

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
SUMMARY SUIT NO.919 OF 1996**

M/s. Unique Integrated Transport and Management
Consultancies Pvt. Ltd.,
a company registered under the Companies
Act, 1956 with certificate of incorporation
No.34689 of 1989 and
registered address at 701-702,
Manish Mahal, Veera Desai Road,
Andheri (W), Bombay – 400 053

... Plaintiff

versus

1. M/s. Punjab National Bank Ltd.,
Fort Branch, through its Asstt.
Manager, P.M.Road, Bombay – 400 023

2. Shri Ajay Dwiwedi, Officer,
Oriental Bank of Commerce, Fort Branch,
P.M.Road, Fort, Bombay – 400 023.

3. Shri Surya Narayan, Officer,
Oriental Bank of Commerce, Fort Branch,
P.M.Road, Fort, Bombay – 400 023

... Defendants

**WITH
NOTICE OF MOTION NO.2566 OF 2018
AND
INTERIM APPLICATION (L) NO.20808 OF 2021
IN
SUMMARY SUIT NO.919 OF 1996
WITH
SUIT NO.2999 OF 2005**

1. Unique Integrated Transport and Management
Consultancies Pvt. Ltd.,
a Company registered under the Indian
Companies Act, with registered office at

702, Manish Mahal, Veera Desai Road,
Andheri (W), Mumbai – 400 053.

2. Mrs. A.P.Khanna, Indian
Resident of 701-702, Manish Mahal,
Veera Desai Road, Andheri (W),
Mumbai – 400 053.
3. Dr. Kishan K. Khanna, Ph.D., Indian
Resident of 701-702, Manish Mahal,
Veera Desai Road, Andheri (W),
Mumbai – 400 053.

... Plaintiffs

versus

Punjab National Bank Ltd.,
a nationalized Bank registered
as a Banking Company under the Companies
Act with Branch Office at Sir P.M.Road,
Fort, Bombay – 400 001

... Defendant

WITH
INTERIM APPLICATION (L) NO.20809 OF 2021
AND
NOTICE OF MOTION NO.2335 OF 2018
IN
SUIT NO.2999 OF 2005

Dr. K.K.Khanna, for Plaintiffs.

Mr. Shanay Shah with Mr. Anup Khaitan i/by Anup Khaitan and Co., for Defendants.

CORAM : N.J.JAMADAR, J.

REHEARD & RESERVED ON : 13 JUNE 2023

PRONOUNCED ON : 19 JUNE 2023

JUDGMENT :

1. As both the suits have their genesis in banking transactions between the parties and a number of common issues arise for determination, they were heard

together and are being decided by this common judgment.

2. Facts in Suit No.919 of 1996 :

2.1 This suit is instituted for recovery of a sum of Rs.1,16,77,000/- along with interest from the date of institution of the suit till realization for the alleged wrongful encashment of the bank guarantees and the consequent loss and damages.

2.2 M/s. Unique Intergrated Transport and Management Consultancies Pvt. Ltd. (M/s. Unique) – Plaintiff, is the company registered under the Companies Act, 1956. The Plaintiff was engaged, inter alia, in the business of work contract.

2.3 Mahanagar Telephone Nigam Ltd. (MTNL) had awarded various contracts to the Plaintiff for construction of PVC pipe duct system for laying cables for telephone lines in Mumbai.

2.4 In accordance with the terms of the contract, the Plaintiff was required to execute bank guarantees of various types in favour of MTNL. M/s. Oriental Bank of Commerce (OBC), which merged with Punjab National Bank (PNB), Defendant No.1, was the Plaintiff's banker (the Bank). Defendant Nos.2 and 3 were the officers then posted at the Fort Branch of the Bank.

2.5 At the instance of the Plaintiff, Defendant No.1 had issued bank guarantees of varying dates; four of them being Performance Bond Guarantees for Rs.9.9 Lakhs, Rs.5.8 Lakhs, Rs.2.88 Lakhs and Rs.2.86 Lakhs respectively; four Mobilization Advance Guarantees of Rs.9.9 Lakhs, Rs.5.8 Lakhs and Rs.2.88 Lakhs

and Rs.2.86 Lakhs respectively, and a Retention Money Bank Guarantee for Rs.9.5 lakhs.

2.6 The Plaintiff asserts, the Plaintiff executed the work in accordance with the terms of the contract and all the guarantees were required to be returned. Four of the bank guarantees, which are the subject matter of the dispute, namely Performance Bond Guarantee No.233/89 for Rs.2.86 Lakhs, initially issued on 18 July 1989, Retention Money Bank Guarantee No.162/93 for Rs.9.5 Lakhs, issued on 11 November 1993, Performance Bond Guarantee No.219a/89 for Rs.2.88 Lakhs, issued on 21 June 1989, and Mobilization Advance Guarantee No.220/89 for Rs.22,970/-, issued on 21 June 1989, had expired by the end of 1994. Those expired bank guarantees covered an amount of Rs.15,68,089/-.

2.7 The Plaintiff avers, disputes arose between the Plaintiff and MTNL over non-payment of the bills despite execution of the contract. The Plaintiff was constrained to invoke arbitration and a number of proceedings, including Arbitration Petitions before this Court, were required to be filed.

2.8 In the wake of the said dispute, according to the Plaintiff, MTNL fraudulently addressed letters to the Bank, calling upon it to make payment of the amount covered by the bank guarantees, without any intimation to the Plaintiff. Nor copy of the letters invoking the bank guarantees were marked to the Plaintiff. On the contrary, under a letter dated 24 March 1995, MTNL asked Defendant No.1 Bank to

encash the bank guarantees and remit the amount without consulting the Plaintiff.

2.9 It is the claim of the Plaintiff that the Bank and its officers, particularly Defendant Nos.2 and 3, connived with MTNL and wrongfully encashed the expired bank guarantees and remitted the amount to MTNL by liquidating the deposits which the Plaintiff had kept with the Bank. The Plaintiff was kept in the dark. The fact that the Defendant No.1 had encashed the bank guarantees became known to the Plaintiff only when the Plaintiff moved to restrain MTNL from encashing the bank guarantees.

2.10 It is the specific case of the Plaintiff that, in the past, whenever the Bank guarantees were extended, the Bank had obtained the consent of the Plaintiff. However, when the bank guarantees were sought to be renewed, even after the expiry of the term of those bank guarantees, Defendant Nos.1 to 3 did not obtain instructions of the Plaintiff. Even the letters under which the bank guarantees were extended, were not marked to the Plaintiff. Nor the Plaintiff was apprised about the encashment of the bank guarantees and remittance of the amount to MTNL, immediately after the payment. Defendant Nos.1 to 3 claimed to have paid a sum of Rs.16.77 Lakhs to MTNL allegedly on behalf of the Plaintiff, after adjusting the amount of more than Rs.8 Lakhs which was lying in fixed deposits with the Bank.

2.11 The Plaintiff claims, the Defendants acted in a most negligent and irresponsible manner and thereby caused wrongful loss to the Plaintiff. The amount of deposit which was adjusted by the Defendants was kept in trust with the Bank. Thus,

the Plaintiff was constrained to institute a suit to recover an amount of Rs.16,77,831/- which was wrongfully paid by the Bank to MTNL, interest thereon and compensation.

3. Defendant Nos.1 and 3 resisted the suit by filing a written statement.

3.1 The suit was stated to be bad for misjoinder of parties as Defendant Nos.2 and 3 had no privity of contract with the Plaintiff.

3.2 The substance of the resistance putforth by Defendant Nos.1 and 3 is that the Defendant No.1 bank was legally obligated to honour the bank guarantees without demur and without reference to the disputes between the Plaintiff and MTNL, the beneficiary.

3.3 It was categorically denied that the bank guarantees were encashed after their term had expired. It was contended that the bank guarantees were renewed from time to time mutually by the beneficiary and the Plaintiff. As of the dates of the encashment of each of the disputed bank guarantees, according to Defendant Nos.1 and 3, the respective bank guarantees were valid and subsisting.

3.4 Defendant Nos.1 and 3 controverted the assertions of the Plaintiff that the Defendants acted in collusion with the officers of MTNL. According to Defendant Nos.1 and 3, encashment of the bank guarantees was made by the Defendants in accordance with the terms of the bank guarantees and in the ordinary course of business. In fact, where MTNL had lodged a claim for encashment in respect of three other bank guarantees aggregating to Rs.1,09,692/-, the Bank had

declined to honour those requests as the term of those guarantees had expired.

3.5 It was denied that the Defendant No.1 had not apprised the Plaintiff about the encashment of the bank guarantees. It was asserted that immediately after encashment of first two bank guarantees, Defendant No.1 had addressed letters to the Plaintiff on 23 March 1995. No sense of urgency was shown by the Plaintiff and reply thereto was received as late as 8 April 1995.

3.6 The Defendants contend that the Bank had paid a sum of Rs.15.68 Lakhs under the bank guarantees in discharge of its legal obligation under the terms of the guarantees. It was contended that the amount of deposit which was adjusted by the Bank was not kept in trust with the Bank, but the said deposit represented the security which the Plaintiff had furnished while availing the bank guarantees.

