

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA
PRADESH

* * * * *

Writ Petition No. 24437 of 2017

Between

M/s Lanco Infratech Limited and another

..Petitioners

And

Power Finance Corporation, New Delhi and another

.. Respondents.

JUDGMENT PRONOUNCED ON : 07.08.2017

THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO :

1. Whether Reporters of Local newspapers : YES
may be allowed to see the Judgments?
2. Whether the copies of judgment may be : YES
Marked to Law Reporters/Journals?
3. Whether Their Ladyship/Lordship wish to : YES
see the fair copy of the Judgment?

* THE HON'BLE SRI JUSTICE A. RAMALINGESWARA RAO

+ Writ Petition No. 24437 of 2017

% 07.08.2017

M/s Lanco Infratech Limited and another

..Petitioners

Vs.

\$ Power Finance Corporation, New Delhi and another

... Respondents

!Counsel for the Petitioners : Senior Counsel Sri D. Prakash
Reddy appearing for
Sri P. Vikram

^ Counsel for Respondents : Senior Counsel Sri A.
Sudershan Reddy appearing for
B. Narasimha Sarma

< Gist :

> Head Note :

? Cases referred:

1. AIR 1998 Delhi 176
2. (1999) 8 SCC 436
3. MANU/DE/1684/2009
4. (2016) 11 SCC 720
5. (2015) 7 SCC 728
6. (2016) 10 SCC 46
7. (1991) 1 SCC 212 : 1991 SCC (L&S) 742
8. (2007) 8 SCC 110

HON'BLE SRI JUSTICE A. RAMALINGESWARA RAO

Writ Petition No.24437 of 2017

Order:

This writ petition is filed challenging the communication dated 20.07.2017 issued by the 1st respondent, Power Finance Corporation to the 2nd respondent, IDBI Bank Limited.

The 1st petitioner is a Company incorporated under the provisions of the Companies Act, 1956 and is engaged in the business of infrastructure and construction. The 2nd petitioner is a subsidiary of the first petitioner Company and it was incorporated as a Special Purpose Vehicle for setting up of a Thermal Power Project comprising four units namely Unit-I (300 MW), Unit-II (300 MW), Unit-III (660 MW) and Unit-IV (660 MW) in the State of Chhattisgarh. The 1st respondent is a financial institution, a Central Government Public Sector undertaking and is engaged in the business of financing power projects. It makes available loan facilities to the entities setting up independent power projects. According to the petitioners, it is a State under Article 12 of the Constitution of India. The 2nd respondent is a Public Sector Bank and is a State within the meaning of Article 12 of the Constitution of India. The 2nd respondent issued a bank guarantee in favour of the 1st respondent on behalf of the 2nd Petitioner, which is the subject matter of the present Writ Petition.

The 2nd petitioner availed loan facilities from a Consortium of banks and financial institutions with the 1st respondent as a lead member of the Consortium for setting up its 300 MW Thermal Power Station (Unit-I). The 2nd petitioner executed financing documents with the 1st respondent and other members of Consortium for availing such loan facility. The 2nd petitioner availed a loan of Rs.904.34 crores by signing the Common

Senior Debt Agreement (Facility Agreement) dated 04.08.2005 for Rupee Term Loan with the 1st respondent and other members of the Consortium. The said amount is required to be repaid by the 2nd petitioner in 48 quarterly instalments which was subsequently revised to 55 quarterly instalments commencing from a date indicated in the facility agreement after commencement of commercial operation of the unit. The date fixed was 15.07.2010. The commercial operation was achieved on 09.04.2010. The second petitioner also executed another agreement on 04.08.2005 called as "Trust and Retention Account Agreement" (TRAA). Under the said agreement, certain accounts were opened and operated by the Account Bank mentioned therein for the purpose of making available the requisite funds under the Facility Agreement to the 2nd petitioner and for repayment of instalments of the loan to the 1st respondent and other Consortium members. The TRAA provides for maintenance of Debt Service Reserve Account (DSRA) to secure the above payments. The account is required to be maintained with an amount stipulated under TRAA which is called as "Debt Service Reserve Amount". In order to provide and maintain the DSRA under the Facility Agreement and TRAA, a bank guarantee for an amount of Rs.88,56,00,000/- was furnished by the 2nd respondent on 18.11.2011. The said bank guarantee is valid and subsisting till 16.11.2017. The bank guarantees to an extent of 193.51 crores for the purpose of covering the DSRA towards debt servicing for the entire debt of Units I and II by Lenders Consortium were furnished by the 1st petitioner, on behalf of the 2nd petitioner, by earmarking its non-fund based limits maintained and made available by the 2nd respondent to the 1st petitioner. The 1st respondent also provided finance to the 2nd petitioner for its Unit-II for which a separate agreement was executed. The total bank guarantees to an extent of 193.51 Crores includes the

guarantee for Unit-II also. Unit-II also became operational with effect from 07.05.2011, but it was shut down from March 2013 to December 2015 due to reasons beyond the control of the 2nd petitioner because of non-availability of linkage coal and unviable tariff being paid by the consumer Discoms resulting in financial stress to the 2nd petitioner. However, the 2nd petitioner continued to service the dues of all the lenders in Units I and II out of the available cash flows of Unit I. There were certain delays in paying the instalments by the 2nd petitioner to the 1st respondent and other Consortium lenders for Unit-II loan. Wherever there was delay, the 2nd petitioner was paying the loan amounts and interest along with the applicable liquidated damages and the account never become a Non-performing Asset (NPA).

While so, the 1st respondent under an apprehension that the account would become Non-performing Asset (NPA) addressed a letter to the 2nd respondent on 18.05.2017 indicating the outstanding amount with respect to Units I and II stating that an amount of Rs.88.02 Crores was outstanding and shall be cleared within three months from the due date indicated therein in order to avoid classifying it as NPA. The 2nd petitioner paid an amount of Rs.3.5 Crores to the 1st respondent on 30.06.2017. In spite of the same, when a communication was issued by the 1st respondent on 20.07.2017 addressed to the 2nd respondent, the present Writ Petition is filed.

This Court, by order dated 24.07.2017 while issuing notice before admission, granted interim stay for a period of one week and the same was extended till 07.08.2017 by an order dated 01.08.2017.

Heard learned Senior Counsel, Sri D. Prakash Reddy for the petitioners and learned Senior Counsel, Sri A. Sudershan Reddy for the first respondent. None appeared for the second respondent.

