

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

% **Date of decision: 8th February, 2021.**

+ **W.P.(C) 7302/2013 & CMs No.2673/2014 (for stay) & 17133/2017**
(u/S 151 of the CPC)

NCUBATE LOGISTIC & WAREHOUSING PVT. LTD.
AND ANR

..... Petitioners

Through: Mr. Abhinav Vasisht, Sr. Adv. with
Mr. R. Jawahar Lal, Mr. Siddharth
Bawa, Mr. Shyamal Anand and Ms.
Priya Singh, Advs.

Versus

UNION OF INDIA & ORS

..... Respondents

Through: Mr. P.S. Singh, Adv. for R-1/UOI.
Mr. H.S. Parihar and Mr. Kuldeep S.
Parihar, Advs. for R-2/RBI.
Mr. Karan Khanna and Ms. Asmita
Kumar, Advs. for R-3 to 5/IOB.

AND

+ **CS(COMM) 829/2016 & IA No.8202/2016 (u/O XXXIX R-1&2**
of the CPC)

INDIAN OVERSEAS BANK

..... Plaintiff

Through: Mr. Karan Khanna and Ms. Asmita
Kumar, Advs.

Versus

NCUBATE INDIA SERVICES PVT LTD & ORS **..... Defendants**

Through: Mr. Abhinav Vasisht, Sr. Adv. with

Mr. R. Jawahar Lal, Mr. Siddharth Bawa, Mr. Shyamal Anand and Ms. Priya Singh, Advs. for D-1(A),5&6.
Mr. H.S. Parihar and Mr. Kuldeep S. Parihar, Advs. for RBI.
Mr. Pallav Saxena, Adv. for D-4.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Ncube Logistic & Warehousing Pvt. Ltd. (Ncube) and its Director Alok Goswami filed W.P.(C) No.7302/2013 seeking mandamus, directing the respondents Union of India (UOI), Reserve Bank of India (RBI) and Indian Overseas Bank (IOB), to honour the following Bank Guarantees (BGs):

Date	Number	Amount
14 th February, 2013	1436/ILG/12/2013	Rs.2 crores
6 th March, 2013	1436/LG/18/2013	Rs.2 crores
6 th March, 2013	1436/LG/19/2013	Rs.1 crore
26 th March, 2013	1436/LG/26/2013	Rs.2 crores

issued by IOB in favour of the Ncube and to pay the amounts thereof together with interest @ 18% per annum, from 1st June, 2013, being the date of invocation of the BGs and till payment.

2. It was the case of Ncube in the writ petition, (i) that Ncube is a part of "SAR Group of Companies"; (ii) that Ncube was promoted by Rakesh Malhotra and Navneet Kapoor, who have 85% and 15% shareholding respectively in Ncube; (iii) that Ncube is engaged in import sourcing, warehousing, logistic services and solutions, distribution to different customers, of various goods and products such as telecom

consumer electronics, durables like water purifiers and air conditioners' stabilizers etc.; (iv) that Global Brands Enterprise Solutions Pvt. Ltd. (GBESPL), promoted by Pranay Dhabhai, Sidhant Dhingra, Sanchay Dhingra and Ashok Arjan Vaswani, had the marketing and distribution rights for India, of electronic consumer goods marketed under the name "AKAI"; (v) that GBESPL was however not able to capitalize on the business opportunity and was struggling to meet its existing obligations with the lenders; (vi) that in or about the year 2012, GBESPL approached the SAR Group, for collaboration, support and expansion of its business operations, by using Ncube's pan India network for selling and distribution of products under the brand name 'AKAI'; (vii) GBESPL and Ncube entered into an Import and Sourcing Agreement dated 5th May, 2012 whereunder GBESPL engaged Ncube as its supplier and Ncube agreed to source, import, warehouse, maintain inventory of and/or otherwise supply the products to GBESPL, based on purchase orders placed and/or instructions given by GBESPL from time to time, by issuance of Letter of Credit (LC) to Ncube's vendors; (viii) that the aforesaid agreement entailed Ncube incurring substantial financial exposure on account of inventory procured and held by Ncube on GBESPL's purchase orders and monies recoverable from GBESPL against the goods sold; (ix) that to safeguard Ncube against the said exposure, GBESPL was required to provide a security deposit of Rs.5 crores to Ncube along with arranging for issuance of an unconditional and irrevocable BG for an amount of Rs.20 crores in favour of Ncube; (x) that an addendum dated 7th May, 2012 to the agreement dated 5th May, 2012 was also executed by GBESPL and Ncube; (xi) that under the aforesaid agreements, GBESPL and its

shareholders Sanchay Dhingra, Sidhant Dhingra and Ravi Dhingra and their company Fashion Clothing Pvt. Ltd. (FCPL) were obligated to arrange for an unconditional and irrevocable BG for an amount of Rs.20 crores in favour of Ncube, on the personal guarantees of Pranay Dhabhai and Ravi Dhingra along with corporate guarantee of FCPL, without creating any charge on the assets of GBESPL; (xii) that GBESPL also entered into a National Distribution Agreement dated 5th May, 2012 with Savoir Faire Services Pvt. Ltd. (SFSPL), a group company of Ncube, whose name was subsequently changed to Global Brands Enterprise Solutions and Distributions Pvt. Ltd. (GBESDPL), with no objection of GBESPL; the said change of name was aimed at streamlining the distribution arrangements and providing a wider distribution network for GBESPL's products and with the same intent, Pranay Dhabhai, being a shareholder of GBESPL, was appointed as one of the Directors of GBESDPL; Pranay Dhabhai however did not own any shares in GBESDPL and was not drawing any remuneration from GBESDPL; (xiii) that the relationship between GBESPL and GBESDPL was that of a vendor and vendee and not that of a principal and agent or principal and principal; (xiv) that the four BGs aforesaid in the total sum of Rs.7 crores were issued by IOB, at the instance of GBESPL, in favour of Ncube, in pursuance to the aforesaid arrangement; (xv) that Ncube, for more than a year, in performance of its contractual obligations, took significant exposure on account of GBESPL's business activities and as on the date of filing of the writ petition, the financial liability of Ncube and its group companies for transacting and sourcing goods on behalf of GBESPL was to the tune of Rs.21 crores; (xvi) that at the time of filing this petition, a sum of Rs.10,25,17,000/- was outstanding from GBESPL to