3.7 Lastly, it was contended that the Plaintiff has not suffered any loss on account of encashment of bank guarantees. Thus, the claim for amount covered by the bank guarantee, interest and compensation was stated to be wholly untenable.

FACTS IN SUIT NO.2999 OF 2005

4. OBC claimed that with the invocation of the bank guarantees and payment to the beneficiaries, there was a resultant overdraft to the tune of Rs.8,40,815.96 in the current account of M/s. Unique, even after the adjustment of the amount of fixed deposits kept with OBC. The latter, thus, called upon M/s. Unique – Plaintiff to make payment of the aforesaid amount vide letters dated 26 June

1996, 2 September 1996, 24 October 1996, 30 November 1995 and 1 December 1996. Since the demand was not complied with, a recall notice was addressed on 8 March 1997. The Plaintiff committed default. Hence, the Bank instituted a suit against the Plaintiff and its directors and guarantors in this Court being Suit No.2172 of 1997.

5. The said suit, upon transfer to DRT, Mumbai, was registered as Original Application (OA) No.962 of 2000. Initially an ex-parte order was passed in the said application in the sum of Rs.12,65,620/- along with future interest @ 15% p.a. on 30 December 2003. M/s. Unique and its directors and Ms. Namita Khanna, original Defendant No.4 therein, preferred an application being Misc. Application No.17 of 2004 to set aside the ex-parte order.

6. By an order dated 2 April 2004, the said ex-parte order was set aside. Eventually, OA No.962 of 2000 came to be dismissed by DRT-1, Mumbai by a judgment and order dated 6 May 2005. M/s. Unique – Plaintiff No.1 and its directors i.e. Plaintiff Nos.2 and 3 have thereupon instituted Suit No.2999 of 2005.

7. After advertng to the facts which led to the institution of Suit No.919 of 1996 and Suit No.2172 of 1997 by the Bank and the consequent transfer and dismissal of OA No.962 of 2000, the Plaintiffs asserted that they were constrained to institute the instant suit for losses and damages, mental and physical pains and sufferings caused by the Bank by various tortious acts of the employees of the Bank and its agents, continued prosecution of false litigation against the Plaintiffs; for refund of the

fixed deposits mis-appropriated by the Bank with interest thereon, and for compensation for loss and damages for the expenses incurred by the Plaintiffs in defending the false litigation relentlessly pursued by Defendant Bank.

8. A number of acts and omissions are attributed to the Bank and its employees, which according to the Plaintiffs, were actuated by a design to cause wrongful loss to the Plaintiffs and make them suffer huge financial losses and mental pain and agony. It was asserted that Defendant Bank obtained an ex-parte order in OA No.962 of 2000 by deliberately furnishing incorrect address of M/s. Unique and its directors and alleged guarantor. The Bank left no stone unturned to protract the litigation before the DRT as well as this Court by resorting to various litigative stratagem. False and unjust motions were made including an attempt to appoint Court Receiver in respect of Flat No.702, where Plaintiff Nos.2 and 3 were residing on the basis of false claim that a security interest was created over the suit flat.

9. False and fabricated allegations were allegedly made in the proceedings before the DRT and this Court. Even after dismissal of OA No.962 of 2000, the Bank refused to pay costs for which the Plaintiffs were forced to institute proceedings. The Bank unjustifiably refused to return the amount of fixed deposits which were misappropriated on the pretext of encashing the bank guarantees despite an order passed by DRT in OA No.962 of 2000 recording a categorical finding that the Bank had wrongfully extended and encashed the bank guarantees.

10. All the aforesaid efforts were, according to the Plaintiffs, directed to save the employees of the Bank who had indulged in egregious fraud. The Plaintiffs enumerated as many as 30 causes of action (which were stated to be yet not exhaustive) for which the Plaintiffs were entitled to recover compensation from the Bank. The Plaintiffs, thus, prayed for compensation in the sum of Rs.26 Crores, refund of Fixed deposits along with interest, compensation for loss, damage, mental and physical pain and suffering etc., interest on the said amounts along with punitive interest.

11. The Bank contested the suit by filing written statement. At the outset, it was contended that the suit was ex-facie barred by limitation. Secondly, according to the Bank, the plaint singularly failed to disclose any cause of action. The Suit was stated to be an abuse of the process of law. The Bank reiterated that it had extended and encashed the bank guarantees in accordance with the terms of the contract and in discharge of its obligations thereunder. Except bare statements in the plaint, there was no material to demonstrate that the Defendant Bank had misappropriated the funds. The allegations against the Defendant Bank were stated to be unwarranted, reckless and without any factual foundation.

12. Suit No.2172 of 1997 which was instituted by Defendant Bank and transferred to DRT was altogether different. It had no bearing on the issues raised in the instant suit and the prayers therein. The Plaintiffs are, therefore, not entitled to

draw any mileage from the order passed in OA No.962 of 2000. The claims for compensation under various heads were wholly unsustainable and sans any cause of action. Ultimate claim for compensation in the sum of Rs.26 Crores was bald and unsubstantiated.

13. In the light of the aforesaid pleadings, the issues were framed. Issues were recast by me on 13 June 2023. Issues are reproduced with my findings against each of the issues for the reasons to follow :

Sr.No.	ISSUES IN COMSS 919 OF 1996	FINDINGS
1	Whether eight bank guarantees totaling about 16,77,421.00 issued by bank Oriental Bank of Commerce already expired in 1994 because of non-extension/non-renewal in 1994 and were got extended by the Defendants under pressure from some employees of MTNL without the concurrence, consent and knowledge of Plaintiff ?	Issue Nos.1 to 3 in the affirmative to the extent of wrongful extension of four subject bank guarantees.
2	Whether the Defendants extended the guarantees extended fraudulently when the guarantees had already expired even otherwise in terms of the conditions in the guarantee ?	—
3	Whether the extension letters of guarantees were issued by Defendants actually in 1995 but they were back dated with various dates in October, December, 1994 ?	—

4	Whether the extension letters issued by the bank falsely stated in the text of the extension letters that the extension letter was issued at the request of the constituent when actually there was no such request made by the Plaintiff ?	In the affirmative.
5	Whether the Defendants paid up the amounts of guarantees to MTNL without the concurrence, consent and knowledge of the Plaintiff and by concealing this fact of payment from the Plaintiff till after payment ?	Issue Nos.5 and 6 in the affirmative to the extent of wrongful encashment of four subject bank guarantees
6	Whether the extension of guarantees and subsequent immediate payment therefore was done by Defendants without the concurrence, consent and knowledge of the Plaintiff with the ulterior motive of causing deliberately wrongful loss to the Plaintiff ?	”-
7	Does the Plaintiff prove that the Defendant No.1 Bank has misappropriated the deposited funds of over Rs.9.50 Lakhs standing to the credit of the Plaintiff and/or directors and also charged high rate of interest with penalty interest of 2% aggregating to 22% p.a. with quarterly rests against the debit of Rs.16,77,421/- ?	In the affirmative to the extent of wrongful appropriation of a sum of Rs.7,35,529/-
8	Is the Plaintiff entitled for a decree in the sum of Rs.1,16,76,622/- as claimed in the statement of claim (Exhibit X) with interest @ 22.10% p.a. with quarterly rests from the date of filing of the suit till realization ?	In the affirmative to the extent of a decree in the sum of Rs.7,35,529/- along with interest at the rate of 12% p.a. from 15 April 1995 till payment/realization.

	<u>ISSUES IN SUIT NO.2999 OF 2005</u>	<u>FINDINGS</u>
1	Whether the Defendant proves that the suit is barred by the law of limitation ?	In the affirmative to the extent of reliefs emanating from the cause of action in COMSS 919 of 1996
2	Whether the Defendant proves that the Suit No.2172 of 1997 filed in High Court by the Defendant Bank and later transferred to DRTI was altogether different and para Nos.34 to 58 of Plaint referring to the proceedings in DRTI have no bearing in the present Suit ?	In the negative
3	Whether the Defendant proves that the Defendant renewed the expired bank guarantee at the request of and as per the directions of the Plaintiffs ?	In the negative
4	Whether the Plaintiffs prove that the bank extended the bank guarantees which had already expired, and made payments to MTNL without information, approval, consent and knowledge of the Plaintiffs ?	In the affirmative to the extent of wrongful extension and encashment of bank guarantees.
5	Whether the Plaintiffs prove that the fixed deposits of the Plaintiffs were misappropriated by the Defendant for making payment to MTNL without knowledge, information, consent, or approval of the Plaintiffs ?	In the affirmative to the extent of wrongful appropriation of an amount of Rs.7,35,529/-.
6	Whether the Plaintiffs prove that they are entitled to compensation for loss, damages, mental and physical pain and suffering as claimed in paragraph 60 of the Plaint ?	In the negative.
7	To What reliefs, if any, is the Plaintiffs entitled ?	Suit No.2999 of 2005 is dismissed and COMSS No.919 of 1996 partly decreed with costs.