Learned Senior Counsel for the petitioners submits that the bank guarantee furnished relates to Unit I and in the absence of any outstanding amount relating to Unit I the invocation of bank guarantee furnished for Unit I cannot be invoked for the alleged outstanding amount in respect of Unit II. He further submitted that no amount was indicated in the letter of revocation and it is contrary to the clauses in the Bank guarantee. He relied on the decisions reported in *Ansal Properties and Industries (P) Ltd., v. Engineering Projects (India) Limited*¹, *Hindustan Construction Company Limited v. State of Bihar*², *Basic Tele Services Limited v. Union of India (UOI)*³ and *Gangotri Enterprises Limited v. Union of India*⁴.

Learned Senior Counsel appearing for the first respondent, on the other hand, submits that the accounts of Units I and II were merged as per the request made by the petitioners and the bank guarantee would enure to the benefit of said combined account and in those circumstances the invocation of bank guarantee cannot be termed as illegal. He further submits that the present Writ Petition is not maintainable in the matter relating to invocation of bank guarantee pursuant to a private contract even though the 1st respondent is a Central Government undertaking and the 2nd respondent is a Bank. He further submitted that in view of the language employed in the bank guarantee, there cannot be any adjudication in the facts of the case and the 2nd respondent is under an obligation to honour the letter of the 1st respondent and release the amount. He further submitted that the 2nd respondent is not before this Court and the petitioners cannot challenge the invocation of bank

¹ AIR 1998 Delhi 176

² (1999) 8 SCC 436

³ MANU/DE/1684/2009

⁴ (2016) 11 SCC 720

guarantee. He relied on the decisions reported in *Joshi Technologies International INC v. Union of India*⁵ and *Gujarat Maritime Board v. Larsen and Toubro Infrastructure Development Projects Limited*⁶.

In the light of the above submissions, the following points have to be decided in the present Writ Petition:

1. Whether the Writ Petition is maintainable under Article 226 of the Constitution of India in the facts and circumstances of the case.
2. If so, whether in the facts and circumstances of the case, the invocation of bank guarantee is valid in law.

In view of the undisputed facts available from the record filed by the petitioners and in view of the non-availability of time, the first respondent did not file any counter, but produced before this Court three letters dated 24.04.2014, 24.07.2017 and 31.07.2017 issued by the 2nd petitioner to the 1st respondent and the 2nd respondent to the 1st respondent and the reply given by the 1st respondent to the 2nd respondent respectively.

The letter dated 22.11.2011 issued by the second respondent enclosing the bank guarantees reads as follows:

“In terms of the Clause 6.1.27 of Common Senior Rupee Debt ‘A’ Agreement and Common Senior Rupee Debt ‘B’ Agreement read with definitions Clause 1.1 of Trust and Retention Account Agreement dated August 04, 2005 of Unit-I of Lanco Amarkantak Power Limited, the Borrower is required to maintain an amount equivalent to two quarters interest and principal payment obligations to Senior Rupee Debt ‘A’ and Debt ‘B’ Lenders in the name of “Debt Service Reserve Account (DSRA)”.

In lieu of maintaining DSRA as stated above, we are pleased to submit Bank Guarantee in favour of Power Finance Corporation (Security Agent and Lead) for an amount of Rs.90.31 Crores the details of which are furnished hereunder.

⁵ (2015) 7 SCC 728

⁶ (2016) 10 SCC 46

BG No.	Dated	Amount (Rs. In Cr.)	Issuing Bank	Validity
11101331BGF00290	18- Nov-11	88.56	IDBI Bank Ltd., Chapel Road, P.B.No.370, Hyderabad Main Branch, Hyderabad – 500 001	16-Nov- 14
5119611BG0000135	19- Nov-11	1.75	State Bank of Patiala, K.G. Marg, New Delhi	16-Nov- 14

We enclose herewith Chartered Accountant's Certificate indicating the amount to be maintained in DSRA for your kind perusal.

We request you to kindly take the above on record and acknowledge the receipt of above Bank Guarantees."

The relevant paras of the Bank Guarantee read as follows:

"Bank Guarantee

To
Power Finance Corporation
New Delhi

B.G.No.1101331BGF00290
B.G.ISSUE Dt: 18-11-2011
B.G.AMOUNT: Rs.88,56,00,000/-
B.G. EXPIRY DT: 16-11-2014
B.G. CLAIM DT: 16-11-2014

Dear Sir,

1. In consideration of the requirement of maintaining security deposit under the terms and conditions of TRA Agreement dated 04.08.2005 and the Facility Agreement dated 04.08.2005 (hereinafter called 'the Financing Agreements') signed between Power Finance Corporation, New Delhi (hereinafter called 'the Beneficiary') and M/s. Lanco Power Limited, having its registered office at Lanco House, Plot No.4, Software Units Layout, Hitec City, Madhapur, Hyderabad – 500 081 (hereinafter called 'the Borrower'), for the due fulfillment by the Borrower of the terms and conditions contained in the Financing Agreements, of production of a bank guarantee for Rs.88,56,00,000/- (Rupees Eighty Eight Crore Fifty Six Lacs only), We, IDBI Bank Ltd., a company constituted under the Companies Act 1956 and deemed to be a banking company under the Banking Regulation Act, 1949, having its registered Office and Head office at IDBI Tower, 10th FLR, TRADE FINANCE DEPT, WTC Complex, Cuffe Parade, Mumbai 400 005, and among other places a branch at D.No.5-9-89/1, CHAPEL ROAD, P.B. NO.370, HYDERABAD MAIN BRANCH 500 001 (hereinafter referred to as the 'Bank' which expression shall unless repugnant to context or meaning thereof, include its successors or assigns in business), at the request of the Borrower do hereby undertake to pay to the Power Finance Corporation an amount not exceeding Rs.88,56,00,000/- (Rupees Eighty Eight Crore Fifty Six Lacs only), against any loss or damage caused to or suffered or would be caused to or

suffered by Power Finance Corporation by reason of any breach by the Borrower of any of the terms or conditions contained in the said Agreement.