Ncube towards purchase of goods and Rs.6,23,41,000/- towards purchase stock held in Ncube's inventory and Rs.8,26,00,000/- had been incurred by Ncube on account of orders placed with foreign suppliers, to fulfill orders placed by GBESPL; a further sum of Rs.2 crores was due to Ncube from GBESPL on account of subscription of debentures in GBESPL by SAR Capital; (xvii) that thus, as of May, 2013, a total of Rs.26,74,58,000/- was payable by GBESPL to Ncube; (xviii) that GBESPL failed to clear its dues in spite of opportunities; (xix) that in the circumstances, Ncube, vide letter dated 1st June, 2013, invoked the four BGs aforesaid for a total sum of Rs.7 crores, owing to GBESPL's inability to clear the dues of Ncube; (xx) however no response was received from IOB, compelling Ncube to send a reminder dated 3rd June, 2013; (xxi) that IOB, vide letter dated 3rd June, 2013 took a stand that the BGs were fraudulently issued in favour of Ncube and therefore IOB refused to remit the amounts of the BGs; (xxii) that IOB, in refusing payment under the BGs, was relying upon an undated letter of Mr. Ravi Dhingra; (xxiii) that the stand of IOB that GBESPL had worked out a plot to cheat and commit a fraud on IOB, is contrary to the settled principle of law that BGs are independent contracts and are enforceable without reference to the underlying contract; (xxiv) that Ncube, vide letter dated 5th June, 2013 again called upon IOB to pay the monies under the BGs; (xxv) that Pranay Dhabhai, the Managing Director of GBESPL, also vide his letter dated 8th June, 2013 called upon IOB to make payment to Ncube; (xxvi) that IOB further informed Ncube that it had filed a case before the Court of Additional District Judge, on 24th June, 2013, for declaration of the BGs as null and void for the reason of having been obtained fraudulently; and, (xxvii) that Ravi Dhingra, vide legal notice

dated 26th June, 2013 to IOB and GBESPL, made a false allegation that the BGs were fraudulently issued in favour of Ncube. Contending that the refusal of IOB to honour the BGs issued in favour of Ncube was wrong, the writ petition was filed.

3. The writ petition came up before this Court first on 22nd November, 2013, when notice thereof was ordered to be issued and pleadings ordered to be completed.

4. Though IOB filed a counter affidavit with annexures and to which Ncube filed a rejoinder but the need to detail the pleas therein at this stage is not felt.

5. The name of Ncube Logistic & Warehousing Pvt. Ltd. was informed to have been changed to Ncube India Services Pvt. Ltd. (Ncube) and vide order dated 3rd December, 2014 in W.P.(C) No.7302/2013, on an application of Ncube informing so, amended Memorandum of Parties was permitted to be filed.

6. The orders dated 23rd April, 2015/21st March, 2016 in W.P.(C) No.7302/2013 record that the plaint in the suit filed by IOB for declaration of the subject BGs as bad had been rejected/returned vide order dated 2nd September, 2014 of the Additional District Judge, on the ground of lack of jurisdiction and IOB had taken recourse to the proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (DRT Act), before the Debt Recovery Tribunal (DRT). Directing IOB to file pleadings in the application filed before the DRT, the writ petition was adjourned to 27th August, 2015. Vide subsequent order dated 21st March,

2016, the counsel for IOB was directed to take a stand, whether IOB was intending to file a suit or not.

7. The order dated 28th January, 2016 in W.P.(C) No.7302/2013 records the contention of the counsel for IOB, that Ncube and GBESPL had/have common Directors and offices at the same address and GBESPL and its allied company owe a sum of more than Rs.14.54 crores to IOB and for which the proceedings were pending before the DRT.

8. The subsequent order dated 19th May, 2016 in W.P.(C) No.7302/2013 records the statement of the counsel for IOB that IOB shall file the suit.

9. That is how CS(COMM) No.829/2016 came to be filed and came up first before this Court on 18th July, 2016, when while issuing summons thereof, the suit was directed to be listed along with the writ petition.

10. IOB, in the suit, (a) seeks declaration that the four BGs are unenforceable; and, (b) seeks permanent injunction to restrain defendant No.1(a) Ncube India Services Pvt. Ltd. and defendant No.1(b) GBESDPL from encashing the BGs. Besides them, GBESPL (through Liquidator), Pranay Dhabhai, Ravi Dhingra, Anurag Aggarwal and Alok Goswami, are also impleaded as defendants No.2 to 6.

11. It is the case of IOB, in the plaint in the suit (a) that prior to 9th September, 2014, defendant No.1(a) Ncube India Services Pvt. Ltd. was known as Ncube Logistic & Warehousing Pvt. Ltd.; Ncube Logistic & Warehousing Pvt. Ltd. and GBESDPL had been merged with Ncube India Services Pvt. Ltd. vide order dated 9th September, 2014 of this Court in Co. Pet. No.334/2014; consequently, all the assets and liabilities of Ncube Logistic & Warehousing Pvt. Ltd. and GBESDPL have been transferred to

Ncubate India Services Pvt. Ltd.; (b) that the other defendants i.e. Global Brands Enterprise Solution Pvt. Ltd. (in liquidation), Pranay Dhabhai, Ravi Dhingra, Anurag Aggarwal and Alok Goswami, either as borrowers, guarantors or as conspirators, along with Ncubate Logistic & Warehousing Pvt. Ltd. and GBESPL, had cheated and defrauded IOB of a huge sum of money; (c) that the fraud played, is egregious in nature; (d) that the cause of action arose due to misrepresentation and non-disclosure of vital facts to IOB, especially by Ncubate, being the beneficiary of the BGs; (e) that the facts which were hidden, vitiate the entire transaction; (f) that in or about March, 2010, GBESPL approached IOB for sanction of certain credit limits and sought for cash credit limit of Rs.5 crores and LC limit of Rs.7 crores; (g) that IOB, acting on the security and documents furnished, sanctioned the said financial arrangement; (h) that thereafter, GBESPL requested for change of LC limits to BG limit, informing that the need therefor had arisen, to furnish BGs to suppliers/vendors, for timely procurement of 'AKAI' branded goods; (i) that since the account of GBESPL was regular and maintained in normal course, IOB allowed 100% inter-changeability and the BGs aforesaid in the total sum of Rs.7 crores were issued by IOB; (j) that the BGs were issued from 14th February, 2013 to 26th March, 2013 and were invoked within a period of 60-75 days; (k) however just before the aforesaid invocation, IOB received a letter from one of the Directors namely Ravi Dhingra, informing IOB of the fraudulent transaction being carried on between GBESPL, the borrower of IOB and Ncubate, being the beneficiary of the BGs; (l) that it was not disclosed to IOB at the time of obtaining the BGs that all the faces behind GBESPL and Ncubate were the same and their interest was common; (m) that IOB started making inquiries and stopped

payment against the BGs on the basis of facts which came to its notice; (n) that IOB discovered, (i) that GBESPL entered into agreement with Ncube and GBESDPL, for import and distribution of the electronics goods, though all three were part of the same group; (ii) that the arrangement was, that Ncube was to import goods for GBESPL and thereafter the same were handed over to GBESDPL for the purpose of distribution, and Pranay Dhabhai, being a Managing Director and Chief Executive Officer (CEO) of GBESPL was made the Director of GBESDPL; (iii) that it was only in the end of 2013 that IOB came across the agreements dated 5th May, 2012 entered into between Ncube, GBESDPL and GBESPL; (iv) that a minute examination of the agreements shows that the importer of goods i.e. Ncube and the distributor of goods i.e. GBESDPL, were group companies; (v) that the said importer, distributor and GBESPL had shared addresses and common godowns and warehouses and it did not make a difference, whether the goods were of GBESPL or of Ncube or of GBESDPL; (vi) that under the agreements, Ncube could not have claimed the amount from GBESPL which GBESPL was supposed to receive from GBESDPL for the goods which were given for distribution; however Ncube invoked the BGs, despite the fact that GBESDPL was liable to pay GBESPL an amount of more than Rs.17.37 crores, as evident from the debtor's statement submitted by GBESPL to IOB along with its letter dated 20th May, 2013; (vii) that Anurag Aggarwal, who was the authorised signatory of GBESPL, was an employee of Navneet Kapoor, a Director of Ncube and GBESDPL; (viii) that the complete control of GBESPL was in the hands of Ncube and GBESDPL; (ix) that Ncube has accepted the fact regarding Anurag Aggarwal in the rejoinder filed in the writ petition; (x) that thus Ncube