REASONS

14. At the outset, it is necessary to note that in the order dated 6 December 2013, it was recorded that the parties consented that common evidence shall be adduced in both the suits and, accordingly, common evidence led by the parties is read in both the suits.

15. In order to substantiate the averments in the plaint, the Plaintiff has examined Mrs.Arun Prabha Khanna (P.W.1), its director. The Defendants have adduced evidence of Mr. Kishor M. Hedau (D.W.1), Senior Manager, PNB. The parties have tendered a number of documents in support of their respective contentions.

16. At the conclusion of the trial in both the suits, I have heard Dr. Khanna, learned Counsel for the Plaintiffs, and also Plaintiff No.3 in Suit No.2999 of 2005, and Mr. Shanay Shah, learned Counsel for the Defendants at considerable length. The learned Counsel have also tendered written notes in elaboration of the submissions canvassed across the bar.

17. Before advertng to deal with the contentious issues, it may be apposite to note the uncontroverted facts to narrow down the controversy. Firstly, jural relationship between the Plaintiff and MTNL as the service provider and the party for whom contract was to be executed, and between Plaintiff, Defendant Bank and MTNL as the constituent principal, the guarantor and the beneficiary is not in dispute.

Secondly, though the performance or non-performance of the underlying contract is not of significance for the determination of the controversy at hand, yet the fact that the disputes arose between Plaintiff and MTNL can hardly be put in contest. Thirdly, the proceedings that have ensued between Plaintiff and Defendant Bank are also the matter of record.

18. It is in the aforesaid context, further admitted facts deserve to be noted.

18.1 The performance guarantee being No.G/IUJ/219a/89 for the sum of Rs.2,88,238/- was issued on 21 June 1989. It was to be valid for 18 months i.e. till 31 December 1990. There is not much controversy over the fact that the said performance guarantee was renewed from time to time and the last undisputed renewal seems to be dated 2 February 1993, upto 30 March 1994.

18.2 The performance guarantee bearing No.G/UIJ/233/89 in the sum of Rs.2,86,730/- was issued on 18 July 1989 and it was to be valid till 18 January 1991. By and large, the last undisputed renewal seems to be on 18 October 1993, to be valid till 18 October 1994.

18.3 Advance guarantee No.G/UIJ/220/89 was initially issued on 21 June 1989 in the sum of Rs.70,000/-. It was to be valid till 30 June 1990. Indisputably, with the successive renewals, the last being on 19 November 1993, it was to be valid till 30 December 1994.

18.4 Guarantee No.G/UIJ/162/1993 was issued towards the refund of

retention money for the sum of Rs.9,50,000/- on 11 November 1993. It was valid till 11 November 1994.

19. The parties are primarily at issue over the renewals and extensions of each of the above four bank guarantees. The bank claims that the performance guarantee No.219a/89 for the sum of Rs.2,88,238/- was renewed under extension letter dated 31 October 1994 upto 30 March 1995. Likewise, the performance guarantee No.233/89 for Rs.2,86,730/- was according to the Defendant Bank renewed on 30 October 1994 till 18 October 1995. Advance guarantee No.220/89 was renewed on 17 December 1994 upto 30 December 1995. Retention Money Guarantee No.162 / 1993 was renewed on 12 October 1994, to be valid till 11 November 1995.

20. The Defendant Bank claims, Performance Guarantee No.219a/89 and Advance Guarantee No.220/89 were invoked on 23 March 1995 and the Performance Guarantee No.233/89 and Retention Money Guarantee No.162/93 were invoked on 10 and 15 April 1994, within the extended validity period.

21. That brings to the fore the crucial question as to whether the guarantees were valid and subsisting on the day of invocation on the basis of the extension thereof as claimed by the Defendant Bank and, consequently, whether the invocation and encashment were lawful.

22. Mr. Shah, learned Counsel for the Defendants, strenuously submitted that the premise of the suit that the bank guarantees could not have been invoked and

encashed as the contracts, for the performance of which the guarantees were furnished, were performed long back and the beneficiary was not entitled to invoke bank guarantees is flawed. Asserting that the Defendant Bank had no concern with the underlying transaction between the Plaintiff and MTNL, an endeavour was made to draw home the point that the bank cannot be proceeded against for making payment under the bank guarantees in accordance with the terms of the contract of guarantee.

23. It was submitted that the legal position is well recognized that in the absence of fraud and irretrievable injustice, the Courts cannot interdict the encashment of the bank guarantee. Mr. Shah would urge that, in the case at hand, none of the two elements could be established. To bolster up the aforesaid submissions, Mr. Shah placed a strong reliance on a judgment of the Supreme Court in the case of **Himadri Chemicals Industries Ltd. V/s. Coal Tar Refining Co.**¹

24. Dr. Khanna joined the issue by canvassing a submission that the aforesaid principle would apply only where there is a subsisting contract of guarantee. In the case at hand, according to Dr. Khanna, the guarantees had already expired and those guarantees were shown to have been extended by fabricating the record and, thereafter, they were wrongfully encashed. The aforesaid proposition, according to Dr. Khanna, does not advance the cause of the Bank.

25. It is trite a bank guarantee constitutes an independent contract between

¹ (2007) 8 SCC 110

the issuing bank and the beneficiary to whom the guarantee is issued. A contract of bank guarantee is, thus, said to be independent of underlying contract between the beneficiary and the constituent party, at whose instance the bank issues the guarantee. A contract of bank guarantee is, thus, not qualified by the underlying transaction and the enforceability of the contract between the person at whose instance the bank guarantee was given and the beneficiary. It must be considered on its own terms and independent of the underlying contract between the constituent of the bank and the beneficiary.

26. The legal position as regards the nature of the obligation which the issuing bank incurs under the bank guarantee is well settled. In the case of **Hindustan Steelworks Construction Ltd. V/s. Tarapore and Co. and Anr.**² the Supreme Court expounded the law as regards the unconditional bank guarantee as under :

“Whether the bank guarantee is towards security deposit or mobilisation advance or working funds or for due performance of the contract if the same is unconditional and if there is a stipulation in the bank guarantee that the bank should pay on demand without a demur and that the beneficiary shall be the sole judge not only on the question of breach of contract but also with respect to the amount of loss or damages, the obligation of the bank would remain the same and that obligation has to be discharged in the manner provided in the bank guarantee.” (emphasis supplied)

2 (1996) 5 SCC 34

27. In the case of **U.P. State Sugar Corporation V/s. Sumac International Ltd.**³ the Supreme Court further expounded the law as regards the invocation of the bank guarantee and the two exceptions in which the Court would be justified in restraining the invocation of the bank guarantee. It was, inter alia, observed as under :

“The bank which gives the guarantee is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not. The bank must pay according to the tenor of its guarantee on demand without proof or condition. There are only two exceptions to this rule. The first exception is a case when there is a clear fraud of which the bank has notice. The fraud must be on an egregious nature such as to vitiate the entire underlying transaction.”

(emphasis supplied)

28. In the case of **Himadri Chemicals Industries Ltd. V/s. Coal Tar Refining Co. (supra)**, on which reliance was placed by Mr. Shah, the Supreme Court, after adverting to the aforesaid pronouncement, observed as under :

“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 different High Courts in **U.P.State Sugar Corpn V/s. Sumac International Ltd. (supra)**, 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

3 (1997) 1 SCC 568

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; and (ii) injustice of the kind which would make it impossible for the guarantor to reimburse himself.” (emphasis supplied)

29. In **Andhra Pradesh Pollution Control Board V/s. CCL Products (India) Ltd.**⁴ the Supreme Court after adverting to the previous pronouncements including the judgment in the case of **Hindustan Steelworks Construction Ltd. V/s. Tarapore and Co. and Anr. (supra)**, enunciated that “the settled legal position which has emerged from the precedents of the Supreme Court was that absent a case of fraud, irretrievable injustice and special equities, the Court should not interfere with the invocation or encashment of a bank guarantee so long as the invocation was in terms of the bank guarantee.”

30. Reverting to the facts of the case, it is imperative to note that the pivotal question that crops up for consideration in the instant case is of the existence of a valid and subsisting contract of bank guarantee, rather than invocation in accordance with the terms of the bank guarantee. What the Plaintiff essentially alleges is that the

4 (2019) 20 SCC 669

contracts of bank guarantees were not valid and subsisting when they were invoked and encashed.

31. Undoubtedly, the question of invocation of the bank guarantees cannot be tested on the premise that the Plaintiff did not owe any obligation to the beneficiary for the enforcement of which the guarantees have been invoked. Mr. Shah is justified in advancing a submission that the Defendant Bank was not concerned with the performance or non-performance of the underlying contract between the Plaintiff and MTNL and the moment the bank guarantees were invoked, it was obligated to make payment thereunder. However, this proposition would hold good only in case of existence of a valid and subsisting contract of guarantee.