2. We, IDBI Bank Ltd., do hereby undertake to pay the amounts due and payable under this guarantee without any demur, merely on receipt of a written demand from the Power Finance Corporation Limited stating that the amount claimed is due by way of loss or damage caused to or would be caused to or suffered by the Power Finance Corporation Limited by reason of breach by the Borrower of any of the terms or conditions contained in the Financing Agreements or by reason of the Borrower's failure to perform any of the provisions the Financing Agreements. Any such demand made on the bank shall be conclusive as regards the amount due and payable by the Bank under this guarantee. However, our liability under this guarantee shall be restricted to an amount not exceeding Rs.88,56,00,000/- (Rupees Eighty Eight Crores Fifty Six Lacs only).

3. We, IDBI Bank Ltd., hereby undertake to pay to the Power Finance Corporation Limited any money so demanded but not exceeding Rs.88,56,00,000/- (Rupees Eighty Eight Crores Fifty Six Lacs only), notwithstanding any dispute or disputes raised by the Borrower in any suit or proceeding pending before any Court or Tribunal relating thereto our liability under this present being absolute and unequivocal.

The Payment so made by us under this bank guarantee shall be a valid discharge of our liability for payment there under and the borrower(s) shall have no claim against us for making such payment."

It appears that a similar bank guarantee was furnished by the State Bank of Patiala for an amount of Rs.1.75 Crores and on issuing a letter of invocation to the 1st respondent the State Bank honoured the same by remitting the amount covered by the said bank guarantee.

It appears that the 2nd petitioner addressed a letter to the 1st respondent on 24.04.2014 and the relevant portion of the said letter reads as follows:

6"Due to stoppage of generation in Unit-II, there has been a severe cash flow constraint. Unit-II's Fixed overheads and interest are presently being met out of Unit-I cash flows. However, in view of cash flow mismatch, we propose to make you a request for restructuring Unit-I and Unit-II debt together with a

repayment period of 15 years with a moratorium of 18 months for making repayment of installments of Unit-I and Unit-II on structured basis. As EBITDA from Unit-I would be sufficient to meet the interest commitments of Unit-I and Unit-II, the above restructuring arrangement would ensure regular interest payment to all the Lenders keeping the accounts status as 'Standard'. We enclose herewith statements showing the outstanding details of Term Loans of Consortium of unit-I and Unit-II together with details of interest and installment overdues as on March 31,2014.

We request you to kindly consider our submissions made above and initiate the restructuring process at the earliest to ensure timely servicing of interest and installment to all the Consortium Members to ensure 'Standard' status of the Term Loan accounts."

It appears that pursuant to such request, the term loans of Unit-I and Unit-II were treated as one. The letter issued by the 1st respondent to the 2nd petitioner on 18.05.2017 reads as follows:

"This is in reference to the overdue amount towards RTL and STL dues to PFC. It has been observed from the records that the amount is still outstanding and has not been received. The details are given below.

Unit-1&2

(Rs.in Crores)			
Due Date	Principal	Interest	Total Amount
15.02.2017 – STL	14.93	1.47	16.40
15.03.2017 – STL	15.13	1.42	16.55
13.04.2017 (STL)	15.32	1.23	16.55
13.04.2017 (RTL)	9.06	12.91	21.97
15.05.2017 (STL)	15.52	1.03	16.55
Total	69.96	18.06	88.02

It is important to mention here that in terms of loan Agreement/policy of the corporation, the non-payment of amount on or before the due date will result in additional financial burden on account of delayed payment charges like interest on interest and penal interest.

Further, RBI has directed PFC to reduce the period from classifying a loan account as NPA on account of non-payment of dues by the borrower from existing 6 months to 3 months. Therefore, for the FY 2017-18, your loan account with us will be classified as NPA, if the overdues are older by 3 months as on 31st March, 2018.

It is therefore requested to give utmost priority to the matter and arrange to remit the outstanding dues of Rs.88.02 core along with interest for the delayed period."

As stated above, the affidavit filed in support of the petition discloses the payment of Rs.3.5 Crores on 30.06.2017 pursuant to the above letter.

It appears that on the date of passing interim order by this Court, i.e.24.7.2017, the 2nd respondent addressed a letter to the 1st respondent pursuant to the letter of invocation issued by the 1st respondent on 20.07.2017 invoking the bank guarantee, seeking withdrawal of the same by stating as follows:

“2. As you may be aware, this guarantee was issued by the bank in good faith that Unit-I was operating profitably and was regular in meeting its interest and repayment obligations; however, after tariff disputes broke out with Haryana Discoms, the operations of Amarkantak Project Unit-2 got affected in March 2013. Since then, company has been facing liquidity issues, as interest and principal repayment obligations of both the units were being serviced out of cash flows generated by Unit-1 above. We believe that had Unit-1 cash flows been utilized for servicing of interest and principal dues of Unit-1 only, there would not have been any delay in servicing the dues of Unit-1 lenders. But, PFC is lead institution of both the units and has been allowing payment of Unit-2 dues out of Unit-1 cash flows, which is the main reason for delay in servicing of interest/principal dues of Unit-1, for which the above BG was issued.

3. The BG has been issued in favour of PFC in its capacity as a Trustee for the Term Lenders of Unit-1, IDBI Bank is also a working capital bank and term lender to Lanco Amarkantak Power Ltd. At the JLF meeting held July 18, 2017, the secured lenders of the project viz Allahabad Bank, Canara Bank, UCO Bank, Indian Bank, Syndicate Bank, HUDCO, SIDBI, etc. observed that the operations of the Unit-1 and Unit-2 were financially viable and the problem being faced by LAPL was only due to the delay in completion of the expansion project. Even at this meeting, the need for invocation of DSRA BG was neither mentioned nor discussed. Still, PFC decided to invoke the DSRA BG, though the delay in servicing of Unit-1 debt has always been on account of unprofitable operations of Unit-2 only and not on account of any shortfall in unit-1 cashflow. As per the figures available with us, Unit-1's DSCR for FY 2015-16 and FY 2016-17 were 1.37 and 1.19 respectively, which clearly establishes the financial viability of Unit-1 operations. In this background, we do not see any reason for PFC to invoke IDBI Bank's DSRA BG and this action of PFC is not in accordance with the spirit of the consortium.”

The first respondent replied on 31.07.2017 stating as follows:

“We are in receipt of IDBI Bank’s letter mentioned at ref. above regarding invocation of the BG. In this regard it is informed as under:-

1. We may reiterate that the captioned Bank Guarantee has been issued in favour of PFC duly extended from time to time. As per the established principles of law and BG, all the pre-requisite conditions stipulated in the notwithstanding clause have been duly complied by PFC, prior to invocation of the BG.