was having a total financial control over GBESPL through Anurag Aggarwal; (xi) that the beneficiary of the BGs issued by IOB had the complete financial control over the borrower of IOB; however on the day of invocation of the BGs, the signatory was changed; (xii) that Alok Goswami, Director of GBESDPL which was a debtor of GBESPL to the extent of Rs.17.37 crores, resigned from GBESDPL because he was also a Director with Ncube, again to remove the link; (xiii) that though Ashok Arjan Vaswani who was actively participating in the working of GBESPL, claimed that he had resigned as Director of GBESPL in 2011 but is found to have signed balance sheet for the year 2012-2013 of GBESPL as a Director; (xiv) that the agreements dated 5th May, 2012 were provided to IOB, only after 20th May, 2013, as admitted by Ncube in its letter dated 5th June, 2013 to IOB; (xv) that a sham winding up petition of GBESPL was filed for a meager amount of Rs.1.42 lacs and which was not even opposed by GBESPL; (xvi) that the agreements, under the garb whereof the BGs were obtained, also contained a provision for set off; (xvii) that in the balance sheet for the year 2013 of GBESDPL, it owed a sum of Rs.14.50 crores to GBESPL; GBESDPL and GBESPL, without paying anything, adjusted the amount *inter se*; (xviii) that GBESDPL, in the amalgamation proceedings claimed to have 'No Objection Certificate' (NOC) from all its unsecured creditors; GBESDPL, on that day owed GBESPL a sum of Rs.14.50 crores but still GBESPL, instead of recovering the same, suffered a winding up; (xix) that all amounts owed by GBESDPL to GBESPL were adjusted in expenses incurred for providing after sales service, when there was no need to provide the same; (xx) that as per the agreements now disclosed, if any of the stock was not taken by GBESPL from Ncube, Ncube could have sold

the same through GBESDPL; (xxi) that GBESPL, GBESDPL and Ncubate and their Directors were acting in connivance with each other, to play a fraud on IOB; they got unconditional guarantees issued, by suppressing material facts and all the acts have been done by them as a part of well planned strategy, with sole intention of obtaining payments under the guarantees; and, (xxii) that but for the letter dated 20th May, 2013 of Ravi Dhingra along with all the documents, IOB would never have been able to understand the magnitude of the fraud played on IOB; (o) that the invocation of the BGs is thus illegal, unjust and improper as the guarantees have been obtained by fraud; and, (p) that in case the guarantees are paid, IOB, a nationalised bank dealing in public money, would suffer irreparable injury and would never be able to recover the said monies as GBESPL has gone into winding up and the securities with the IOB do not even fully cover the other credit limits granted by IOB to GBESPL and for which proceedings before the DRT have been undertaken.

12. Ncubate, in its written statement in the suit, has pleaded (i) that IOB has filed the suit to protect the interest of Ravi Dhingra whose personal guarantees will be invoked, if the BGs are encashed; (ii) that the invocation of BGs has not been challenged by GBESPL, at whose instance/on whose behalf IOB has furnished the BGs; (iii) that IOB, instead of making payment under the BGs and recovering the amount from GBESPL and its guarantors, is failing in contractual and legal obligation under the BGs; (iv) that it is not the case of IOB that the BGs were issued under coercion or have been invoked without authority; (v) that it is the admitted case of IOB that it is fully secured against the issuance of BGs; (vi) that the BGs are secured by mortgage of plot of land at Udyog Vihar, Gurgaon, Haryana, personal

guarantees of Pranay Dhabhai and Ravi Dhingra and his sons Sidhant Dhingra and Sanchay Dhingra as well as by corporate guarantee of FCPL controlled by Pranay Dhabhai as well as by cash margin of 20% of the BGs amount; (vii) that IOB has already initiated recovery proceedings against GBESPL in respect of other facilities extended by IOB to it; (viii) that IOB, in the proceedings in the DRT, has also pleaded that if the monies under the BGs are paid, such amount would also be due from GBESPL and its Directors; (ix) that GBESPL had agreed to furnish BGs to Ncube, to secure the goods to be imported by Ncube and to be supplied to GBESPL; (x) that GBESPL and GBESDPL do not have common shareholders; they are distinct legal entities; (xi) that Ncube imported the goods and sold the same to GBESPL and for which GBESPL was to pay Ncube and to secure which amounts GBESPL agreed to furnish BGs to Ncube; (xii) that the entire case of IOB, of collusion, is on the basis of Ncube and GBESDPL having common Directors and having merged in Ncube India Services Pvt. Ltd.; (xiii) that there is no basis for IOB to resist payment under the BGs; (xiv) that if IOB had made payments under the BGs on time, it could have, before the winding up of GBESPL, taken steps for recovery of amounts paid under the BGs to Ncube and the delay on the part of IOB cannot be a reason for seeking injunction; (xv) that IOB has no privity of contract with Ncube and has no cause of action against Ncube and the plaint is liable to be rejected; (xvi) that the transaction between GBESPL and Ncube was an arms-length transaction, on principal-to-principal basis; (xvii) that it is a matter of record that Ncube and GBESDPL were part of the same group; (xviii) that based on the account statement as on 1st June, 2013, GBESPL owes Rs.10.25 crores to Ncube and in recovery of which, Ncube invoked

the BGs for Rs.7 crores; (xix) that GBESPL, as on 30th June, 2014 also owed Rs.2.49 crores to GBESDPL and the question of set off does not arise; (xx) that the plea of IOB, of GBESDPL owing Rs.17.37 crores to GBESPL, is false; the Official Liquidator (OL) of GBESPL has demanded only a sum of Rs.4,15,32,890/- from GBESDPL; the said claim of OL of GBESPL against GBESDPL has also been disputed by GBESDPL; (xxi) that Anurag Aggarwal was not an employee of Navneet Kapoor; (xxii) that the shareholders or Directors of Ncube never had any role in GBESPL; (xxiii) that though an amount of Rs.14.50 crores was due as on 31st March, 2013 from GBESDPL to GBESPL, the same was paid/adjusted during the subsequent months (para 21&22 (k) in reply to para 24 of the plaint); (xxiv) that though the goods were sold in the market by GBESDPL but the obligation to provide after sales service and support was of GBESPL and on failure of GBESPL to provide the after sales service, since GBESDPL distributed the goods, consumers and retailers started harassing the retailers who in turn started harassing GBESDPL and GBESDPL was forced to provide the support and incur expenses therein and which were adjusted in the amount owed to GBESPL; and, (xxv) that no fraud has been played on IOB.

13. The defendant No.5 Anurag Aggarwal has also filed a short written statement to the suit, supporting the stand of Ncube and otherwise stating that no relief in the suit having been claimed against him, he is not required to give parawise reply.