32. The principle of constricted interference in the matter of invocation and encashment of bank guarantee by the courts would not come to the assistance of the Bank where the very existence of a subsisting contract of guarantee is put in contest. Conversely, if the Court holds that the guarantees were subsisting, the aforesaid proposition would come to the aid of the bank.

33. Another aspect which deserves to be kept in view while appraising the evidence adduced by the parties is the fact that the evidence of Mr. Kishor M. Hedau (D.W.1) for the Defendant Bank, went unchallenged. The Plaintiffs categorically declined to cross-examine Mr. Kishor M. Hedau (D.W.1). Banking upon the unimpeached testimony of Mr. Kishor M. Hedau (D.W.1), Mr. Shah, learned Counsel

for the Defendant would urge that the evidence Mr. Kishor M. Hedau (D.W.1) deserves to be accepted in its entirety. According to Mr. Shah, the failure to cross-examine Mr. Kishor M. Hedau, cuts the Plaintiff's case in two ways. First, the case set up by the Defendant to rebut the Plaintiff's case goes unchallenged. Second, the justification of the action of the Defendants remains unimpeached.

34. On this sole count, the contentious issues on the aspect of invocation and encashment of bank guarantees, according to Mr. Shah, deserve to be answered in favour of the Defendant Bank. To lend support to the aforesaid submission, Mr. Shah placed reliance on a judgment of the Supreme Court in the case of **Muddasani Venkata Narsaiah (dead) through legal representatives V/s. Muddasani Sarojana**⁵ and a Division Bench judgment of the Calcutta High Court in the case of **A.E.G Carapiet V/s. A.Y.Derderian**⁶.

35. In the case of **Muddasani Venkata Narsaiah (dead) through legal representatives V/s. Muddasani Sarojana (supra)**, the Supreme Court enunciated that the cross-examination is a matter of substance and not of procedure. One is required to put one's own version in the cross-examination of opponent. The effect of non-cross examination is that the statement of witness has not been disputed and, consequently, such witness account has to be accepted. The observations of the Supreme Court in paragraphs 15 and 16 are material and, hence, extracted below :

5 (2016) 12 SCC 288

6 AIR 1961 Cal 359

“15. Moreover, there was no effective cross-examination made on the plaintiff’s witnesses with respect to factum of execution of sale deed, PW.1 and PW 2 have not been cross examined as to factum of execution of sale deed. The cross-examination is a matter of substance not of procedure one is required to put one’s own version in cross-examination of opponent. The effect of non cross-examination is that the statement of witness has not been disputed. The effect of not cross-examining the witnesses has been considered by this Court in Bhoju Mandal V/s. Debnath Bhagat⁷. This Court repelled a submission on the ground that same was not put either to the witnesses or suggested before the courts below. Party is required to put his version to the witness. If no such questions are put the court would presume that the witness account has been accepted as held in Chuni Lal Dwarka Nath V/s. Hartford Fire Insurance Co. Ltd.⁸

16. In Maroti Bansi Teli v. Radhabai⁹, it has been laid down that the matters sworn to by one party in the pleadings not challenged either in pleadings or cross-examination by other party must be accepted as fully established. The High Court of Calcutta in A.E.G. Carapiet V/s. A.Y.Derderian (supra) has laid down that the party is obliged to put his case in cross-examination of witnesses of opposite party. The rule of putting one’s version in cross-examination is one of essential justice and not merely technical one. A Division Bench of Nagpur High Court in Kuwarlal Amritlal v. Rekhilal Koduram & Ors.¹⁰ has laid down that when attestation is not specifically challenged and witness is not cross-examined regarding details of attestation, it is sufficient for him to say that the document was attested. If the other side wants to challenge that statement, it is their duty, quite apart from raising it in the pleadings, to cross-examine the witness along those lines. A Division Bench of Patna High Court in Karnidan Sarda & Anr. v. Sailaja Kanta Mitra¹¹ has laid down that it cannot be too strongly

7 AIR 1963 SC 1906

8 AIR 1958 P&G 440

9 AIR 1945 Nag 60

10 AIR 1950 Nag 83

11 AIR 1940 Patna 683

emphasized that the system of administration of justice allows of cross-examination of opposite party's witnesses for the purpose of testing their evidence, and it must be assumed that when the witnesses were not tested in that way, their evidence is to be ordinarily accepted. In the aforesaid circumstances, the High Court has gravely erred in law in reversing the findings of the first Appellate Court as to the factum of execution of the sale deed in favour of the plaintiff.” (Emphasis supplied)

36. In the case of **A.E.G. Carapiet (supra)**, the Division Bench of the Calcutta High Court enunciated the consequences which non cross-examination entails as under :

“9. The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the Plaintiff's account in its entirety.”

(emphasis supplied)

37. The proposition that if the testimony goes unchallenged, it deserves to be accepted in its entirety and the party who fails to avail an opportunity to cross-

examine his opponent and put his case to the opponent, is presumed to have not disputed the case of the opponent, is one of the first principles of law. In an adversarial system of trial, failure to cross-examine the opponent where the evidence bears on material issues can only be at the peril of the party who declines to cross-examine.

38. In the case at hand, the Plaintiffs have ran the risk. However, the nature of the controversy cannot be lost sight of. The dispute essentially revolves around the existence and validity of the subject bank guarantees. Proof or disproof of existence and validity of the bank guarantees, to a substantial extent, depends on documents. The transactions are evidenced by documents over which there is not much controversy. If the testimony of Mr. Kishor M. Hedau (D.W.1) is based on documents which the Bank has relied upon, the Plaintiff's case cannot be thrown over-board for the only reason of failure to cross-examine the Defendant's witness Mr. Kishor M. Hedau (D.W.1). Nonetheless, the Court has to keep in view the fact that the evidence of Kishor M. Hedau (D.W.1) has gone unimpeached. I propose to evaluate the evidence by keeping in view the said fact and giving deserving weight to the unimpeached testimony of Kishor M. Hedau (D.W.1).

**ISSUE NOS.1 TO 6 IN COMM. SUMMARY SUIT NO.919 OF 1996 AND
ISSUE NOS.3 AND 4 IN SUIT NO.2999 OF 2005 :**

39. As noted above, the core controversy revolves around the validity of the

bank guarantees on the day of invocation, on the strength of extension as claimed by the Bank, and the consequent encashment. All these issues are thus, required to be determined by common reasoning as it may not be practicable to appraise the evidence on each of the above issues in watertight compartments and the finding on one issue bears upon the finding on the other.

40. To begin with the terms and conditions of the bank guarantees. Though the purpose for which the bank guarantees Nos.219a/89, 233/89, 220/89 and 162/93 were issued, were distinct, yet, the material terms and conditions of the bank guarantee Nos.219a/89, 233/89 and 162/93 appear to be, by and large, similar.

41. The performance guarantee No.219a/89 issued dated 21 June 1989 was issued to indemnify MTNL for due observance and performance of the terms and conditions of the contract. Under clause (1), the bank irrevocably and unconditionally agreed to indemnify MTNL to the extent of Rs.2,88,238/- on account of any default, breach or deficiency in the performance of the obligation of the contract on the part of M/s. Unique, on demand and without demur. Clause (2) provided that the decision of the MTNL as to whether there was failure or breach on the part of M/s. Unique would be final and binding on the bank. Under clause (3), the liability of the bank under the said guarantee was as of principal debtor. Under clause (8), the bank agreed not to revoke the guarantee during its currency except with the previous consent of the beneficiary – MTNL.

42. Clauses 4 and 5 which are of material significance for the determination of the controversy at hand, read as under :

“4. The guarantee herein contained shall remain in full force and effect during the period that would be taken for performance of the aforesaid terms of the said contract and it shall continue to be enforceable till 12 months, if the relevant works have not been put into operation from the date of completion and acceptance testing of the said works or 6 months after putting into operation of such works whichever is earlier, all the dues of the MTNL under or by virtue of the said contract have been fully paid and its claim certified or discharged or till it is certified by the MTNL that the terms and conditions of the said contract have been fully and properly carried out by the said contract and a NO DEMAND CERTIFICATE submitted to this effect by the contractor.

5. The Bank further agrees that the Guarantee herein contained shall remain in full force and effect for a period of EIGHTEEN MONTHS from the date hereof and also that the extension of this Guarantee will be provided for by the Bank for such period beyond the said period of EIGHTEEN MONTHS as the MTNL may feel necessary in this behalf. Provided further that if any claim accrues or arises against the Bank before the expiry of the said EIGHTEEN MONTHS or an extension thereof, the same shall be enforceable against the Bank notwithstanding the fact the same is enforced after the said period of EIGHTEEN MONTHS OR ANY extension thereof.”

43. Laying emphasis on the aforesaid clauses, it was strenuously submitted by Mr. Shah that the aforesaid clauses constitute a complete answer to the controversy sought to be raised in these suits. First and foremost, according to Mr. Shah, clause (5) expressly provided that the bank was obligated to extend the period of guarantee beyond 18 months at the instance of MTNL. This clause, according to Mr. Shah,

dismantles the case of the Plaintiff that the bank was enjoined to obtain consent or even consult M/s. Unique. Since there is material to show that the MTNL had periodically sought extension of the bank guarantees and the subject bank guarantees were accordingly extended, the Plaintiffs' claim does not deserve any countenance. Secondly, it is not the case of the Plaintiffs that they had submitted 'no demand certificate' as envisaged by clause 4. In the absence thereof, the assertion of the Plaintiff that on account of the due performance of the contract, the bank guarantees had expired and were not to be encashed cannot be accepted.