Further as per clause 2 of the BG: “IDBI Bank has undertaken “to pay the amount due and payable under this guarantee without any demur, merely on receipt of a written demand from the Power Finance Corporation Ltd., stating that the amount claimed is due by way of loss or damage caused to or would be caused to or suffered by the Power Finance Corporation Ltd. By reasons of breach by the Borrower of any of the terms and conditions contained in the Financing Agreements or by reasons of the Borrower’s failure to perform any of the provisions the Financing Agreement.”

Hence, IDBI being the BG Banker was required to process the invocation without any demur and delay as non-payment to the beneficiary of the BG shall tantamount to breach of the terms and conditions of the guarantee in question, under the Indian Contract Act.

2. All the issues raised pertaining to the project in the aforementioned letter of IDBI are irrelevant as far as invocation of BG is concerned and is out of the periphery of contractual terms of the BG.

3. As you are aware, at the request of the Borrower, all the consortium lenders have accorded sanction to realign and combine the trust and retention accounts pertaining to Project Unit 1 and 2 and reschedule the repayments due to the project lenders in order to enable the borrower to meet its debt servicing and other payment obligations. Hence, the Trust and Retention Account (TRA) of Units-1 and 2 have been merged. Consequently, BG issued by IDBI Bank in favour of PFC, is available in lieu of Debt Servicing and Reverse Account (DSRA) requirement of both Units-1 and 2.

4. We may further inform you that as on the date of BG invocation, the project term lenders outstanding dues have been accruing since May 2017 onwards to the extent of Rs.140 Crores (approx.). Further the dues are being cleared partly only by LAPL, which is resulting in the levy of additional interest/penal interest on the outstanding dues. Non-payment of scheduled outstanding dues is breach by the Borrower of the terms and conditions contained in the

Financing Agreement caused loss to the Project lenders, therefore it was decided to invoke the said BG for clearing the dues of the Project lenders.

5. You may also appreciate that LAPL has also submitted a BG of Rs.1.75 Crore from State Bank of Patiala in lieu of DSRA of Unit 1 And 2. The same has also been invoked by PFC and the proceeds have been promptly remitted as per instructions.

To conclude, we may state that the said bank guarantee is a contract between the beneficiary and the bank. Upon invocation of the said BG by the beneficiary by serving the letter of invocation, it is obligatory on the Bank's part to make payment to the Beneficiary. Delay in honouring the guarantee tends to erode its value, the sanctity of scheme of guarantees and image of the Bank and loss to the beneficiary. We hope this above clarifies the matter and request the IDBI Bank for further appropriate action in the matter."

The above facts, being supported by documentary evidence, cannot be disputed. But the learned Senior Counsel for the Petitioners submitted that the above correspondence is subsequent to the invocation of bank guarantee. It is also not disputed since the correspondence refers to the letter of invocation.

In the light of the above facts, the points framed above have to be decided.

POINT NO.1 (MAINTAINABILITY OF THE WRIT PETITION):

The authoritative decision of the Supreme Court with regard to maintainability of a Writ Petition in a matter like this is Joshi Technologies International INC's case (supra). In the said case the facts set out in the judgment of the Hon'ble Supreme Court are as follows:

".....It so happened that the appellant had entered into two contracts dated 20.02.1995 with the Union of India, through Ministry of Petroleum and Natural Gas (MoPNG) in the year 1992 relating to exploration of certain oil fields which the Union of India had selected in Gujarat and other States. These contracts were on production sharing basis for Dholka and Wavel Oil Fields respectively. It started the production

after entering into the contract and filed its income tax return on the income generated from the aforesaid production. In the returns, the appellant claimed benefit of Section 42 of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'). Section 42 is a special provision for deductions in the case of business for prospecting, etc. for mineral oil. It provides for certain additional allowances as are specified in the agreement, details thereof would be taken note of hereinafter. We may, however, point out here itself that such allowances, as stipulated in the Section, are to be specifically mentioned in the agreement as well, which is entered into with the Central Government and it is also necessary that such an agreement has been laid on the Table of each House of Parliament.

2. The Income Tax Authorities extended the benefit of granting deductions under the aforesaid provisions from the year 2001-02 (assessment years onwards) when the appellant commenced commercial production in the aforesaid two oil fields. However, while making assessment for the Assessment Year 2005-06, the Assessing Officer observed that there were no such provisions made in the Agreements which were signed between the Central Government and the appellant and in the absence of such stipulation in the agreement, the appellant was not entitled to the benefit of deductions under Section 42 of the Act. Realising that the Agreements did not contain such a provision, the appellant wrote to the MoPNG stating that though there was such an arrangement agreed to as per the understanding between the two parties, non-inclusion thereof was an inadvertent omission in the Contracts that were signed. The MoPNG wrote to Ministry of Finance (MoF) accepting the aforesaid omissions and requested the MoF to give clarification in this behalf. As no clarification came from the MoF, the Assessing Officer disallowed the claim for deduction under Section 42(1)(b) and 42(1)(c) of the Act.

3. At this stage, the appellant preferred writ petition.....”

The Writ Petition was dismissed by the High Court on 28.05.2012 and challenging which the above appeal was filed. The Hon'ble Supreme Court framed five issues and while answering Issue Nos.4 and 5 the Hon'ble Supreme Court considered the following three facets included in the said questions.

“49. These issues have three facets, namely:

- (i) Whether there is a prayer to this effect in the Writ Petition?

- (ii) If it was intended to give such a benefit before entering into the agreement, whether this intention gives any right to the appellant to seek an amendment?
- (iii) Whether the Court has the power to issue mandamus or direction to the Government?"

While holding that without there being a prayer in view of availability of specific averments in the body of the writ petition as well as in the grounds, the plea was entertained, though reluctantly. With regard to Court's power to issue Mandamus or direction, the observations of the Court are as follows:

"55. Law in this aspect has developed through catena of judgments of this Court and from the reading of these judgments it would follow that in pure contractual matters extraordinary remedy of Writ under Article 226 or Article 32 of the Constitution cannot be invoked. However, in a limited sphere such remedies are available only when the non-Government contracting party is able to demonstrate that its a public law remedy which such party seeks to invoke, in contradistinction to the private law remedy simplicitor under the contract. Some of the case law to bring home this cardinal principle is taken note of hereinafter.

