

demand bank guarantee/s for equivalent amount. In pursuance of the LoI, ACIL submitted nine bank guarantees, all dated 18 July 2011, issued by the Defendant-bank in favour of the Plaintiff, covering the entire sum of mobilization advance, i.e. Rs.4.46 crores. Eight bank guarantees were for the sum of Rs.50 lacs each, whilst the ninth bank guarantee was for a sum of Rs.46 lacs. The first four bank guarantees of Rs.50 lacs each were said to be valid until 17 January 2012, whereas the subsequent five bank guarantees including the guarantee of Rs.46 lacs were said to be valid until 17 April 2012. The guarantees were unconditional and irrevocable, the terms of which shall be discussed presently. Suffice it to know here that the bank guarantees required invocation in an enclosed format. It is, however, an admitted position between the parties that in fact no format was enclosed with any of the nine bank guarantees. Relying on these nine bank guarantees, the Plaintiff paid mobilization advance of Rs.4.46 crores to ACIL. By four separate letters dated 17 January 2012, addressed by the Defendant to the Plaintiff, the validity period of the first four bank guarantees was extended from 17 January 2012 to 17 April 2012. Later by separate nine letters addressed by the Defendant to the Plaintiff, the period of validity of all nine bank guarantees was extended upto 17 July 2017. On either of these extensions, what was amended was the validity period and all other terms and conditions of the original bank guarantees remained unchanged. It is the Plaintiff's case that ACIL failed to perform and fulfill the terms of the contract between the Plaintiff and itself and complete the work entrusted to it by the completion date, i.e. by 22 May 2012, as provided in the LoI. The Plaintiff, accordingly, by its letter dated 17 July 2012 (the letter having been delivered to the Defendant on the same day, i.e. 17 July 2012), claimed and demanded encashment of all

nine bank guarantees for a total sum of Rs.4.46 crores and called upon the Defendant to remit full payment forthwith. The Defendant, by its letter dated 18 July 2012, refused to accede to the demand of payment on the ground that the invocation was not in conformity with the terms of the bank guarantees. There was no indication in the letter as to the manner in which, or the reason for which, the invocation was said to be not in conformity with the terms. Immediately thereafter, ACIL filed an arbitration petition under Section 9 of the Arbitration and Conciliation Act, 1996, purporting to act under an arbitration agreement between the Plaintiff and itself, for restraining invocation/payment under the bank guarantees. The Defendant was made a party to the arbitration petition. When the petition appeared before a learned Single Judge of this Court on 20 July 2012, learned Counsel for the Plaintiff herein informed the Court that since ACIL objected to the contents of the letter of invocation of bank guarantees, the Plaintiff would issue a fresh letter of invocation to the Defendant-bank (Respondent No.2 to the arbitration petition). In view of this statement, the arbitration petition was disposed of by the Court. On the same day as this order, the Plaintiff addressed a letter to the Defendant, notifying the latter that ACIL had failed to observe, perform and fulfill the terms of the contract executed by it with the Plaintiff and that the Plaintiff had, in the premises, invoked the bank guarantees by demanding immediate payment to the Plaintiff of the amount stipulated under the bank guarantees, i.e. Rs.50 lacs each in first eight bank guarantees and Rs.46 lacs in the ninth bank guarantee. The Defendant-bank, however, did not make any payment to the Plaintiff in response to the invocation. In the premises, the present Commercial Suit came to be filed on 20 December 2012.

3 It is interesting to note here that in a separate Suit filed by ACIL against the Defendant-bank herein in the City Civil Court at Bombay, it is recorded by the Court that after receipt of the Plaintiff's original claim, lodged on 17 July 2012, the Defendant by its letter dated 19 July 2012 wrote to ACIL that the former would proceed to make payment if the invocation was as per the terms of the bank guarantees. This letter was followed by the Plaintiff's demand by way of invocation of 20 July 2012, as noted above. Immediately thereafter, by another letter dated 26 July 2012, the Defendant-bank called upon ACIL to make arrangement for payment of all nine bank guarantees, presumably on the footing that the bank was required to honour the invocation.

4 In its written statement, the only ground of defence urged by the Defendant-bank is that the invocation of the bank guarantees is not in accordance with the terms thereof.

5 On 7 August 2014, this Court framed issues as under :-

I S S U E S

- (i) Whether the Plaintiff's letter dated 17 July 2012 (Exhibit 'D', page 62 of the plaint) addressed to the Defendant amounted to a valid demand under the Bank Guarantees ?
- (ii) Whether the Plaintiff's letter dated 17 July 2012 (Exhibit D, page 62 of the plaint) is a valid claim under Clause 7 of the Bank Guarantees ?
- (iii) Whether the Plaintiff's letter dated 20 July 2012 (Exhibit 'G-1' pages 66-83 to the plaint) addressed to the Defendant amounted

to a valid invocation of the said Bank Guarantees ?