44. In opposition to this, Dr. Khanna, would urge that it is the stated case of the Defendants that the bank guarantees were extended at the instance of M/s. Unique, not only in the pleadings, but even in the letter under which the bank guarantees were purported to have been extended. This demonstrably false stand of the bank completely demolishes the bank's defence.

45. Mr. Khanna laid emphasis on the fact that, in the past, the bank had extended guarantees only after consulting M/s. Unique and, in some cases, on the basis of concurrence in writing on behalf of M/s. Unique. However, while extending the subject bank guarantees in the month of October/December 1994, neither any concurrence was sought nor the letters of extension were marked to M/s. Unique. In the circumstances, according to Dr. Khanna, the bank cannot draw support from the afore-extracted clause 5.

46. In order to appreciate the aforesaid submissions, recourse to the documents on record and the manner in which the bank guarantees were extended, over a period of time, becomes necessary. In the evidence of Kishor M. Hedau (D.W.1), there is a reference to the requisitions for extension of bank guarantee Nos.219a/89 dated 21 June 1989 and the letters of extension issued by the bank. From a perusal of those letters and the letters of extension (Annexure 4 to Annexure 13), it becomes evident that the MTNL had sought extension of the bank guarantees before the expiry of the term, for instance on 14 November, 1990 when the originally issued bank guarantee was to expire on 31 December 1990 and it was accordingly extended on 21 January 1991 vide Bank's letter (Annexure 5 / Exh A colly – page 50).

47. What is of importance is that each of the letters seeking extension of the bank guarantee were forwarded by MTNL to M/s. Unique, including letter dated 1 February 1994 (Annexure 14), in response to which the impugned extension dated 31 October 1994 (Annexure 16 / Exh. A colly. Page 97) was purportedly issued. It is imperative to note that though MTNL had sought extension of the bank guarantee No.219a/89 on 1 February 1994, evidently, the said guarantee was extended vide letter dated 31 October 1994. What transpired in the intervening period is of saliance.

48. The letter dated 3 October 1994 (Annexure 15/ Exh. B colly – page 94) addressed by MTNL to OBC indicates that vide communication dated 13 September 1994, the bank had informed MTNL that the said bank guarantee No.219a/89 stood

extinguished with effect from 30 March 1994. Controverting the said stand of the bank, MTNL asserted that the letter dated 1 February 1994 seeking extension or, in default of extension, encashment of the said bank guarantee, was received by the bank on 22 February 1994. Thus, the said stand of the bank that the bank guarantee stood extinguished on 30 March 1994 by the end of the last renewal i.e. on 30 March 1994, was in breach of the contractual obligation.

49. The aforesaid communication of MTNL unmistakably indicates that the bank guarantee No.219a/89 was not renewed before 30 March 1994. On the contrary, vide letter dated 13 September 1994, the bank took a categorical stand that the bank guarantee stood expired on 30 March 1994. Neither a copy of the said letter dated 13 September 1994 is placed on record, nor the evidence of Mr. Kishor M. Hedau (D.W.1) throws light on the circumstances in which the said letter was addressed by the bank. Had the said letter been placed on record, the stand of the bank as to the validity of the said bank guarantee when the question first arose would have become known and then the justifiability thereof could have been evaluated. In the absence of the said letter, the Court has to proceed on the premise that on 13 September 1994, the bank took a stand that the said bank guarantee had expired.

50. The aforesaid letter dated 3 October 1994 (Annexure 15/Exh. B colly – page 94) appears to be immediately preceding communication to the letter dated 31 October 1994 (Annexure 16) whereby the bank guarantee was professed to be extended

from 30 March 1994 to 30 March 1995. It is pertinent to note the said letter in terms records that at the request of the constituent M/s. Unique, the bank extended validity of the guarantee by a period of 12 months so as to expire on 30 March 1995. This claim of the bank as the record would bear out, has not been pursued, much less, sought to be substantiated. Instead, placing reliance on clause 5 of the bank guarantee (extracted above), an endeavour was made to draw home the point that the bank was obligated to extend the bank guarantee at the request of MTNL only, and, conversely, was not required to consult or seek consent of M/s. Unique.

51. At the first blush, if considered through the prism of the stipulations in clause 5 only, the submissions may appear alluring. However, it is required to be appreciated in the light of the attendant circumstances and course of conduct of the parties. It is of significance to note that in each of the letters seeking an extension of the bank guarantee, including the letter dated 1 February 1994 (this position governs all the bank guarantees), it was specifically mentioned that a copy of the said letter was addressed to the party concerned, and, accordingly it was marked to M/s. Unique. Clauses 2 to 4 of the said letter (identical clauses are found in all other letters seeking extension) read as under :

“2. The contractor is yet to fulfill his obligation under the contract as on this date. As such, the bank guarantee which was given for PERFORMANCE as per the terms and conditions of the contract is required to be extended till fulfillment of contractual obligations. Therefore, you are requested to extend the validity of the bank guarantee for a further period of one year. The

contractor concerned has been intimated to approach you in this regard.

3. In case, the contractor fails to approach your organization with a request to extend the bank guarantee before the expiry date you are directed to treat this communication as a letter of demand under para 1 of the said bank guarantee for encashing the bank guarantee and the amount of Rs. 2,88,238/- as and when ready may kindly be drawn in favour of MTNL Bombay by means of a crossed cheque and caused to be sent to the undersigned directly.

4. Your early action in this regard is solicited. It may also be noted that a copy of this letter is also being addressed to the party concerned.”

52. The aforesaid stipulations make it abundantly clear that MTNL followed the practice of intimating the contractors about its intent to seek extension of the bank guarantee, forwarded a copy of the letter addressed to the bank seeking invocation and, also apprise the bank that a copy was so marked to the constituent. The contractor was intimated to approach the bank to process the extension of the guarantee. In the event the contractor failed to approach the bank seeking extension of the bank guarantee before it expired, the bank was directed to treat the said communication as the letter of demand and remit the amount of the bank guarantee.

53. The aforesaid communication would, thus, indicate that MTNL did not seek extension of the bank guarantee surreptitiously and professed to post the contractor about its intent to seek extension and, in default, invoke the bank guarantee. In the face of the aforesaid nature of the communication, it would be difficult to accede to the submission that in the normal course of banking business, the bank would not

have consulted the constituent. In fact, the command of the creditor/beneficiary was to process the request for extension which would emanate from the principal debtor – constituent, and, in the event of default on the part of principal debtor, encash the bank guarantee. The reason for such mechanism is not far to seek. The principal debtor could take a stand that it was not desirous of extending the bank guarantee for valid reasons. In that event, the liability of the bank would not extinguish for want of consent. Instead that would amount to a case of invocation of the bank guarantee within a period of its validity.

54. Dr. Khanna, was justified in canvassing a submission that the aforesaid stand of the bank is at variance with the pleadings and the intrinsic evidence of the extension letters. In paragraph 1(e) of the Written Statement, a categorical statement was made that the guarantees were renewed from time to time mutually by the beneficiary and the Plaintiff. Likewise, as noted above, in the letter of extension dated 31 October 2014, the bank claimed that the guarantee was extended at the request of the constituent – M/s. Unique. No material was sought to be placed on record to substantiate the said fact. On the contrary, a bold defence was taken that the bank was not at all required to either consult or seek consent of the constituent. If that was the case, the extension letters were not required to mention that the guarantees were extended thereunder at the request of M/s. Unique.

55. The course adopted by the parties in the matter of extension of the bank

guarantees also bears upon the determination of this question. Dr. Khanna invited attention of the Court to the letters whereby the concurrence of M/s. Unique was sought to extend the bank guarantees at the request of MTNL and the consent in writing conveyed by M/s. Unique to OBC. For instance, on 25 June 1990 (Exh. A colly - page 41), OBC addressed a communication to M/s. Unique seeking to be advised about the concurrence to extend the bank guarantees. Vide communication dated 28 June 1990 (Exh. B colly - page 42), M/s. Unique conveyed its consent. Such a concurrence was again sought vide communication dated 6 July 1990 in respect of three of the bank guarantees. Vide communication dated 18 May 1992 (Exhibit A colly. - page 61), OBC called upon M/s. Unique to advise it about the extension of bank guarantee Nos.219a/89, 220/89 and 221/89. In response thereto, it seems, vide communication dated 24 June 1992 (Exhibit B colly. - page 62) M/s. Unique had advised the bank not to renew the bank guarantee or pay the amount or make payment thereunder till M/s. Unique advises the bank.

56. The aforesaid normal course of banking transactions is in accord with the prudent practice which the bank followed and MTNL directed it to follow. The situation gets accentuated in respect of the bank guarantee 219a/89 as there is an interval of almost 9 months in extending the bank guarantee from the date of requisition.