56. Significantly, in *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust & Ors. v. R. Rudani* ((1989) 2 SCC 691) as well, this Court made it clear that if the rights are purely of private character, no mandamus can be issued. Thus, even if the respondent is a 'State', the other condition which has to be satisfied for issuance of a Writ of Mandamus is the public duty. In a matter of private character or purely contractual field, no such public duty element is involved and, thus, Mandamus will not lie.

57. First case which needs to be referred is *Bareilly Development Authority Vs. Ajai Pal Singh and others* [1989] 1 SCR 743). That was the case where Appellate Authority had undertaken construction of dwelling units for people belonging to different income groups and the cost at which such flats were to be allotted to the allottees. However, it was mentioned that the cost stated was only estimated cost and subject to increase or decrease according to rise or fall in the price at the time of completion of property. The authority increased the cost and monthly installment rates which it demanded from the allottees were almost doubled and cost and rates of installments initially stated in the brochure. Respondents/allottees filed writ petition challenging the same and in this context question of maintainability of the writ petition arose. High Court, relying upon the judgment of the

Supreme Court in the case of Ramana Dayaram Shetty Vs. Airport Authority of India (1979) 11 LLJ 217 SC) allowed the writ petition by observing as under : (Ajai Pal Singh v. Bareilly Development Authority, 1986 SCC OnLine All 110 : AIR 1986 All 362, para 16)

"16.....It has not been disputed that the contesting opposite party is included within the term 'other authority' mentioned under Article 12 of the constitution. Therefore, the contesting opposite parties cannot be permitted to act arbitrarily with the principle which meets the test of reason and relevance. Where an authority appears acting unreasonably, this court is not powerless and a writ of mandamus can be issued for performing its duty free from arbitrariness or unreasonableness."

58. In appeal filed by the Authority, this Court in Ajai Pal Singh case (supra), on facts, noted that the respondents had applied for registration only by acceptance of terms and conditions contained in the brochure. Moreover, subsequently letter was written by the Authority about the enhancement of the cost of the houses/flats as well as increase in monthly installments. Rate of yearly interest requesting allottees to give their written acceptance and the respondents except respondent No.4 had sent their written acceptance and it was on the basis of the written acceptance that name of first respondent was included in the draw and he was successful in getting allotment of a particular house. The court observed that respondents were under no obligation to seek allotment of house/ flats even if they had registered themselves. Notwithstanding, they voluntarily registered themselves as applicants only after fully understanding the terms and conditions of the brochure including relating to variance in prices.

59. On the basis of these facts, this Court observed that the aforesaid observations of the High Court relying upon Ramana Dayaram Shetty case (supra) were not correct. Thus observed the Court, speaking through Ratnavel Pandian. J.: (Bareilly Development Authority v. Ajai Pal Singh, (1989) 2 SCC 116 : (1989) 1 SCR 743, SCC pp. 125-26, paras 21-22)

"21. This finding in our view, is not correct in the light of the facts and circumstances of this case because in Ramana Dayaram Shetty case (supra), there was no concluded contract as in this case. Even conceding that the BDA has the trappings of a state or would be comprehended in 'other authority' for the purpose of Article 12 of the constitution, while determining price of the houses/flats constructed by it and the rate of monthly installments to be paid, the Authority or its agent after entering into the field of ordinary contract acts purely in its executive capacity.

Thereafter the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines the rights and obligations of the parties inter se. In this sphere they can only claim rights conferred upon them by the contract in the absence of any statutory obligations on the part of the authority (i.e. BDA in this case) in the said contractual field.

22. There is a line of decisions where the contract entered into between the state and the persons aggrieved is non-statutory and purely contractual and the rights are governed only by the terms of the contract, no writ or order can be issued under Article 226 of the Constitution of India so as to compel the authorities to remedy a breach of contract pure and simple - Radhakrishna Agarwal Vs. State of Bihar (1977) 3 SCC 457), Premji Bhai Parmar Vs. Delhi Development Authority (1980 (2) SCC 129) and DFO Vs. Biswanath Tea Company Ltd. (1981) 3 SCC 238)"

60. The next case of relevance is the Divisional Forest officer Vs. Bishwanath Tea Co. Ltd. (supra). In that case respondents took on lease certain land from the Government. Initially, period of lease was 15 years. The lease was to be extended for cultivation and raising tea garden and was subject to condition set out in the Lease Agreement and generally to Assam Land & Revenue Regulation and Rules made thereunder. The Respondent Company approached appellant seeking permission to cut 7000 cubic ft of timber. The Appellant took the stand that as the timber was required for a particular use which was not within the Grant, full royalty will be payable on timber so cut and removed. The Respondent company paid the amount of royalty under protest and filed writ petition under Article 226 of the Constitution in the High Court alleging that upon a true construction of the relevant clauses of the Grant as also the proviso to Rule 37 of the Settlement Rules, it was entitled to cut and remove timber without payment of royalty and, therefore, the recovery of royalty being unsupported by law, the appellant was liable to refund the same.

61. A preliminary objection was taken by the appellant to the maintainability of the writ petition on the ground that claim of the respondent flows from terms of lease and such contractual rights and obligations can only be enforced in a civil court. This preliminary objection was overruled by the Court which proceeded to hear the matter and allowed the writ petition of the respondent company. In appeal by the appellant to this Court, the decision of the High Court was reversed holding that writ was not maintainable. The following observations may usefully be quoted: (Bishwanath Tea Co.Ltd. case (supra), SCC p.246, paras 8-9)

"8. It is undoubtedly true that High Court can entertain in its extraordinary jurisdiction a petition to issue any of the prerogative writs for any other purpose. But such writ can be issued where there is executive action unsupported by law or even in respect of corporation there is a denial of equality before law or equal protection of law. The Corporation can also file a writ petition for enforcement of a right under a statute. As pointed out earlier, the respondent company was merely trying to enforce a contractual obligation. To clear the ground let it be stated that obligation to pay royalty for timber cut and felled and removed is prescribed by the relevant regulations, the validity of regulations is not challenged. Therefore, the demand for royalty is unsupported by law. What the respondent claims is an exception that in view of a certain term in the indenture of lease, to wit, Clause 2, the appellant is not entitled to demand and collect royalty from the respondent. This is nothing but enforcement of a term of a contract of lease. Hence, the question whether such contractual obligation can be enforced by the High Court in its writ jurisdiction.