14. Similarly, defendant No.6 Alok Goswami has also filed a written statement supporting the written statement of Ncube.

15. Though IOB has filed a replication to the written statements aforesaid but need to refer thereto is not felt.

16. Vide order dated 26th September, 2016, defendants No.2 to 4 viz. GBESPL through OL, Pranay Dhabhai and Ravi Dhingra were proceeded against *ex-parte*; however Ravi Dhingra is found to have filed written arguments.

17. The suit, on 17th November, 2016, was listed for framing of issues. However, the counsel for IOB as well as the senior counsel for defendant No.1(a)&(b) i.e. Ncube and GBESDPL, since merged in Ncube India Services Pvt. Ltd. and defendants No.5&6 i.e. Anurag Aggarwal and Alok Goswami, stated that no trial is required and the suit be disposed of on the basis of arguments and documents. The consent of the counsels that the record of the writ petition shall be read in the suit, is also recorded in the order dated 17th November, 2016.

18. The hearing of the writ petition and the suit commenced on 14th February, 2017 and continued till 14th January, 2020, when written arguments were filed by the counsel for IOB and orders reserved.

19. Ncube, neither in the suit nor in the writ petition had placed on record any documents to show that the amount of the BGs was due from GBESPL to Ncube, for Ncube to, in realisation of the said amount, invoke the BGs. During the hearing on 14th February, 2017, it was so enquired from the senior counsel for Ncube and other defendants aforesaid and on request of the senior counsel for Ncube, Ncube permitted to file the said documents.

20. Ncube filed an additional affidavit verified on 26th April, 2017 (in Volume V of Part A file in the writ petition) along with documents, besides in the said Volume V of Part A file in the writ petition, in as many as 59 additional Volumes. Ncube along with the said additional affidavit, has filed copies of (i) Trade Mark License and Technical Collaboration Agreement between AKAI Sales Pte Ltd. Singapore and GBESPL, whereunder GBESPL was free to sell products under the trade mark 'AKAI' in India, Sri Lanka and Bangladesh, on payment of licence fee; (ii) Letter dated 2nd March, 2012 issued by AKAI Sales Pte Ltd. to GBESPL, authorising GBESPL to source or purchase products under the trade mark 'AKAI' from third parties and letter dated 24th May, 2012 whereby AKAI Sales Pte Ltd. permitted Ncube to import and source products under the trade mark 'AKAI', for sale by GBESPL; (iii) Ledger Summary of Ncube showing transactions containing total billing, payment, outstanding etc. of GBESPL; (iv) Month-wise billing done by Ncube on GBESPL and month-wise payments made by GBESPL to Ncube; (v) Sample Documents evidencing the manner in which goods were purchased by Ncube for GBESPL (in this regard it is pleaded that GBESPL used to identify the seller from which product was to be procured by Ncube; GBESPL used to determine quantity, price and terms of payment and obtain proforma invoice from the seller in the name of Ncube and hand over the same to Ncube to procure the products from the identified seller; Ncube thereafter used to approach the identified seller for procuring the products, establish LC from its bankers in favour of the seller; file bill of entry with the Customs Authorities and get the duty assessed and paid and clear the goods and warehouse the same) (it is also stated that the said goods were freely

importable under the open general licence, without need for obtaining licence); (vi) Summary of Purchases made from the suppliers of the products and Summary of Payments made to them; (vii) Summary of Total Purchases made for GBESPL and Payments made by GBESPL to Ncube; (viii) Commercial Invoices of purchase of goods for GBESPL, Packing Lists as well as Bills of Lading; (ix) Documents evidencing opening of LCs; (x) Bank statements of Ncube evidencing payments made to sellers from whom the products were procured as well as the payments received from GBESPL; (xi) Invoices raised by Ncube on GBESPL (it is also pleaded that the products, on being released from Customs, were brought into the godown/warehouse of Ncube and transferred to the several warehouses of Ncube and thereafter sold to GBESPL as per the requirement of the GBESPL); (xii) Summary of Transactions between GBESPL and GBESDPL as per which an amount of Rs.2.64 crores is due from GBESPL to GBESDPL (it is also pleaded that qua Modern Trade Chains/Shops viz. Reliance, Croma, Big Bazaar etc., the role of GBESDPL was limited to local logistics and invoicing and the duty of sale, distribution and collection was that of GBESPL and in consideration whereof GBESPL was to pay GBESDPL 1.5% trade margin on the net selling price; else, GBESPL was to pay GBESDPL 4.5%); (xiii) Month-wise purchases made by GBESDPL from GBESPL; (xiv) Month-wise payments made by GBESDPL to GBESPL; (xv) Banks Statements of GBESDPL (it is also pleaded that GBESDPL was entitled to credit of Rs.1.21 crores for payments directly received by GBESPL and to credit of Rs.1.23 crores towards sale scheme under Clause 4.5 of the agreement between GBESPL and GBESDPL and to credit of Rs.0.20 crore towards octroi duty reimbursement in terms of

Clause 4.9(c) of the agreement between GBESPL and GBESDPL); (xvi) Debenture Subscription Agreement entered into by GBESPL and its shareholders with SAR Capital Pvt. Ltd., a group company of Ncube and GBESDPL, whereunder SAR Capital Pvt. Ltd. had advanced Rs.2 crores to GBESPL for allotment of optionally convertible debentures and notices/letters sent by SAR Capital Pvt. Ltd. calling upon GBESDPL to pay Rs.2 crores with interest in terms of Clause 7 of Schedule B of Debenture Subscription Agreement; (xvii) Documents evidencing payment of Rs.2.43 crores by GBESDPL to SAR Capital Pvt. Ltd.; and, (xviii) Service Vouchers to show after sale service rendered by GBESDPL on failure of GBESPL to provide so.

21. The senior counsel for Ncube argued, (a) that as per the statement made by counsels and recorded in the common order dated 17th November, 2016 in the suit and the writ petition, no trial is required and the writ petition and the suit have to be decided on the basis of arguments and documents; (b) that Ncube has filed all the documents to show the genuineness of the transactions and which documents show that no fraud was practiced on IOB; (c) that IOB did not choose to lead any evidence and has also not filed any documents in response to the documents filed by Ncube along with its additional affidavit; (d) that GBESPL was having financial facilities from IOB, of Rs.12 crores, since prior to the agreement of GBESPL with GBESDPL and it is not as if, financial facilities from IOB were obtained only when GBESDPL came into picture; (e) that in fact GBESPL was having financial difficulties inspite of having a valuable agreement with AKAI and GBESDPL stepped in only to enable GBESPL to reap the benefits of the said agreement with AKAI; (f) that GBESPL had agreed to

furnish unconditional BGs for Rs.7 crores in favour of Ncube in consideration of Ncube agreeing to provide credit to GBESPL for a period of 45 days from the date of receipt of consignment in the first warehouse upon importation of goods in India or upon domestic purchase from vendor; attention was invited to Clauses 2.4, 2.5 and 2.9 of the agreement between GBESPL and GBESDPL; (g) that it is not as if, IOB did not have any security for the BGs furnished by it; if IOB has lost the securities, it has itself to blame; (h) that the documents filed by Ncube show transactions of over Rs.100 crores and transactions of such volume cannot be called collusive; (i) that the tests of fraud are to be seen in the context of Section 17 of the Indian Contract Act, 1872 and merely by shouting fraud, IOB cannot claim to have been defrauded; (j) that IOB is presumed to have done due diligence before giving the BGs; (k) that attention was drawn to Annexure C to the additional affidavit, being the ledger summary of Ncube qua transactions with GBESPL; and, (l) that the shareholders of GBESPL and Ncube were different and it was only one person of GBESPL, who was appointed on the Board of GBESDPL, that too for proper functioning.