57. To add to this, vide communication dated 13 September 1994, the bank

took a stand that the guarantee stood expired. In such situation, in the absence of cogent evidence to show that M/s. Unique consented for the extension of the bank guarantee, it would be difficult to draw an inference that the bank guarantee was lawfully extended. Even the unimpeached testimony of Mr. Kishor M. Hedau (D.W.1) does not preclude such an inference which is rather inescapable.

58. Bank guarantee No.233/89 for Rs.2,86,730/- was sought to be extended lastly by a communication dated 2 September 1994 (Annexure 23/Exh A – Page 92). The said letter as well as all the preceding letters seeking extension contain similar stipulations and were marked to M/s. Unique. The said bank guarantee, the bank claims, was extended by a letter dated 31 October 1994. All the three infirmities noted above in respect of the bank guarantee No.219a/89 afflict the bank guarantee No.233/89. First, it contains a categorical statement that the guarantee was extended at the request of the constituent M/s. Unique. Second, the letter seeking extension expressly called upon the bank to extend the guarantee if the constituent approached it for the extension and, in default, encash the bank guarantee. Third, there is no material to show that the bank consulted or sought concurrence of M/s. Unique.

59. In respect of Advance Guarantee No.220/89 which came to be restricted to Rs.22,970/-, the last letter of extension was addressed on 1 November 1994 (Annexure 40 / Exh. A colly – page 98). In response thereto, the bank professed to have extended the guarantee upto 30 December 1995 vide letter dated 17 December

1994 (Annexure 41 – Exh. A colly – page 99). Again, the bank guarantee was stated to have been extended thereunder at the request of the constituent – M/s. Unique.

60. Dr. Khanna sought to draw support and sustenance to his submission that the letters of extension were ante-dated by banking upon reference number on the said letter dated 17 December 1994. It bears Outward No.186/95. On its own, an error in mentioning the Outward Register Number may not be decisive. Concomitant circumstances, however, make the same significant.

61. There is no material to show that the concurrence of M/s. Unique was ever sought while extending bank guarantee till 31 December 1995. It is of relevance to note that the Advance Guarantee does not contain a clause of automatic renewal at the instance of the beneficiary. The bank would, thus, be not justified in taking a stand that under the terms of the guarantee, it was not required to consult the constituent and obliged to extend the bank guarantee at the request of the beneficiary alone.

62. Retention Money Guarantee bearing No.162/93 for Rs.9.50 Lakhs, Mr. Kishor M. Hedau (D.W.1) affirms, was extended at the request of the beneficiary vide letter dated 1 October 1994 from 11 November 1994 to 11 November 1995. Mr. Kishor M. Hedau (D.W.1) deposed that the said bank guarantee was renewed vide letter dated 12 October 1994. Though the letter seeking extension of the bank guarantee dated 1 October 1994 (Annexure 27 / Exh. A colly – page 93) was placed on record, yet the letter dated 12 October 1994 under which the guarantee was allegedly extended was

not tendered. Nor any explanation was offered that the said document could not be traced as the record was old, as was sought to be offered in respect of other documents, in the Affidavit of Mr. Kishor M Hedau (D.W.1). Had it been a case of mere non-production of letter dated 12 October 1994, the situation would not have exacerbated.

63. The Plaintiff has placed on record a letter dated 2 March 1995 (Exh. A colly page 110) addressed by MTNL to OBC making a grievance that the bank guarantee No.162/93 dated 11 May 1993 was not renewed. The said letter indicates that on 1 October 1994, MTNL had firmly demanded to either renew or encash the bank guarantee. MTNL regretted that the said bank guarantee was not kept renewed by OBC till the date of the said communication. MTNL invoked the bank guarantee and called upon the bank to encash the said bank guarantee. It was categorically stated that the said communication be treated as final notice.

64. What follows the said communication is of material significance. Vide letter dated 7 March 1995 (Exhibit A colly – page 111) OBC informed MTNL that the said bank guarantee was extended upto 11 November 1995 vide letter dated 12 October 1994, a copy of which was sought to be forwarded therewith. OBC, thus, requested MTNL to not insist for encashment of the bank guarantee as it was extended upto 11 November 1995.

65. The situation which, thus, emerges is that, one the one hand, till 2

March 1995 MTNL had not received the extension of the bank guarantee, and, therefore, invoked the bank guarantee, and, on the other hand, the bank took a stand that the guarantee was already extended vide letter dated 12 October 1994 and sought to forward a copy thereof. The failure to place on record the said letter dated 12 October 1994, therefore, dents the claim of the bank. Under a month of the said communication dated 7 March 1995, the beneficiary invoked the bank guarantee vide letter dated 10 April 1995. This short interval is required to be appreciated in the light of the fact that the bank guarantee was sought to be extended by referring to a communication which was addressed in the month of October 1994, and, which did not see the light of the day. In the absence of the letter dated 12 October 1994, the identity of the party at whose instance the bank guarantee was extended cannot be ascertained. At any rate, it is not the case of the bank that it had consulted M/s. Unique.

66. Evidently, there was a flurry of activity in granting extension for and invocation of the bank guarantees during the period October to December 1994. Those bank guarantees of which term had expired at an earlier point of time, were also sought to be extended on the premise that the letters of extension were already issued, within time. Incontrovertibly, the bank is not concerned with the dispute between the constituent and the beneficiary. Whether the bank was aware of the dispute that had arisen between the Plaintiff and MTNL and proceedings which were initiated, may

not be, therefore, delved into. However, when the Court has to draw an inference about the continued validity of the bank guarantees, all the attendant circumstances are required to be taken into account.

67. A reference to the proceedings which were filed by the Plaintiff for invoking the arbitration may not be warranted. However, the fact remains that on 18 July 1994 itself, Mr. Surendra Nath, the sole Arbitrator passed an award in the disputes that had arisen between M/s. Unique and MTNL and directed MTNL to pay a sum of Rs.83,000/- to M/s. Unique comprising of compensation for delay in releasing the payment by MTNL (Exh. C-5 to the plaint). In the wake of the said award and dispute that had arisen between M/s. Unique and MTNL, while seeking encashment of Mobilization Advance Guarantee No.221 of 89 vide letter dated 24 March 1995 (Exhibit A colly – page 117), in contradistinction to the consistent practice, MTNL called upon the bank to encash the said guarantee and remit the amount without consulting M/s. Unique.

68. All the aforesaid factors, if considered in juxtaposition with each other, lead to a legitimate inference that the four subject bank guarantees were not extended by the bank in conformity with the contract between the Plaintiff and the Bank and in a lawful manner. The Plaintiff had made an endeavour to assert that the bank guarantees were fraudulently extended. It would be suffice to note that no serious endeavour was made to substantiate the element of fraud. Nonetheless, a legitimate

finding can be recorded that four subject bank guarantees were not lawfully extended and they were not valid and subsisting on the respective dates of invocation. Issue Nos.1 to 6 in Comm. Summary Suit No.919 of 1996 and issue Nos.3 and 4 in Suit No.2999 of 2005 are thus answered accordingly.

ISSUE NO. 2 IN SUIT NO.2999 of 2005 :

69. Dr. Khanna, strenuously submitted that the judgment in OA No.962 of 2000 arising out of Suit No.2172 of 1997 passed by the DRT, Mumbai, constitutes *res-judicata*. In the said OA, the bank professed to recover a sum of Rs.12,65,620/- towards the amount which was paid to MTNL, upon encashing the bank guarantee, after adjusting fixed deposits of the Plaintiff. It was the claim that even after appropriation of the deposits of the Plaintiffs, there was an overdraft of Rs.8,40,815.96 in the current account of M/s. Unique. The learned Presiding Officer, DRT recorded a categorical finding that the bank guarantees were extended without the consent and concurrence of M/s. Unique and the unilateral extension of the guarantees after the guarantee stood expired was illegal.

70. Per contra, it was urged on behalf of the bank that the said decision cannot be said to have attained finality as the Writ Petition preferred by the bank assailing the order passed by the DRAT in an Appeal against the said judgment, is subjudice. Mr. Shah made an earnest endeavour to impress upon the Court that the issues which arose for determination in the said OA cannot be said to be directly and

substantially in issue in the instant suit.

71. I have perused the judgment in OA No.962 of 2000. The claim of the bank in the said OA was principally based on the encashment of the bank guarantees in accordance with the contract of guarantee and the liability of the principal debtor to the guarantor. The issue as to whether the bank guarantees were lawfully extended squarely arose for determination in the said OA. In paragraph No.39 of the judgment in OA No.962 of 2000, the DRT has summed up its conclusion as under :

“39. To sum up, I hold that the extension of the guarantees after the date of expiry of the guarantees without concurrence and instructions from the Defendants was illegal. Such unilateral act on the part of the Applicant would not be binding on the Defendants and the Defendants are under no obligation to repay the amount paid by the Applicant to the MTNL under the expired guarantees.”