(iv) What order ?

6 The issues really concern construction of two demand letters of the Plaintiff, namely, the letters dated 17 July 2012 (Exhibit 'D' to the plaint) and 20 July 2012 (Exhibit 'G-1' to the plaint). What the Court is called upon to consider is whether the letter of 17 July 2012 amounts to a valid demand or claim and whether the letter of 20 July 2017 amounts to a valid invocation.

7 Since the answer to both these questions turns on a proper construction of certain crucial terms and conditions, which were common to all nine bank guarantees, we may at the outset notice these terms. These are set out below.

“01. In consideration of Client, at the request of the Contractor, advancing a sum of Rs.50,00,000/- (Rs.Fifty Lacs Only), to the Contractor as and by way of Mobilization advance, the Bank hereby unconditionally and irrevocably guarantees to the Client for due performance of the Contractor's obligations under the contract and indemnifies the client in respect of the amount of the mobilization advance. BANK hereby undertakes without recourse to Contractor, to pay the Client, on mere demand in the enclosed format up to and not exceeding altogether a sum of Rs.50,00,000/- (Rs. Fifty lacs only) being the part amount of the 100% (One hundred percent) of the mobilization advance payment i.e. thirteen percent (13%) of Contract value or such other unadjusted amount of the said mobilization advance. If the Client notifies to the Bank that the Contractor has failed to observe, perform and fulfill the terms of the said Contract then the Bank shall immediately pay to the CLIENT, on CLIENT's mere demand in the enclosed format, such sum or sums of money to the extent of Rs.50,00,000/- (Rs.Fifty lacs only) being part of 13% of the value of the Contract value as may be claimed by the CLIENT by reason of non-fulfillment by the Contractor of his obligations under the Contract as aforesaid/and

shall also indemnify the CLIENT against all losses and damages which may be suffered by the CLIENT as aforesaid and against all costs, charges, expenses which may be incurred by the CLIENT in connection herewith. The Bank shall pay the said amount without demur or protest or without recourse to the Contractor. Any such demand placed in the enclosed format on the Bank shall be conclusive with respect to the amount due and payable by the Bank under this Guarantee. The decision of Client as to whether the terms and conditions of this Guarantee or Contract have been observed or not shall be final and binding on BANK and the BANK will not have the discretion to withhold payment to the CLIENT if letter in enclosed format is delivered by the CLIENT to the BANK on or before 17 January 2012 (Tenure of Contract including extension period, if any or the complete recovery of mobilization advance whichever is later).

02. The Guarantee is a continuing Guarantee and not revocable except with the previous written consent of the CLIENT and as aforesaid, it will continue in force until the Contractor has maintained the schedule of delivery of the said work under the Contract and observed and fulfilled the terms and conditions of the Contract. The CLIENT has an irrevocable & unconditional right to claim under the Guarantee in case the Guarantee required to be extended in its opinion is not extended by the CONTRACTOR or the BANK within the time frames and for the time frames stipulated by the CLIENT.
03. The CLIENT may, without affecting Bank's liabilities and obligations hereunder and without reference to the Bank grant time or other indulgence to or compound with the Contractor or enter into any agreement or agree to forbear to enforce any of the terms and conditions of the Contract.
04.
05.
06.
07. The GUARANTEE HEREIN CONTAINED is unconditional and not revocable by notice during its currency and will remain in full force until full payment has been made to the Client by BANK on the Client having lodged a claim under the Bank Guarantee within its validity i.e. 17 January 2012 (Due Date) and if no claim is lodged by the Client then the Guarantee would expire within the period

specified in this Guarantee. The BANK's liability under this Guarantee is restricted to Rs.50,00,000/- (Rupees Fifty Lacs Only). The CLIENT may claim the full or part of the amount under the Guarantee entirely at its sole discretion and make this claim at one or more times before the expiry (including the claim period) of this guarantee. The total amount of claims is restricted to the BANK's liability under the Guarantee. The Bank is required to make a payment immediately on receipt of the claim in the enclosed format.

08.
09.
10.
11. Subject to clause 3 hereof, Guarantee shall remain in force until the date of issue of Virtual Completion Certificate under the Contract.
12. Unless demand or claim under this Guarantee is made within Nine (9) months from the date of expiry of this Guarantee, all the rights of the CLIENT hereunder shall be forfeited and the Bank shall be relieved and discharged of all liabilities.
13.
14.
15. The Bank hereby declares that it has the power to issue this Guarantee and the undersigned has full power to do so.