22. The counsel for IOB, besides reiterating the facts as pleaded in the counter affidavit to the writ petition and in the plaint, argued (i) that the claim of IOB is that there has been an egregious fraud by parties involved, thereby vitiating the whole transaction and it is for this reason only that the BGs have not been paid; needless to state that if the BGs are paid, irreparable loss will be caused to IOB; (ii) that entities under the garb of corporate veil cannot be permitted to play fraud and swindle away public money; (iii) that all the securities and monies that IOB had reserved to secure its interest and monies lent to GBESPL including in the form of BGs,

have been removed and swindled away; (iv) that it is the case of Ncube that monies have become due to Ncube in terms of the agreement with GBESPL, because GBESPL did not pay its dues under the purchase orders and the same were outstanding for more than 55 days; (v) however Ncube, after invoking the BGs on 1st June, 2013 has made adjustments worth Rs.4.73 crores; (vi) that writ jurisdiction cannot be invoked where the Bank is claiming fraud on the part of the beneficiary; (vii) that adjudication of serious question of fraud requires examination of documents and which cannot be done in writ jurisdiction; reliance is placed on *Edward Owen Engineering Ltd. Vs. Barclays Bank International Ltd.* (1978) 1 All ER 976 (CA), *U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd.* AIR 1988 SC 2239, *U.P. State Sugar Corporation Vs. Sumac International Ltd.* (1997) 1 SCC 568 and *National Building Construction Corporation Vs. Punjab National Bank* 98 (2002) DLT 53; (viii) that Ncube, in its writ petition has not made GBESPL or its shareholders and Directors a party; (ix) that examination of fraud cannot be undertaken and adjudicated under Article 226 of the Constitution of India; (x) that GBESPL was availing credit facility from IOB, of Rs.5 crores for CC limit and Rs.7 crores for LC, since the year 2010; (xi) that vide letter dated 30th January, 2013, Anurag Aggarwal requested IOB to allow interchangeability of LC limits into BG limits stating that the necessity of the same was to cover up purchase orders being raised by GBESPL on Ncube; (xii) that IOB subsequently discovered that Ncube was the importer of the goods and was further stocking, warehousing and maintaining inventory of the goods and also distributing the goods; (xiii) that as far as GBESPL was concerned, it was just a paper based transaction

because GBESPL was the licence holder of AKAI; (xiv) that there was active concealment of facts and documents; (xv) that certain acts were staged, only to have the monetary gains of encashment of BG; (xvi) that IOB, was not told that Ncube and GBESDPL were part of the same group and associate concern; (xvii) that it was also concealed that Anurag Aggarwal of GBESDPL and Ncube was made to serve in GBESPL; (xviii) that IOB further learnt that AKAI Sales Pte Ltd. was into winding up in Singapore, on 1st March, 2013; (xix) that all the goods were under the control of Ncube but still the goods were hypothecated by GBESPL in favour of IOB; (xx) that GBESPL was maintaining several bank accounts with other Banks and was transacting with Ncube and GBESDPL through these accounts; (xxi) that both the agreements entered into by GBESPL, with Ncube and GBESDPL, were one sided; (xxii) that IOB further learnt that Anurag Aggarwal who was an Officer of GBESPL was actually an employee of Navitas Grain Power Limited, a shareholder of Ncube as well as GBESDPL; (xxiii) that thus, Ncube only was controlling the financial operations of GBESPL also; (xxiv) that Ncube had 40% share of GBESPL pledged with it; (xxv) that Anurag Aggarwal was subsequently removed from GBESPL, to remove the link between GBESPL and Ncube; (xxvi) that as per the agreement between GBESPL and Ncube, on GBESPL not lifting the goods within 55 days of import, Ncube could sell the same through GBESDPL, in realisation of its dues; (xxvii) that the purchase orders placed by GBESPL on Ncube, which are the basis of the BGs, have not been placed on record; (xxviii) that the purchase orders placed by GBESDPL on GBESPL, have also not been placed on record; (xxix) that under the agreement between GBESPL and GBESDPL, GBESDPL was to

pay the monies to GBESPL, as and when received; (xxx) that GBESDPL owed Rs.17.37 crores to GBESPL on 30th April, 2013 and there was no need for Ncube to invoke the BGs on 1st June, 2013; (xxxi) that GBESDPL was intentionally named like GBESPL, to carry out distribution of AKAI goods, for which GBESPL had a licence; and, (xxxii) that GBESPL, as a licence holder of AKAI, instead of charging monies from Ncube or GBESDPL for use of the said licence, gave total control of GBESPL to the group of companies to which Ncube and GBESDPL belonged; importing, sourcing, warehousing, inventory maintaining, distribution, after sale service, collections etc., in relation to AKAI products, were all being done by the group of companies to which Ncube and GBESDPL belonged; the day Ncube came to know of winding up of AKAI Sales Pte Ltd., the BGs were got issued, to siphon off the monies.

23. I have perused the voluminous records, besides going through the pleadings and have considered the contentions of the counsels.

24. The suit, though for declaration of the BGs as null and void and unenforceable and for permanent injunction restraining Ncube from encashing the BGs, unlike most of the other suits for similar reliefs, with which the Courts are inundated, has been filed not by the creditor of the beneficiary of the BG, at whose instance the BG is issued/furnished by the Bank, but by the Bank itself. Unlike other suits, where the person at whose instance/on whose behalf the BG has been furnished, claims the BG to have been fraudulently obtained by the beneficiary, here it is the Bank which has furnished the BGs, which is claiming the beneficiary to have practiced fraud in the matter of issuance of the BGs. Again, unlike other suits where the

Bank which has issued the BG is a neutral party and but for the injunction granted by the Court, is willing to pay under the BG, here it is the Bank itself which is the contesting party and is denying the liability to pay and the client of the Bank at whose instance the Bank has issued the BG, is the neutral party and though impleaded as a defendant in the suit, has chosen not to contest.

25. Owing to the aforesaid differences, in my opinion, the plethora of judgments of the Supreme Court and the High Courts, on suits for injunction against invoking/encashment of BGs, filed by the customers of the Bank at whose instance the BG has been issued, laying down that the Courts will not interfere in an unconditional, unequivocal BG having effect as per its terms save on the ground of established fraud of an egregious nature to the knowledge of the Bank or on the ground of irretrievable injustice, would not have any application.

26. The claim of IOB for injunction against encashment of BGs and the claim of Ncube for payment under the BGs, in my opinion, has to be adjudicated applying the law relating to contracts of guarantee as contained in the Contract Act.