72. The question as to whether the aforesaid judgment operates as a *res-judicata*, in the strict sense of the term, need not detain the Court. The provisions contained in Section 11 of the Code of Civil Procedure incorporating the principles of *res-judicata* are not exhaustive of the general doctrine of *res-judicata*. Determination of an issue between the parties gives rise to the principle of issue of estoppel as well.

73. A reference to the decision of the Supreme Court in the case of **Hope Plantations Ltd. V/s. Taluka Land Board, Peermade and Anr.**¹² on which reliance was placed by Mr. Shah for a different purpose, may be profitable. The observations in paragraphs 26 and 31 are material and, hence, extracted below :

¹² (1999) 5 SCC 590

“26. It is settled law that principles of estoppel and res judicata are based on public policy and justice. Doctrine of res judicata is often treated as a branch of the law of estoppel though these two doctrines differ in some essential particulars. rule of res judicata prevents the parties to a judicial determination from litigating the same question over again even though the determination may even be demonstratedly wrong. When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it. They cannot litigate again on the same cause of action nor can they litigate any issue which was necessary for decision in the earlier litigation. These two aspects are 'cause of action estoppel' and 'issue estoppel'. These two terms are of common law origin. Again once an issue has been finally determined, parties cannot subsequently in the same suit advance arguments or adduce further evidence directed to showing that issue was wrongly determined. their only remedy is to approach the higher forum if available. the determination of the issue between the parties gives rise to as noted above, an issue estoppel. It operates in any subsequent proceedings in the same suit in which the issue had been determined. It also operated in subsequent suits between the same parties in which the same issue arises. Section 11 of the Code of Civil Procedure contains provisions of res judicata but these are not exhaustive of the general doctrine of res judicata. Legal principles of estoppel and res judicata are equally applicable in proceedings before administrative authorities as they are based on public policy and justice.”

31. Law on res judicata and estoppel is well understood in India and there are ample authoritative pronouncements by various courts on these subjects. As noted above, the plea of res judicata, though technical, is based on public policy in order to put an end to litigation. It is, however, different if an issue which had been decided in an earlier litigation again arises for determination between the same parties in a suit based on a fresh cause of action or where there is continuous cause of action. The parties then may not be bound by the determination made earlier if in the meanwhile, law has

changed or has been interpreted differently by a higher forum. But that situation does not exist here. Principles of constructive res judicata apply with full force. It is the subsequent stage of the same proceedings.....

74. DRT was called upon to decide whether the bank guarantees were legally extended and encashed and did decide definitively that the bank guarantees were not lawfully extended and encashed and M/s. Unique was not liable to repay the amount which was paid by the bank to MTNL under the expired bank guarantees. The said finding operates as an issue estoppel in these suits as the same issue directly and substantially arises for determination. Issue No.2 is, therefore, answered in the negative.

ISSUE NO.7 IN COMSS NO.919 OF 1996 AND ISSUE NO.5 IN SUIT NO.2999 OF 2005 :

75. The parties are in unison on the point that the amount which stood deposited, in the accounts of M/s. Unique, with the bank were appropriated by the bank upon encashment of the four subject bank guarantees. Consequent to the finding that the invocation and encashment of the bank guarantees was not lawful, M/s. Unique becomes entitled to the said amount which came to be appropriated by the bank.

76. In OA No.962 of 2000 M/s. Unique claimed for refund of the amount of deposit as well as compensation upon returning a finding that the guarantees were wrongfully encashed. The learned Presiding Officer, DRT declined to entertain the

prayer as there was no counter claim and the Defendant No.1 therein had already instituted the instant Suit No.919 of 1996. The necessary corollary of the finding that the bank guarantees were wrongfully invoked and encashed is refund of the amount wrongfully appropriated by the bank.

77. There is, however, controversy over the amount which was appropriated by the bank upon the encashment of the bank guarantees. In fact, there is neither clarity in pleadings, nor any effort was made by the Plaintiffs to bring on record the exact amount which was appropriated by the bank with an element of certainty. In paragraph No.13 of the Plaint in COMSS No.919 of 1996, it was asserted that the bank had adjusted the amount of over Rs.8 Lakhs lying with the bank in FD's. In Suit No.2999 of 2005, which came to be instituted specifically for refund of the FD's, in paragraph No.60, it was asserted that the bank was holding deposits of Rs.2.88 Lakhs since June 1989 and Rs.5 Lakhs since November 1993.

78. The situation which thus obtains is that the Plaintiff has not pleaded with certainty as to the amount which stood deposited with the bank. M/s. Unique could have placed on record documents to indicate that FDs of particular amounts were kept with the bank. No effort was made to substantiate the said claim. Nor any effort was made to elicit the said fact from Mr. Kishor M. Hedau (D.W.1). Equally the Defendants have not pleaded the exact amount which was appropriated towards the amount which the bank was called upon to pay under the bank guarantee.

79. In such a fluid situation, the quantum of the amount which was appropriated by the bank is required to be determined on the basis of the amount which the bank claimed to have paid to MTNL and the shortfall it sought to recover from M/s. Unique. Under the four subject bank guarantees, the bank claimed to have paid a sum of Rs.15,47,938/-. After appropriating the amount which was standing to the credit of M/s. Unique, the bank professed to recover a sum of Rs.8,40,815/- in OA No.962 of 2000. It would, thus, imply that the bank had appropriated a sum of Rs.7,07,123/-. In addition, the evidence of Mr. Kishor M. Hedau (D.W.1) indicates that the bank had debited the account of M/s. Unique with a sum of Rs.28,406/- towards the commission for extension of bank guarantees. Since the Court has arrived at a conclusion that the bank guarantees were not lawfully extended, this amount of Rs.28,406/- also deserves to be refunded to M/s. Unique.

80. The Plaints in both the suits contain an allegation that the amounts were fraudulently misappropriated. No endeavour was made to substantiate the said claim. It would be suffice to note that the understanding of Mrs. Arun Khanna (P.W.1) as to the allegation of misappropriation and fabrication of accounts, as elicited in her cross-examination. To a pointed question as to what Mrs.Arun Khanna (P.W.1) meant by the statement that the bank has misappropriated and fabricated the accounts, she replied that the bank had encashed the guarantees which had already expired and the amount of FDs were converted by the bank. Thus, the stated basis of the claim is

wrongful appropriation of the amounts lying to the credit of the account of M/s. Unique. I am, therefore, persuaded to answer Issue Nos.7 in COMSS 919 of 1996 and Issue No.5 in Suit No.2999 of 2005 to the extent that the bank had wrongfully appropriated the sum of Rs.7,35,529/-.

ISSUE NO.1 IN SUIT NO.2999 OF 2005

81. Mr. Shah would urge that the claim in Suit No.2999 of 2005 is ex-facie barred by limitation. Taking the court through the plaint in Suit No.2999 of 2005, Mr. Shah would urge that the entire cause of action relates to Suit No.919 of 1996. Dismissal of OA No.962 of 2000 is sought to be unjustifiably made a cause of action for seeking huge compensation on account of alleged breach of contractual obligation arising out of a purely commercial transaction. Dismissal of OA No.962 of 2000, according to Mr. Shah, would not furnish a fresh cause of action. On the contrary, various reliefs claimed in Suit No.2999 of 2005 are barred by principle of issue of estoppel as the learned Presiding Officer, DRT declined to grant compensatory cost and compensation. Thus, Suit No.2999 of 2005 not being based on any independent cause of action is clearly barred by limitation as the alleged wrongful extension and encashment of the bank guarantees was in the year 1994-95.

82. Dr. Khanna joined the issue by asserting that Suit No.2999 of 2005 could not have been instituted before the decision in OA No.962 of 2000 and, moreover, the conduct of the bank in the said proceedings and in Suit No.919 of 1996 actuated by the

design to vex M/s. Unique and its directors, furnishes the cause of action to claim damages in addition to the refund of the amount wrongfully appropriated by the bank.

82. I have carefully perused the averments in Suit No.2999 of 2005. Wrongful invocation and encashment of the bank guarantees is the substratum of Suit No.2999 of 2005. Heads under which compensation is sought to be claimed in Suit No.2999 of 2005 can, at best, be termed as the elaboration of the claim in Suit No.919 of 1996. To the extent the reliefs in Suit No.2999 of 2005 are based on the wrongful invocation and encashment of the bank guarantees, especially for compensation, the same appear to be barred by limitation. However, cause of action based on alleged vexation and delay, with a view to deprive the Plaintiffs of the amount to which they are allegedly entitled to, can legitimately relate to the dismissal of OA No.962 of 2000. In any event, this issue does not assume determinative significance as the claim in respect of wrongful encashment of the bank guarantees and refund of the amount wrongfully appropriated and the damages therefor, forms part of Suit No.919 of 1996. Issue No.1 is accordingly answered partly in the affirmative to the extent of the reliefs emanating from the cause of action in COMSS No.919 of 1996.