Notwithstanding anything-contained hereinabove our liability under the guarantee is restricted to Rs.50,00,000/- (Rupees Fifty Lacs Only). This guarantee is valid upto 17 January 2012. Any claim arising of the guarantee must be lodged with the bank at its office at Andheri Large Corporation Branch, M.D.I. Building, 1st Floor, 28, S.V. Road, Andheri (West), Mumbai-400 058 on or before 17 January 2012 after which the liability of the bank would be extinguished, whether or not the original bank guarantee is returned to us.”

8 Clause-01 quoted above makes it clear that the guarantee on the part of the Defendant-bank was unconditional and irrevocable; the guarantee was for due performance of ACIL's obligations under the contract; and the guarantee indemnified the Plaintiff in respect of the mobilization advance, which was 13% of the total contract sum (i.e. Rs.4.46 crores by way of 9 bank guarantees). The Defendant-bank undertook to pay the Plaintiff on a mere demand. The demand was required to conform with the enclosed format. There was, however, admittedly no format enclosed. The clause also contained a stipulation that if the Plaintiff notifies to the bank that the Contractor ACIL had failed to observe, perform and fulfill the terms of the said contract, then the bank would immediately pay to the plaintiff, on a mere demand, a sum to the extent of mobilization advance, as may be claimed by the Plaintiff, by reason of non-fulfillment of the contract or its obligations under the contract. The Defendant-bank's commitment was to pay this amount without demur or protest or without recourse to the Contractor ACIL. The clause thereafter contained a stipulation that the bank would not have a discretion to withhold payment, if a letter in enclosed format was delivered to it on or before 17 January 2012. Curiously, after this stipulation, the following expression appears in a bracket : *“Tenure of Contract including extension of period, if any or the complete recovery of the mobilization advance whichever is later”*. The stipulation suggests that the original period provided for making a demand, namely, 17 January 2012, was linked to the original tenure of the contract, whereas the words following *“Tenure of Contract”* suggest that this tenure was extendable for the extension period, if any, or the complete recovery of mobilization advance, whichever occurs later. Then we have Clause-02, which *inter alia* provides that the bank guarantee shall continue in force

“until the Contractor has maintained the schedule of delivery of the said work under Contract and observed and fulfilled the terms and conditions of the Contract.” This is followed by the following stipulation : *“The CLIENT has an irrevocable & unconditional right to claim under the Guarantee in case the Guarantee required to be extended in its opinion is not extended by the CONTRACTOR or the BANK with the time frames and for the time frames stipulated by the CLIENT.”* The purport of this clause appears to be doubtful. On the one hand, it suggests that the guarantee is liable to be continued in force until the contractor maintains the schedule of delivery or observes or fulfills the terms and conditions of the contract. On the other hand, it also suggests that the guarantee is a continuing guarantee mandated to continue by its own force until the events noted above occur. In either case, however, there is an irrevocable and unconditional right on the part of the Plaintiff to claim under the guarantee. Clause-11 suggests the guarantee to be *“in force until the date of Virtual Completion Certificate under the Contract”*. This clause is subject to Clause-03. It is difficult to understand what connection possibly exists between Clause-03 and Clause-11. Be that as it may, we will take it for whatever it is worth. Then there is a specific stipulation in Clause-12 which countenances demand or claim under the guarantee within nine months from the expiry of the guarantee. The clause provides that otherwise, that is to say, if such demand is not made within nine months, all rights of the Plaintiff under the guarantee shall be forfeited and the bank shall be relieved and discharged of all liabilities. Lastly, we have the non-obstante clause noted above, which provides that the liability is restricted to the amount of mobilization advance. The guarantee is said to be valid upto 17 January 2012 (the date later extended to 17 April 2012 and finally to 17 July 2012). The clause

further provides that any claim arising out of the guarantee must be lodged with the bank at its office named therein on or before 17 January 2012 (later extended, as noted above, to 17 July 2012), after which the liability of the bank would be extinguished. Apropos of these stipulations, if anything is clear, it is that there is a complete lack of clarity. And the confusion is confounded by fact that the parties have not led any evidence in support of any particular interpretation as understood by them.