27. Ordinarily, if the guarantor, in spite of demand, does not pay under the guarantee, the remedy of the beneficiary of the guarantee, which per Section 126 of the Contract Act, is called the "creditor", is to institute a suit for recovery of the amount of the guarantee. As per said Section 126, the person in respect of whose default the guarantee is given i.e. GBESPL here, is called the "principal debtor". Ncube as the creditor, while so instituting a suit for recovery of the guaranteed amount, would have a choice, to so

institute the suit either jointly or severally against the guarantor i.e. IOB and GBESPL or if entitled under the guarantee to recover from IOB as guarantor, without first having recourse against GBESPL as the principal debtor, to institute the suit for recovery against IOB alone.

28. Ncube however, taking advantage of IOB being a nationalised bank and a writ petition under Article 226 of the Constitution of India lying thereagainst, instead of filing a suit, choose to file the instant writ petition. Though a writ petition seeking recovery jointly and/or severally from IOB and GBESPL, the principal debtor of Ncube, would not have been maintainable but Ncube could have added GBESPL as a proforma respondent, but it did not. IOB, in its counter affidavit to the writ petition pleaded fraud, giving particulars thereof.

29. Ordinarily, when disputed questions of fact are found to arise and which require examination and cross-examination of witnesses and which cannot be done in writ jurisdiction, the parties are relegated to a remedy where the witnesses can be examined and no relief in writ jurisdiction granted. Again, ordinarily writ petitions do not lie in contractual matters or in enforcement of contract, as Ncube has filed the instant writ petition, in enforcement of the contract of guarantee with IOB. However, the occasion to consider all this did not arise in the writ petition because of it being informed that IOB had instituted a suit for permanent injunction restraining encashment of subject BGs and for declaration of the same as null, void and unenforceable and plaint wherein had been returned for filing in the Court of appropriate pecuniary jurisdiction and IOB taking a stand that it would re-file the suit in this Court. This is how, the writ petition was kept pending

awaiting the suit and the two being taken up together for consideration. However, the parties in the suit also have taken a stand that they do not want to lead evidence. We have thus returned to the same position in which we were in the writ petition.

30. In the circumstances, I have wondered the course of adjudication, on the anvil of, (a) whether the defence of IOB in the writ petition and which is the same as in its plaint in the suit, of the BGs having been fraudulently and collusively obtained, is established on the basis of documents on record; (b) even if it is not so conclusively established, whether such claim of IOB is plausible enough to raise disputed questions of fact which cannot be decided without examination and cross-examination of witnesses; and, (c) on whom does the onus lie, of proving that the monies are due under the BG and/or of proving that the BGs were fraudulently obtained and if the said questions cannot be decided without examination and cross-examination of witnesses, who should suffer i.e. IOB or Ncube, for not leading any verbal evidence.

31. I have first perused the voluminous records to gauge, what the documents tell.

32. All the four BGs subject matter of these proceedings, are identically worded and the material terms thereof are as under:

"Bank Guarantee

As per the conditions mentioned in the purchase orders being raised for procurement of branded consumer electronic goods from Global Brands Enterprise Solutions Private Limited ("GBES") to Ncube Logistic & Warehousing Private Limited ("NLWPL"), GBES is required to arrange for issuance of unconditional and irrevocable, bank guarantee in favour of NLWPL for performance of the terms and conditions mentioned

*therein. The Indian Overseas Bank, DLF Qutub Enclave Branch, DLF Phase II, Gurgaon (the "**Guarantor Bank**") hereby agrees unequivocally, irrevocably and unconditionally to pay to NLWPL forthwith on demand in writing from NLWPL or any Officer authorized by NLWPL in this behalf, any amount up to and not exceeding Rs.2,00,00,0000/- (Rupees Two Crores Only) on behalf of GBES.*

.....

The Guarantor Bank hereby agrees and acknowledges that NLWPL shall have a right to invoke this bank guarantee in part or in full, as it may deem fit.

The Guarantor Bank hereby expressly agrees that it shall not require any proof in addition to the written demand by NLWPL, made in any format, raised at the above mentioned address of the Guarantor Bank, in order to make the said payment to NLWPL.

The Guarantor Bank shall make payment hereunder on first demand without restriction or conditions and notwithstanding any objection by GBES and/or any other person. The Guarantor Bank shall not require NLWPL to justify the invocation of this bank guarantee, nor shall the Guarantor Bank have any recourse against NLWPL in respect of any payment made hereunder."

33. Per Section 126 of the Contract Act, a contract of guarantee is a contract to perform the promise or discharge the liability of a third person in case of his default. Section 127 titled "Consideration for Guarantee" provides that anything done or any promise made, for the benefit of the principal debtor i.e. GBESPL, may be a sufficient consideration to the surety i.e. IOB here, for giving the guarantee. The consideration for the BGs issued by IOB in favour of Ncubate, on the face of and as per the language of the BGs, was "conditions mentioned in the purchase orders being raised

for procurement of branded consumer electronic goods from Global Brands Enterprise Solutions Private Limited ("**GBES**") to Ncube Logistic & Warehousing Private Limited ("**NLWPL**"), GBES is required to arrange for issuance of unconditional and irrevocable, bank guarantee in favour of NLWPL for performance of the terms and conditions mentioned therein".

34. Ncube invoked all the four BGs, as aforesaid, vide its letter dated 1st June, 2013 to IOB, merely stating "We hereby invoke these guarantees and demand payment of the said amount of Rs.7,00,00,000/- (Rupees Seven Crores only) to us forthwith as per the terms of guarantees issued".

35. As would be evident from the BGs and the letter of invocation thereof, they have been issued "as per the conditions mentioned in the purchase orders raised for procurement of branded consumer electronic goods from Global Brands Enterprises Solutions Pvt. Ltd. to Ncube Logistic & Warehousing Pvt. Ltd.". It being the case of IOB, that it is not liable under the BGs and the BGs were obtained owing to collusion between GBESPL and Ncube, I have in the plethora of documents searched for purchase orders placed by GBESPL on Ncube and to secure Ncube qua performance of terms and conditions whereof, the BGs were given. Surprisingly, Ncube had not filed the said purchase orders, neither with its writ petition or with the rejoinder to the counter affidavit of IOB therein nor with its written statement in the suit. However, Ncube in its additional affidavit filed in pursuance to the order dated 14th February, 2017 *supra*, in paragraph 8 has deposed "sample copy of documents evidencing the manner in which goods were purchased by petitioner No.1 for Global Brands are annexed herewith and marked as Annexure F". Annexure F runs from

internal pages 141 to 191 of the said additional affidavit but has only two purchase orders placed by GBESPL on Ncube i.e. Purchase Order No.GBES/1MP/2012-13/14 dated 4th July, 2012 of Rs.4,85,95,200/- and Purchase Order No.GBES/1MP/2012-13/14 dated 29th November, 2012 of Rs.2,83,82,520/-. The other documents in Annexure F, though relating to procurement of goods by Ncube, are not purchase orders placed by GBESPL on Ncube. The "Terms and Conditions" printed on both the purchase orders are as under:

- "1. Payment terms: as per the terms of the Agreement.*
- 2. Price terms: as per the terms of the Agreement.*
- 3. VAT/CST: extra as applicable.*
- 4. Local Delivery Charges: extra."*

The purchase orders do not require GBESPL to furnish any BG in favour of Ncube, in consideration whereof the BGs record IOB to have furnished the guarantee. Neither the BGs nor the invocation letter have any reference to any agreement or to the agreement dated 5th May, 2012 between GBESPL and Ncube and in pursuance whereof the purchase orders were being placed by GBESPL on Ncube. The plea of IOB that the said agreements were suppressed from IOB and came to its knowledge only subsequently, is thus a plausible plea.