9. Ordinarily, where a breach of contract is complained of, a party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed, or the party may sue for damages. Such a suit would ordinarily be cognizable by the Civil Court. The High Court in its extraordinary jurisdiction would entertain a petition either for specific performance of contract or for recovering damages. A right to relief flowing from a contract has to be claimed in a Civil Court where a suit for specific performance of contract or for damages could be filed....."

Thereafter, the Court considered *Shrilekha Vidyarthi v. State of UP*⁷ and the observations made therein elaborately. The further observations of the Court are as follows.

"65. Similarly, in *State of Gujarat v. M.P. Shah Charitable Trust* [1994] 3 SCC 552, this Court reiterated the principles that if the matter is governed by a contract, the writ petition is not maintainable since it is a public law remedy and is not available in private law field, for example, where the matter is governed by a non-statutory contract.

66. At this stage, we would like to discuss at length the judgment of this Court in *ABL International Ltd. V Export Credit Guarantee Corpn. of India Ltd* (2004) 3 SCC

⁷ (1991) 1 SCC 212 : 1991 SCC (L&S) 742

553), on which strong reliance is placed by the counsel for both the parties. In that case, various earlier judgments right from the year 1954 were taken note of. One such judgment which the Department in support of their case had referred to was the decision of Apex Court in case LIC of India v. Escorts Ltd.[1986] 1 SCC 264] wherein the Court had held that ordinarily in matter relating to contractual obligations, the Court would not examine it unless the action has some public law character attached to it. The following passage from the said judgment was relied upon by the respondents: (ABL International Ltd. case (supra), SCC pp. 565-66, para 12)

"12. '102.....If the action of the State is related to contractual obligations or obligations arising out of the tort, *the court may not ordinarily examine it unless the action has some public law character attached to it.* Broadly speaking, the court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The difficulty will lie in demarcating the frontier between the public law domain and the private law field. It is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances. When the State or an instrumentality of the State ventures into the corporate world and purchases the shares of a company, it assumes to itself the ordinary role of a shareholder, and dons the robes of a shareholder, with all the rights available to such a shareholder. There is no reason why the State as a shareholder should be expected to state its reasons when it seeks to change the management, by a resolution of the company, like any other shareholder." (Escorts Ltd. case (supra), SCC p.344, para 102)"
(emphasis in original)

This Court dealt with this judgment in the following manner:
(SCC p.566, para 13)

"13. We do not think this Court in the above case has, in any manner, departed from the view expressed in the earlier judgments in the case cited hereinabove. This Court in LIC v. Escorts Ltd., (supra) proceeded on the facts of that case and held that a relief by way of a writ petition may not ordinarily be an appropriate remedy. This judgment does not lay down that as a rule in matters of contract the court's jurisdiction under Article 226 of the Constitution is ousted. On the contrary, the use of the words "court may not ordinarily examine it unless the action has some public law character attached to it" itself indicates

that in a given case, on the existence of the required factual matrix a remedy under Article 226 of the Constitution will be available."

67. Insofar as the argument of the respondents in the said case that writ petition on contractual matter was not maintainable unless it is shown that the authority performs a public function or discharges a public duty, is concerned, it was answered in the following manner: (ABL International Ltd. case (supra), SCC pp. 569-70, paras 22-23)

"22. We do not think the above judgment in VST Industries Ltd. V. Workers Union (2001) 1 SCC 298) supports the argument of the learned counsel on the question of maintainability of the present writ petition. It is to be noted that VST Industries Ltd., against whom the writ petition was filed was not a State or an instrumentality of a State as contemplated under Article 12 of the Constitution, hence, in the normal course, no writ could have been issued against the said industry. But it was the contention of the writ petitioner in that case that the said industry was obligated under the statute concerned to perform certain public functions, failure to do so would give rise to a complaint under Article 226 against a private body. While considering such argument, this Court held that when an authority has to perform a public function or a public duty if there is a failure a writ petition under Article 226 of the Constitution is maintainable. In the instant case, as to the fact that the respondent is an instrumentality of a State, there is no dispute but the question is: was first respondent discharging a public duty or a public function while repudiating the claim of the appellants arising out of a contract ? Answer to this question, in our opinion, is found in the judgment of this Court in the case of Shri Lekha Vidyarthi v. State of U.P. [1991 (1) SCC 212] wherein this Court held: (SCC pp. 236-37, paras 22& 24)

"22.The impact of every State action is also on public interest.

* * *

24.....It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters."

23. It is clear from the above observations of this Court, once State or an instrumentality of State is a party to the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the above said requirement of Article 14 then we have no hesitation in holding that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent."

68. The Court thereafter summarized the legal position in the following manner: (ABL International Ltd., case (supra), SCC pp. 572, paras 27-28)

"27. From the above discussion of ours, following legal principles emerge as to the maintainability of a writ petition :-

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of facts arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power [See: Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai & Ors. [1998 (8) SCC 1]. And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the court thinks it necessary to exercise the said jurisdiction."

69. The position thus summarized in the aforesaid principles has to be understood in the context of discussion that

preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, can refuse to exercise. It also follows that under the following circumstances, 'normally', the Court would not exercise such a discretion:

69.1. The Court may not examine the issue unless the action has some public law character attached to it.

69.2. Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.

69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

69.4. Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.

70. Further, the legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to contracts entered into by the State/public authority with private parties, can be summarized as under:

70.1 At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.

70.2 State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practice some discriminations.

70.3 Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 of the Constitution could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases the court can direct the aggrieved party to resort to alternate remedy of civil suit etc.

70.4 Writ jurisdiction of High Court under Article 226 of the Constitution was not intended to facilitate avoidance of obligation voluntarily incurred.

70.5 Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the license if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the license, if he finds it commercially inexpedient to conduct his business.

70.6. Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.

70.7. Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if it can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

70.8. If the contract between private party and the State/instrumentality and/or agency of State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitution of India and invoking its extraordinary jurisdiction.

70.9. The distinction between public law and private law element in the contract with State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract. This Court has maintained the position that writ petition is not maintainable. The Dichotomy between public law and private law, rights and remedies would depend on the factual matrix of each case and the distinction between public law remedies and private law, field cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone

into the decision making process or that the decision is not arbitrary.

