agreement entered into between the petitioner and the said ECGC. The petitioner had already released the amount in favour of the EXIM Bank under the guarantee issued by the petitioner. The petitioner had accordingly recovered the said amount under the said guarantee between the petitioner and the said ECGC. In my view, the direction of the learned arbitrator to direct the petitioner to credit the amount received from the ECGC in the account of the respondents is totally illegal, shows patent illegality and without jurisdiction.

58. There was neither any such claim made by the respondents nor any such relief could be granted by the learned arbitrator in favour of the respondents. A perusal of the record indicates that the respondents did not file any proceedings against the petitioner for injunction

restraining the petitioner from releasing any payment under the said bank guarantee. The respondents also did not file any proceedings for cancellation of the counter guarantee issued by the petitioner on the ground of the petitioner not complying with the directions issued by the respondents for amending the bank guarantee. The respondents did not file any proceedings against the EXIM Bank for injunction restraining EXIM Bank from releasing any payment to the NBK. The proceedings filed by the respondents against the said CGC were not successful. A perusal of the termination letter issued by the CGC indicates that the contract was terminated due to various other reasons attributable to the respondents and not on the ground that the petitioner had not issued any amended bank guarantee as suggested by the said CGC.

59. Be that as it may, the learned counsel for the respondents could not dispute that the said CGC which had once made a suggestion for amendment of the counter guarantee had encashed the said bank guarantee issued by the EXIM Bank. The respondents did not take any action for eight months for cancellation of the counter guarantee issued by the petitioner or for injunction. On the contrary, the letter of the respondents indicates that the respondents, though once had requested to issue unconditional counter guarantee, had given up the said request and had requested the petitioner to issue counter guarantee with change in the name of the party expeditiously. In my view, the award is patently illegal and contrary to law and deserves to be set aside. In my view, since the payment made by the petitioner to the EXIM Bank under unconditional counter guarantee was in compliance with the counter guarantee and was just, fair and rightful payment, the judgment of the Madhya Pradesh

High Court in the case of *Tarachand Lakhmichand Chuhan (supra)* does not assist the respondents.

51. I, therefore, pass the following order :-

- a) Arbitration Petition is made absolute in terms of prayer clause (a).
- b) The impugned award dated 6th September 2011 passed by the learned arbitrator is set aside.
- c) There shall be no order as to costs.

R.D. DHANUKA, J.