36. The said agreement dated 5th May, 2012 between GBESPL and Ncube, is titled "Import and Sourcing Agreement". A perusal of the said agreement shows, (a) that GBESPL thereunder engaged Ncube to import, warehouse and/or supply the products to GBESPL that were required by GBESPL from time to time; (b) that Ncube was to source the products

from vendors, whether in India or overseas, as were to be designated by GBESPL and to sell the same to GBESPL; (c) that Ncube thereunder also agreed to extend working capital support to GBESPL; (d) that under the said agreement, GBESPL was to, from time to time, place specific and confirmed purchase orders on Ncube giving specific quantities with model references, shipment period etc. and Ncube, on receipt of the said purchase orders from GBESPL, was to raise requisite purchase orders on the vendors, by opening the necessary LC; (e) that the price at which the products were to be supplied by Ncube to GBESPL was to be based on the foreign exchange rate prevalent at the time of payment; (f) that Ncube agreed to provide credit in respect of consignment of products to GBESPL for a period of 45 days from the date of receipt of consignment in the warehouse, upon importation of goods in India; and, (g) that in case of delay beyond the time of 55 days from the date of receipt of consignment in the warehouse upon importation to India, Ncube was entitled to suspend further imports and was also entitled to sell the products directly or through other channels, as it may consider appropriate, in order to liquidate the inventory and recover the dues and to receive the balance, if any from GBESPL.

37. On a reading of the aforesaid agreement, what transpires is that on GBESPL placing purchase orders on Ncube, Ncube was to import the subject goods and to retain custody thereof in its warehouse and GBESPL was required to purchase the said goods from Ncube within 45 days, with the grace period of 10 days, of the goods so reaching the warehouse and on failure of GBESPL to purchase the said goods within 55 days from Ncube, Ncube was entitled to sell the same to realize the amounts incurred by it in import thereof and to recover from GBESPL only the shortfall, if any. It

will thus be seen that under the agreement between them, at no point of time, the goods purchased/imported by Ncube, even though at the asking/behest of GBESPL, were to go out of the charge or custody or title of Ncube, without Ncube receiving payment thereof from GBESPL and on failure of GBESPL to so purchase the goods within 55 days, Ncube was entitled to sell the same. The risk thus of Ncube, under the agreement aforesaid with GBESPL, on GBESPL defaulting in purchasing the said goods from Ncube and paying price thereof to Ncube, was confined to, the loss if any suffered in sale of the said goods to others or being not able to sell the same in India. However, it is not the case of Ncube, neither in the writ petition filed by it nor in its written statement in the suit, that the goods were not sellable or could not be sold or in such sale fetched less price than what GBESPL had agreed to pay. The said goods, as aforesaid, were of 'AKAI' and which had a large market in India at the relevant time.

38. Notwithstanding the risk of Ncube being limited as aforesaid, the Import and Sourcing Agreement aforesaid between GBESPL and Ncube, in Clause 4 thereof provided for GBESPL to arrange for issuance of an unconditional and irrevocable BG in favour of Ncube, of the value of the goods for which purchase orders were placed on Ncube.

39. However, the BGs issued and whereunder payment is claimed, are not with reference to any specific purchase order and it is inexplicable why BGs for Rs.7 crores only were deemed apposite when the transactions claimed under the agreement are of much more.

40. Not only so, even after GBESPL had so purchased the goods imported by Ncube, from Ncube, under another "National Distribution

Agreement" dated 5th May, 2012 between GBESPL and Savoir Faire Services Pvt. Ltd. (whose name was subsequently changed to GBESDPL) and which was/is admittedly a sister concern of Ncube, GBESPL appointed GBESDPL as the distributor of the goods. Under the said agreement, GBESDPL was responsible for handling of invoicing and local logistics of the goods purchased by GBESPL from Ncube.

41. What thus emerges is, that even after the title in the goods imported by Ncube on asking of GBESPL had passed from Ncube to GBESPL, the custody of the goods was with GBESDPL, a sister concern of Ncube. In such manner, the goods remained in the custody, control and charge of the Ncube and GBESDPL and were never in the custody or charge of GBESPL, for whose default in payment to Ncube, IOB furnished the BGs.

42. On a reading of the aforesaid documents, which are the only relevant documents to the controversy, in a commercial sense, the occasion for Ncube to invoke the BGs could have arisen only on failure of GBESPL within the prescribed time of 55 days purchasing the goods from Ncube and Ncube either being unable to sell the said goods to others, which it was entitled to under the agreements or on suffering loss on such sale. Neither is the pleaded case of Ncube. On the contrary, Ncube filed the writ petition on the premise that since it is the holder of an unconditional BG, it is entitled to encash the same. The same is the defence of Ncube to the suit. However the law does not entitle the beneficiary of a BG to monies thereunder, merely because it can. Similarly, the law does not compel the guarantor to pay, merely because the guarantor has secured itself with the securities furnished by the principal debtor. When the consideration for the

BG, as set out in the BG, is the terms and conditions of the purchase orders and which in turn refer to the agreements, for the beneficiary to be entitled to payment under the BGs, when disputed by the guarantor Bank, has to plead and at least *prima facie* show that monies are due. It is not the case of Ncube, that GBESPL did not purchase the goods for which it had placed the purchase orders or that on such default by GBESPL, Ncube suffered any loss. Rather, Ncube is claiming overall deficit of GBESPL in its ledger and claiming the amount to be due under the BGs. However, the BGs are not for such deficit but for default of GBESPL in compliance with the terms and conditions of the purchase orders. No other monies even if due from GBESPL to Ncube, can be recovered by Ncube under the BGs. Moreover, none of the documents filed show any acknowledgement of GBESPL of liability under the purchase orders towards Ncube or unequivocally establish any amounts to be due from GBESPL to Ncube under the purchase orders. IOB, as aforesaid, since after invocation of the BGs, is denying liability under the BGs.

43. Even if it is assumed that Ncube, after importing the goods, delivered the same to GBESPL without realising the price thereof, the goods still remained in the custody and charge of Ncube through its sister concern GBESDPL, again showing that there was no risk for which the BGs in question were required to be issued. BGs are issued only to secure risk and/or payment of which there would else be no security in the hands of the beneficiary. Here, under the agreements aforesaid, Ncube was not at any risk inasmuch as it was not required to part with the goods imported by it, without receipt of payment thereof and even if so parted with custody of the goods, the goods remained with its sister concern i.e. GBESDPL and

Ncube thus remained entitled to sell the same in the event of non-payment by GBESPL and to realise its dues. In other words, Ncube was not at risk at any single moment in the entire transaction and I fail to gauge the need for BG and the action of GBESPL of arranging BGs in favour of Ncube, from IOB, is suspect.