70.10. Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

70.11. The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes.

71. Keeping in mind the aforesaid principles and after considering the arguments of respective parties, we are of the view that on the facts of the present case, it is not a fit case where the High Court should have exercised discretionary jurisdiction under Article 226 of the Constitution. First, the matter is in the realm of pure contract. It is not a case where any statutory contract is awarded.”

The appeal was ultimately dismissed confirming the order of the High Court. The above elaborate extracts from the judgment of the Hon'ble Supreme Court are made only in order to avoid repetition of the facts considered in various cases and to put the law in proper perspective.

The observations made therein and law laid down were considered in Gujarat Maritime Board's case (supra) and approved the ratio laid down in the above decision. The brief facts in Gujarat Maritime Board's case are; the appellant invited bids for development of Sutrapada Port and a letter of intent was issued to the first respondent. As per the letter of intent a performance guarantee/bank guarantee of Rs.5.00 Crores was required to be submitted to Gujarat Maritime Board. The first respondent requested for change of location from Sutrapadu to Kachchigarh and the bank guarantee was extended. The Yes Bank Limited furnished a bank guarantee to the appellant on 26.11.2011 for the amount of Rs.5.00 Crores. The first respondent could not proceed with

the work even at the new place and the appellant by letter dated 10.03.2015 cancelled the letter of intent issued to the first respondent and on the same day invoked the bank guarantee furnished by Yes Bank Limited at the instance of the first respondent. Challenging the cancellation of letter of intent and invocation of bank guarantee the first respondent filed a writ petition before the High Court of Gujarat and the writ petition was allowed. In the back drop of the said facts of the case, the Hon'ble Supreme Court observed as follows:

“9. Unfortunately, the High Court went wrong both in its analysis of facts and approach on law. A cursory reading of Lol would clearly show that it is not a case of forfeiture of security deposit “... if the contract had frustrated on account of impossibility...” but invocation of the performance bank guarantee. On law, the High Court ought to have noticed that the bank guarantee is an independent contract between the guarantor-bank and the guarantee-appellant. The guarantee is unconditional. No doubt, the performance guarantee is against the breach by the lead promoter, viz., the first respondent. But between the bank and the appellant, the specific condition incorporated in the bank guarantee is that the decision of the appellant as to the breach is binding on the bank. The justifiability of the decision is a different matter between the appellant and the first respondent and it is not for the High Court in a proceeding under Article 226 of the Constitution of India to go into that question since several disputed questions of fact are involved.”

Thereafter, it approved the ratio laid down in Joshi Technologies International INC's case (supra) and made the following observations.

“11. It is contended on behalf of the first respondent that the invocation of Bank Guarantee depends on the cancellation of the contract and once the cancellation of the contract is not justified, the invocation of Bank Guarantee also is not justified. We are afraid that the contention cannot be appreciated. The bank guarantee is a separate contact and is not qualified by the contract on performance of the obligations. No doubt, in terms of the bank guarantee also, the invocation is only against a breach of the conditions in the Lol. But between the appellant and the bank, it has been stipulated that the

decision of the appellant as to the breach shall be absolute and binding on the Bank.

12. An injunction against the invocation of an absolute and an unconditional bank guarantee cannot be granted except in situations of egregious fraud or irretrievable injury to one of the parties concerned. This position also is no more *res integra*. In *Himadri Chemicals Industries Limited v. Coal Tar Refining Company* [2007] 8 SCC 110], at paragraph -14: (SCC pp. 117-18)

“14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank guarantee or a letter of credit:

(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit.

(iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned.”

13. The guarantee given by the bank to the appellant contains only the condition that in case of

breach by the lead promoter, viz., the first respondent of the conditions of Lol, the appellant is free to invoke the bank guarantee and the bank should honour it ... “without any demur, merely on a demand from GMB (appellant) stating that the said lead promoter failed to perform the covenants...”. It has also been undertaken by the bank that such written demand from the appellant on the bank shall be ... “conclusive, absolute and unequivocal as regards the amount due and payable by the bank under this guarantee”. Between the appellant and the first respondent, in the event of failure to perform the obligations under the Lol dated 06.02.2008, the appellant was entitled to cancel the Lol and invoke the bank guarantee. On being satisfied that the first respondent has failed to perform its obligations as covenanted, the appellant cancelled the Lol and resultantly invoked the bank guarantee. Whether the cancellation is legal and proper, and whether on such cancellation, the bank guarantee could have been invoked on the extreme situation of the first respondent justifying its inability to perform its obligations under the Lol, etc., are not within the purview of an inquiry under Article 226 of the Constitution of India. Between the bank and the appellant, the moment there is a written demand for invoking the bank guarantee pursuant to breach of the covenants between the appellant and the first respondent, as satisfied by the appellant, the bank is bound to honour the payment under the guarantee.”

(Underlining and emphasis is mine)

What emerges from the above discussion is that though the respondent is a State within the meaning of Article 12 of the Constitution of India, in the absence of any element of public law, the Writ Petition in a contractual matter is not maintainable. In respect of bank guarantees, the satisfaction of the beneficiary is final with regard to breach of the covenants between the beneficiary and the person on whose behalf the bank guarantee was issued and the bank has no other alternative except to honour the payment under the guarantee.

In the case before me, though the respondents satisfy the requirement of State, no relief can be granted in the present Writ Petition in the absence of any element of public law. The contract between the

petitioners and the respondents are purely private contracts. The first point is answered accordingly.

POINT NO.2: With regard to nature of the bank guarantees, the decision of the Hon'ble Supreme Court in Himadri Chemicals Industries Limited v. Coal Tar Refining Company⁸ is an authority.