9 Yet one has to construe the guarantee and make a sense out of it. To that end, the Court is called upon to consider the significance of the date '17 January 2012', corrected as '17 July 2012'. At one place (Clause-1), the guarantee describes that date as the date by which a letter in the enclosed format ought to be delivered to the bank. At another place (Class-7), it mentions that date as a stipulated date for lodging a claim under the bank guarantee. If no claim is lodged by that date *“then the Guarantee would expire within the period specified in this Guarantee.”* At yet another place (last Clause), it is said to be the date upto which the guarantee is valid. These descriptions of the date must be contrasted with at least two other stipulations in the guarantee. Clause-11 specifically provides that the guarantee shall remain in force until the date of issue of Virtual Completion Certificate under the Contract. Besides, a demand or claim under the guarantee could always be made within nine months thereafter, since Clause-12, in terms, provides that it could be so made within nine months from the date of expiry of the guarantee. The descriptions of the date of 17 January 2012 (corrected as 17 July 2012) and the other clauses referred to above throw up two interpretations. One interpretation would imply that the client must fully and finally invoke the bank guarantee on or before 17

July 2012 (i) by lodging a claim or a demand with the bank for a sum not exceeding the named sum and (ii) by notifying to the bank that the contractor has failed to observe, perform and fulfill the terms of the contract. This interpretation, though, makes a scarce sense of the other clauses referred to above. The other interpretation, which makes a much better sense of the terms of the guarantee read together, is that the client must (i) lodge a claim or demand with the bank for a sum not exceeding the named sum on or before 17 July 2012 and (ii) must complete the invocation by notifying to the bank that the contractor has failed to observe, perform and fulfill the terms of the contract within nine months of 17 July 2012. The second interpretation implies a duty on the part of the client to communicate its claim or demand upto a specified amount to the bank by 17 July 2012 and then follow up such claim by notifying the bank about the contractor's failure within nine months. Going by Clause-01 and reading it in the light of Clauses-02, 07, 11 and 12, which are noticed above, it is clearly possible to hold that in the guarantee document there is a distinction between a claim or a demand on the one hand and completion of invocation of the guarantee as properly understood in law on the other. A proper invocation, under the terms of the guarantee, would imply that there must not only be a claim or demand, but there must also be a notification to the bank *“that the contractor has failed to observe, perform and fulfill the terms of the said contract....”* It is possible to hold that a demand or claim had to be communicated to the bank by the stipulated date, i.e. 17 July 2012, though after communicating such demand or claim, it would be open to back it up by notifying to the bank about the contractor's failure as noted above within nine months of the expiry of the bank guarantee, i.e. within nine months of 17 July 2012 so as to complete

invocation.

10 In a case such as this, one must go by the well known rule of *contra proferentem*, embodied in the maxim “*verba chartarum fortius accipiuntur contra proferentem*”. Under this rule, which is very often used in insurance law, any ambiguity in the wording of the policy is to be resolved against the party who prepared it. The Supreme Court has referred to this principle in the case of **Industrial Promotion And Investment Corporation of Orissa Ltd Vs. New India Assurance Company Ltd.**¹, stating the law as follows :

“Quite apart from contradictory clauses in policies, ambiguities are common in them and it is often very uncertain what the parties to them mean. In such cases the rule is that the policy, being drafted in language chosen by the insurers, must be taken most strongly against them. It is construed *contra proferentes*, against those who offer it. In a doubtful case the turn of the scale ought to be given against the speaker, because he has not clearly and fully expressed himself. Nothing is easier than for the insurers to express themselves in plain terms. The assured cannot put his own meaning upon a policy, but, where it is ambiguous, it is to be construed in the sense in which he might reasonably have understood it. If the insurers wish to escape liability under given circumstances, they must use words admitting of no possible doubt.”

11 This principle is ordinarily applied in insurance law, but it is clearly apposite to invoke it even in the case of a bank guarantee. After all, just as cases of insurance imply a good faith on the part of the insured and correspondingly, the contract is liable to be construed *contra proferentes* against the insurer in case of an ambiguity or a doubt, a contract of bank guarantee, which is internationally recognized as an instrument on which

1 (2016) 15 Supreme Court Cases 315

businessmen safely conduct trade or commerce, must imply good faith on the part of the beneficiary and application correspondingly of the rule of *contra proferentem* against the guaranteeing bank.

12 Even otherwise, the Supreme Court in a recent decision in the case of **Bank of India Vs. K. Mohandas**² has applied this principle to other contracts as well. In **Bank of India**'s case the Court was concerned with a contractual scheme of voluntary retirement framed by Nationalized Banks, for construing which the Court made the following observations :

“The fundamental position is that it is the banks who were responsible for formulation of the terms in the contractual Scheme that the optees of voluntary retirement under that Scheme will be eligible to pension under the Pension Regulations, 1995, and, therefore, they bear the risk of lack of clarity, if any. It is a well-known principle of construction of a contract that if the terms applied by one party are unclear, an interpretation against that party is preferred (*verba chartarum fortius accipiuntur contra proferentem*).”