44. Though undoubtedly IOB as the issuer of unconditional unequivocal BGs was/is liable to honour the same but IOB has succeeded in raising a doubt as to the entitlement of Ncube to the monies claimed under the BGs. Once it is so, the onus to prove in the positive that monies are due under the BGs, shifted to Ncube and which Ncube has failed to discharge. Ncube neither choose to file a suit for recovery of monies nor choose to conclusively prove by leading evidence that monies claimed are due under the BGs.

45. Section 133 of the Contract Act provides that "Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance". Section 134 provides that the surety is discharged by any contract between the creditor and the principal debtor by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor. Section 142 provides that any guarantee which has been obtained by means of misrepresentation by the creditor concerning a material part of the transaction, is invalid. Section 143 makes any guarantee obtained by means of keeping silence as to any material circumstance, invalid.

46. As aforesaid, the subject BGs do not refer to the agreement dated 5th May, 2012 between GBESPL and Ncube and whereunder the purchase orders referred to in the BGs were to be placed by GBESPL on Ncube. The parties have also not placed any other document on record to show that IOB was aware of the said agreement at the time of issuing the BGs. Even if it was not so, since the BGs have not been issued referring to or in consideration of the said agreement, the only inference is that the BGs have been issued only in terms of the purchase orders. However, neither counsel during the hearing has drawn attention to any purchase order or to any of the terms thereof under which the BGs may have been issued. Since the parties did not choose to lead any verbal evidence, the question of the same surfacing during the examination and cross-examination did not arise. Thus, today it cannot be said with certainty, whether the agreement dated 5th May, 2012 between GBESPL and Ncube was in the knowledge of IOB before issuing the BGs.

47. However there is a specific plea of IOB in its plaint in the suit and qua which no document has been referred to in the written statement that the agreements dated 5th May, 2012 between Ncube and GBESPL and between GBESPL and GBESDPL were not disclosed to IOB. From non-disclosure of the said agreements to IOB, it can be said that the same was a variance of the terms of the contract between GBESPL as the principal debtor and Ncube as the creditor and IOB as a guarantor thus stood discharged. All the aforesaid facts and documents speak for themselves and the aforesaid facts are enough for denying to Ncube the relief sought in the writ petition in exercise of powers under Article 226 of the Constitution of India, of mandamus to IOB to encash the BGs. The counter affidavit filed

by IOB in the writ petition raised disputed questions of fact which if proved could have resulted in discharge of IOB from its obligation under the BGs and/or to the guarantee being invalid under Section 142 and 143 of the Contract Act.

48. With reference to the course of adjudication in paragraph 30 above, in my opinion, (a) on the basis of documents on record, it cannot be conclusively established, whether monies under the BGs are due to Ncube or not or whether the BGs were obtained by misrepresentation or concealment or whether IOB stands discharged from liability thereunder owing to dealings between Ncube and GBESDPL on the one part and GBESPL on the other part and which discharge GBESPL from liability under the purchase orders for the value thereof, with GBESPL remaining responsible/liable only for the loss, if any suffered by Ncube in sale of the goods not purchased by GBESPL; (b) however, IOB has placed sufficient material on record for suspicion to arise on all the aforesaid counts; the said questions cannot be answered without examination and cross-examination of witnesses; (c) though initial onus to prove that the BGs have been obtained by fraud, collusion and concealment was on IOB as the plaintiff in the suit but IOB has discharged the initial onus by raising questions which could have been answered only by Ncube and onus thus shifted on Ncube, to prove in the positive that liability covered by the BGs had accrued and which Ncube has failed to discharge; and, (d) thus, Ncube has to suffer for not leading evidence.

49. Even otherwise, once Ncube is found to be not entitled to the relief in the writ petition, the remedy of Ncube, on failure of IOB to honour the

BGs, was/is by way of filing a suit against IOB, whether under Order XXXVII of the Code of Civil Procedure, 1908 or otherwise. Ncubate did not deem it appropriate to do so inspite of the writ petition having remained pending for the last seven years, since the year 2013 and the limitation for filing such a suit has expired.

50. Supreme Court recently in *Punjab National Bank Vs. Atmanand Singh* (2020) 6 SCC 256 was concerned with consistent judgments of the Single Judge and of the Division Bench of the High Court allowing a writ petition seeking mandamus directing the Bank to pay the monies claimed to be due. The High Court allowed the writ petition reasoning that the plethora of documents brought by the writ petitioner before the Court, when read as a whole, gave a feeling that the Bank was wanting to wriggle out of a ticklish situation by raising technical objections with regard to the maintainability of the writ application. Setting aside the consistent judgments of the Single Judge and of the Division Bench of the High Court, the Supreme Court held (a) that there was no unanimity between the writ petitioner and the Bank on the relevant facts, on the basis of which the relief claimed in the writ petition was founded; (b) that the Bank had denied the liability by relying upon the affidavits of its personnel and some documents; (c) that the stand taken by the Bank, on preponderance of probabilities, could not be out rightly dismissed; (d) that the case set up by the writ petitioner was neither the admitted position nor could be said to be indisputable; (e) that rather the case set up by the writ petitioner involved scrutiny of complex matters and issues, including the existence of the agreement and its genuineness; (f) that such a matter could not be decided on the basis of inferences; (h) that the High Court could not have assumed the documents produced by the writ

petitioner to be genuine and admissible, despite denial by the Bank; and, (i) that from a very reading of the agreement, it was unfathomable how the Bank would agree to such onerous terms; reliance was placed on *Thansingh Nathmal Vs. Superintendent of Taxes, Dhubri* AIR 1964 SC 1419 and *Suganmal Vs. State of Madhya Pradesh* AIR 1965 SC 1740 holding that jurisdiction under Article 226 of the Constitution of India is not intended as an alternate remedy for relief which may be obtained in a suit and that ordinarily a petition under Article 226 of the Constitution of India would not be entertained, when there is an alternate remedy and/or when elaborate examination of evidence to establish the right sought to be enforced, is required or for recovery of money.

51. The aforesaid judgment applies fully to the facts of this case and thus the need to multiply precedents is not felt.

52. Resultantly, W.P.(C) No.7302/2013 is dismissed, as entailing disputed questions of fact, not capable of decision in jurisdiction under Article 226 of the Constitution of India and CS(COMM) No.829/2016 is disposed of observing that Ncubate Logistic & Warehousing Pvt. Ltd. as the beneficiary of the BGs having not sued for recovery of monies under the BGs, is in any case not entitled to recovery thereof and on the basis of documents on which the parties agreed for suit to be decided, there is sufficient material before the Court to hold IOB to have stood discharged from its obligations under the BGs owing to concealment and misrepresentation and owing to the evident collusion and fraud practiced in issuance of the BGs.

53. However the parties are left to bear their own costs.

54. Before closing, I must condole the sudden and sad demise, after judgment in these proceedings was reserved, of Mr. Karan Khanna, Advocate, who valiantly and to the best of his ability defended the interest of IOB in these proceedings.

RAJIV SAHAI ENDLAW, J.

FEBRUARY 08, 2021

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