The said case arises out of an application under Section 9 of the Arbitration and Conciliation Act, 1996 seeking an order of injunction restraining the respondent from receiving any payment under a letter of credit. The appellant entered into a contract with the respondent by which the respondent agreed to supply 26,000 metric tons of extra hard pitch (reprocessing grade) (in short "goods") to the appellant as per the schedule set out in the contract. As per the terms of the contract an irrevocable letter of credit was opened in favour of the respondent. Under the said letter of credit payment was to be made "at sight". When the banker received a document against which payment was to be made the banker noticed that the description of goods was not in terms of the letter of credit and accordingly communicated the same to the appellant. Though correspondence ensued the issue with regard to quality of goods was not settled. In those circumstances, the application under Section 9 of the Act was filed by the appellant to stop release of payment under the letter of credit without first resolving the issue regarding the quality of goods. Initially an order of *status quo* was passed by the learned single Judge of the High Court and later on it was vacated. The said order of vacation was confirmed by the Division Bench. In the back drop of above facts, the Hon'ble Supreme Court held as follows:

⁸ (2007) 8 SCC 110

“10. The law relating to grant or refusal to grant injunction in the matter of invocation of a Bank Guarantee or a Letter of Credit is now well settled by a plethora of decisions not only of this court but also of the different High Courts in India. In U.P. State Sugar Corporation Vs. Sumac International Ltd. [(1997) 1 SCC 568], this court considered its various earlier decisions. In this decision, the principle that has been laid down clearly on the enforcement of a Bank guarantee or a Letter of Credit is that in respect of a Bank Guarantee or a Letter of Credit which is sought to be encashed by a beneficiary, the bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. Accordingly this Court held that the courts should be slow in granting an order of injunction to restrain the realization of such a Bank Guarantee. It has also been held by this court in that decision that the existence of any dispute between the parties to the contract is not a ground to restrain the enforcement of Bank guarantees or Letters of Credit. However this court made two exceptions for grant of an order of injunction to restrain the enforcement of a Bank Guarantee or a Letter of Credit. (i) Fraud committed in the notice of the bank which would vitiate the very foundation of guarantee; (ii) injustice of the kind which would make it impossible for the guarantor to reimburse himself.

11. Except under these circumstances, the courts should not readily issue injunction to restrain the realization of a Bank Guarantee or a Letter of Credit. So far as the first exception is concerned, i.e. of fraud, one has to satisfy the court that the fraud in connection with the Bank Guarantee or Letter of Credit would vitiate the very foundation of such a Bank Guarantee or Letter of Credit. So far as the second exception is concerned, this court has held in that decision that it relates to cases where allowing encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. While dealing with the case of fraud, this court in the case of U.P. Coop. Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd. (1988) 1 SCC 174) held as follows: (SCC p. 197, para 53)

The fraud must be of an egregious nature such as to vitiate the entire underlying transaction.
(emphasis supplied)

While coming to a conclusion as to what constitutes fraud, this court in the above case quoted (at SCC p.197, para 54) with approval the observations of Sir John Donaldson, M.R. in Bolivinter Oil SA v. Chase Manhattan Bank (1984) 1 All ER 351 (CA) at p. 352g-h which is as follows:

“The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be

fraudulent. But the evidence must be clear both as to the fact of fraud and as to the banks knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a banks Credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it charged.

(Emphasis supplied)

12. In Svenska Handelsbanken Vs. Indian Charge Chrome [(1994) 1 SCC 502], it has also been held that a confirmed Bank Guarantee/irrevocable Letter of Credit cannot be interfered with unless there is established fraud or irretrievable injustice involved in the case. In fact, on the question of fraud, this decision approved the observations made by this court in the case of U.P. Coop. Federation Ltd Vs. Singh Consultants and Engineers (P) Ltd. (supra).

13. So far as the second exception is concerned, this court in U.P. State Sugar Corporation Vs. Sumac International Ltd. (supra) as considered herein earlier, at para 14 on page 575 observed as follows :

“14. On the question of irretrievable injury which is the second exception to the rule against granting of injunctions when unconditional bank guarantees are sought to be realized the court said in the above case that the irretrievable injury must be of the kind which was the subject matter of the decision in the Itek Corpn. V. First National Bank of Boston (566 Fed Supp 1210). In that case an exporter in USA entered into an agreement with the Imperial government of Iran and sought an order terminating its liability on stand by letter of credit issued by an American Bank in favour of an Iranian Bank as part of the contract. The relief was sought on account of the situation created after the Iranian revolution when the American Government cancelled the export licences in relation to Iran and the Iranian government had forcibly taken 52 American citizens as hostages. The US Government had blocked all Iranian assets under the jurisdiction of United States and had cancelled the export contract. The court upheld the contention of the exporter that any claim for damages against the purchaser if decreed by the American courts would not be executable in Iran under these circumstances and realization of the bank guarantee/letters of credit would cause irreparable harm to the Plaintiff. This contention was upheld. To avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if he ultimately succeeds, will have to be decisively established.

Clearly, a mere apprehension that the other party will not be able to pay, is not enough. In Itek case, there was certainty on this issue. Secondly, there was good reason, in that case for the Court to be prima facie satisfied that the guarantors i.e. the bank and its customer would be found entitled to receive the amount paid under the guarantee.

(Emphasis supplied)

14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a Bank Guarantee or a Letter of Credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a Bank Guarantee or a Letter of Credit :-

(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional Bank Guarantee or Letter of Credit is given or accepted, the Beneficiary is entitled to realize such a Bank Guarantee or a Letter of Credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The Bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The Courts should be slow in granting an order of injunction to restrain the realization of a Bank Guarantee or a Letter of Credit.

(iv) Since a Bank Guarantee or a Letter of Credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of Bank Guarantees or Letters of Credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a Bank Guarantee or Letter of Credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional Bank Guarantee or a Letter of Credit would result in irretrievable harm or injustice to one of the parties concerned.”

In the instant case, there is no plea of fraud or irretrievable harm or injustice and this court, on the basis of record available, does not find any such exception. In view of the same, this Court is not inclined to go

into the merits of the present controversy between the parties relating to the original contract between the petitioners and the first respondent and on the settled point of law, the second respondent is bound by the terms of the bank guarantee. In the Hindustan Construction Co. Ltd. Case (supra), the bank guarantees were invoked and when invocation was challenged in a suit, the courts went into the merits of the case. Similarly, the case in Basic Tele Services Ltd. (supra) is also after invocation of bank guarantee and the court examined the merits of the case. In Gangotri Enterprises Limited (supra), the dispute was in relation to the 'monies due' and invocation of bank guarantee in an unrelated contract between the same parties. Thus, the decisions cited by the learned Counsel for the Petitioners relate to the merits of respective cases and are not relevant for the purpose of present case.

This court is of the opinion that the present Writ Petition is not maintainable in this court in view of the nature of private contract without any element of public law and is liable to be dismissed. Accordingly the Writ Petition is dismissed at the admission stage. No costs.

As a sequel thereto, the miscellaneous petitions, if any, pending in this Writ Petition shall stand closed.

A. RAMALINGESWARA RAO, J

Date: 07th August 2017
Nsr