13 The Plaintiff has preferred, and presumably acted on, the interpretation that it was permissible for it to lodge its claim or demand, pure and simple, with the bank under the bank guarantee on or before the stipulated date, i.e. 17 July 2012 and then follow it up by notifying the bank within nine months of the stipulated date about the contractor's failure to perform the contract. Since this is clearly a possible interpretation, it ought to be preferred in the facts of the case and allowed to hold the field on the principle of *contra proferentem*.

2 (2009) 5 Supreme Court Cases 313

14 Learned Counsel for the Defendant submits that there is no ambiguity or doubt in the present case. In plain terms, that appears to be an extremely ambitious argument. Ambiguities and doubts are galore in this document of guarantee, as shown above. Learned Counsel alternatively submits that in any event, there being a non-obstante clause in the bank guarantee, the conflict, if any, between different provisions of it must be resolved in favour of the stipulation that the date of 17 July 2012 is the last date of invocation. In the first place, it is by no means clear that the non-obstante character of the clause referred to by learned Counsel extends to all stipulations within that clause. The non-obstante clause begins with the words “Notwithstanding anything contained” and ends with the words “Rs.50,00,000/- (Rupees Fifty Lacs Only)”. It surely applies to the ceiling limit of the amount for which the guarantee is given, but does it apply to the period of its invocation, that is to say, the period of validity of the guarantee and lodgment of a claim thereunder on or before the specified date? That is by no means clear. Be that as it may, even if the non-obstante clause were to extend to all stipulations which follow it, it can only be applied on one and the only basis and that is that Clauses 11 and 12 of the bank guarantee are completely nugatory and have no existence in the contract. No contract can be construed in a manner so as to make the whole of its clauses rendered completely nugatory. It is pertinent to note that these two specific stipulations, namely, Clauses 11 and 12, are self contained clauses and would make no sense at all if the non-obstante clause were to be read as suggested by the Defendant. In the facts of the case and on the interpretation discussed by the Court above, the non-obstante clause must be held to be restricted to the stipulation of the upper ceiling of the amount to be claimed, i.e. Rs.50 lacs in eight bank

guarantees and Rs.46 lacs in the ninth bank guarantee.

15 Learned Counsel for the Defendant next submits that the Plaintiff is not right in contending that a claim or demand was lodged with the bank on or before the specified date and what was done on 20 July 2012 was merely a reiteration by following up with the notification of the failure of the contractor. Learned Counsel submits that the Plaintiff in fact withdrew its original claim or demand made vide letter dated 17 July 2012 and issued an altogether fresh notice or demand on 20 July 2012 terming it as an invocation. In the first place, whether or not the Plaintiff did so is a matter of fact. It is, firstly, to be alleged in the pleading and secondly, to be proved in evidence. The Defendant does neither. There is no specific plea in written statement that the original claim or demand of 17 July 2012 was in fact withdrawn by the Plaintiff and there is no oral or documentary evidence led to support such case. The only plea to be found in the written statement is that by reason of the subsequent invocation, the original claim or demand '*had stood cancelled*'. There is nothing in the letter of 20 July 2012 which indicates that by its own force the original claim or demand of 17 July 2012 can be said to have stood cancelled. Besides this plea, there is absolutely nothing on record to support the Defendant. We have in that case to go by the Plaintiff's case, which is supported not only by a specific plea but by reason of its consistency with the documents on record, namely, the letters of 17 July 2012 and 20 July 2012. This is also in keeping with the Defendant's own contemporaneous correspondence when it wrote to ACIL in the context of, and after, the Plaintiff's invocation of 20 July 2012 that the Defendant would have to pay and ACIL would have to reimburse it under the bank guarantees.

16 In the premises, the first three issues are answered in favour of the Plaintiff. The demand of 17 July 2012 is a lodgment or communication of the Plaintiff's claim or demand, followed by the latter of 20 July 2012, which is addressed by way of a formal invocation notifying the contractor's failure and the same is within time and ought to be honoured by the Defendant.

17 There will, accordingly, be a decree against the Defendant in the sum of principal amount of Rs.4.46 crores. *Pendente lite* and further interest for a period of four months thereafter at the rate of 12 per cent per annum. After four months, the principal amount shall carry interest at the rate of 18 per cent per annum till payment or realization. The Defendant to also pay the costs of the Suit to the Plaintiff.

(S.C. GUPTE, J.)