ISSUE NO. 8 IN COMSS NO.919 OF 1996 AND ISSUE NOS.6 AND 7 IN SUIT NO.2999 of 2005 :

83. In the particulars of claim in Suit No.919 of 1996, the Plaintiff has claimed a sum of Rs.16,77,831/- which was allegedly paid by the bank to MTNL

under the subject bank guarantees. This claim for refund of the amount, which was allegedly paid by the bank to MTNL, does not seem to be well conceived. M/s. Unique would be entitled to recover from the bank only the amount which was appropriated from its account or it was made to pay, upon encashment of the bank guarantees, and not the entire amount of the bank guarantees. It is not the claim of the Plaintiffs that M/s. Unique paid the entire amount covered by the bank guarantees to the bank. As noted above, a sum of Rs.7,07,123/- which was lying in deposit with the bank was appropriated by the bank. OA No.962 of 2000 instituted by the bank for recovery of Rs.8,40,815/- from M/s. Unique came to be dismissed. The Plaintiffs would, thus, be entitled to recover only the sum which was wrongfully appropriated by the bank namely Rs.7,35,529/-.

84. This propels me to the aspect of compensation for the breach of the contract in wrongful encashment of the bank guarantees and appropriation of the amount which was deposited by the Plaintiffs with the bank. Under Section 73 of the Indian Contract Act, 1872, which incorporates the principles of measure and remoteness of damages, a party suffering from breach of contract is entitled to receive compensation from the party in breach for the loss or damage that arose in the usual course of things from such breach or which a party knew at the time of contract is likely to result from such breach. Second para of Section 73 emphatically states that the compensation is not to be given for any remote and indirect loss or damage on

account of breach of contract.

85. In the case at hand, the breach of contract is alleged in a purely commercial and banking transaction. The Plaintiff has suffered loss of the amount which was wrongfully appropriated by the bank. Ordinarily, the Plaintiff would, thus, be entitled to be placed in the same position in which it would have been had the amount been not wrongfully appropriated.

86. There can be no duality of opinion that the Plaintiffs having been deprived of the money to which they were entitled to, have a right to be compensated. In the case of **Secretary, Irrigation Department, Government of Orissa and Ors. V/s. G.C.Roy**¹³ a Constitution Bench of the Supreme Court held that a person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. The compensation, in the circumstances of the case, would be by way of interest on the said amount.

87. The Plaintiffs, however, allege that they had suffered losses and damages in variety of ways. Thus, the Plaintiffs seek special damages including damages for the physical pain, suffering and mental agony by the Plaintiff Nos.2 and 3, the directors of M/s. Unique. Whether this claim sustainable ?

88. At the heart of the issue is the entitlement for special damages. It is

¹³ (1992) 1 SCC 508

trite, general damages are such that the law implies and presumed to have occurred from the breach of contract. On the contrary, special damages must be specifically pleaded and substantiated by proof.

89. A useful reference in this context can be made to the judgment of the Supreme Court in the case of **Ghaziabad Development Authority V/s. Union of India and Anr.**¹⁴ wherein the Supreme Court enunciated the principle of measure of damages. The observations in paragraph 5 are material and, hence, extracted below :

“5.....In case of breach of contract damages may be claimed by one party from the other who has broken its contractual obligation in some way or the other. The damages may be liquidated or unliquidated. Liquidated damages are such damages as have been agreed upon and fixed by the parties in anticipation of the breach. Unliquidated damages are such damages as are required to be assessed. Broadly the principle underlying assessment of damages is to put the aggrieved party monetarily in the same position as far as possible in which it would have been if the contract would have been performed. Here the rule as to remoteness of damages comes into play. Such loss may be compensated as the parties could have contemplated at the time of entering into the contract. The party held liable to compensation shall be obliged to compensate for such losses as directly flow from its breach.

Chitty on Contracts (27th Edition, Vol.1, para 26.041) states-

“Normally, no damages in contract will be awarded for injury to the plaintiff's feelings, or for his mental distress, anguish, annoyance, loss of reputation or social discredit caused by the breach of contract;...The exception is limited to contract whose performance is to provide piece of mind or freedom from distress.... Damages may also be awarded for nervous shock or an anxiety state (an actual breakdown in health) suffered by the plaintiff, if that was, at the time the contract was made, within the

¹⁴ (2000) 6 SCC 113

contemplation of the parties as a not unlikely consequence of the breach of contract. Despite these developments, however, the Court of Appeal has refused to award damages for injured feelings to a wrongfully dismissed employee, and confirmed that damages for anguish and vexation caused by breach of contract cannot be awarded in an ordinary commercial contract.”

(emphasis supplied)

90. On the aforesaid touchstone, reverting to the facts of the case, it is imperative to note that the thrust of the Plaintiffs case is that the encashment of the bank guarantees resulted in the alleged blacklisting of M/s. Unique and it was deprived of the credit facility, it was required to raise funds from other sources and, eventually, business suffered. It would suffice to note, there are omnibus assertions in the Plaints in COMSS No.919 of 1996 and Suit No.2999 of 2005 as regards the entitlement to receive compensation under the various heads.

91. On the one hand, there are no specific pleadings. On the other hand, the evidence is far from satisfactory. In this connection, the manner in which Mrs. Arun Khanna (P.W.1) fared in the cross-examination deserves to be appreciated. Mrs. Arun Khanna (P.W.1) conceded that there was no communication from any bank to the effect that the financial facilities were not being extended as the bank guarantees furnished on behalf of M/s. Unique were encashed. On the aspect of the raising of the funds from the non-banking sources, Mrs. Arun Khanna (P.W.1) expressed her inability to state the names of the concerned parties from whom the amounts were raised. Nor there were receipts to evidence raising of the said amount. Mrs. Arun

Khanna (P.W.1) blamed her memory to state as to whether those borrowings were reflected in the income tax returns. To a pointed question as to whether payment to labour, supplier, CA and engineer and sub-contractor were made by cheque or cash, Mrs. Arun Khanna (P.W.1) categorically declined to answer.

92. The position which, thus, emerges is that there is no material to show that it was in the contemplation of the parties that the encashment of the bank guarantees would entail the consequences, as alleged by the Plaintiffs to have resulted. Nor to show that such consequences did, in fact, result. On the aspect of the compensation for the alleged physical and mental pain and agony, again the evidence is far from satisfactory. Moreover, the fact that the dispute was between two corporate entities arising out of a purely commercial banking transaction cannot be lost sight of. It seems, and that is a different matter, that the commercial dispute spiralled out of proportion and resulted in multiplicity of proceedings. The claim for compensation for the alleged vexation and delay has also its genesis in the breach of the commercial obligation. Since the learned Presiding Officer, DRT had awarded costs in OA No.962 of 2000 and declined to grant compensatory costs and the said order has not been assailed by the Plaintiffs, the Plaintiffs cannot, in these suits, claim compensatory and exemplary costs for the alleged litigative stratagem adopted by the bank in the said proceedings. Mr. Shah would be justified in placing reliance on the decision of the Supreme Court in the case of Hope Plantations Ltd. V/s. Taluka Land Board,

Peermade and Anr. (supra).

93. The conspectus of aforesaid consideration is that the Plaintiffs are not entitled to compensation for loss, damages, mental and physical pain and suffering as claimed in paragraph 60 of the Plaint in Suit No.2999 of 2005. Issue No.6 in the said suit is, therefore, required to be answered in the negative. So far as the COMSS No.919 of 1996 is concerned, the Plaintiff is entitled to refund of the amount of Rs.7,35,529/-, which was wrongfully appropriated by the bank, along with interest thereon from 15 April 1995.

94. What should be the rate of interest ? Dr. Khanna would urge that the bank had charged interest on the alleged outstanding amount @ 22.10% p.a. and, therefore, by the said token, the amount which was wrongfully appropriated by the bank is required to be refunded along with interest at the said rate. The claim of the bank for outstanding amount and interest thereon was negated by DRT in OA No.962 of 2000. Therefore, rate of interest, which the bank professed to charge, cannot be a correct measure to determine the compensation.

95. What interest the said deposit would have fetched had it not been appropriated by the bank would be the correct measure of compensation. In my view, having regard to the length of time and the cyclical manner in which interest rates move, in money market, it would be appropriate to award interest @ 12% p.a. I am impelled to grant the same rate for pendite lite and future interest. Issue No.8 in

COMSS No.919 of 1996 stands answered in the affirmative to the aforesaid extent.

96. Resultantly, Suit No.2999 of 2005 deserves to be dismissed. COMSS No.919 of 1996 deserves to be partly decreed, qua Defendant No.1 bank alone.

97. Hence, the following order :

ORDER

COMSS NO.919 OF 1996

- (i) Suit stands partly decreed.
- (ii) Defendant No.1 Bank do pay a sum of Rs.7,35,529/- along with interest @ 12% p.a. from 15 April 1995 till the date of payment and/or realization to the Plaintiff.
- (iii) Suit stands dismissed qua Defendant Nos.2 and 3.
- (iv) Defendant No.1 Bank shall pay costs of the suit to the Plaintiff and bear its own.
- (v) Defendant Nos.2 and 3 shall bear their own costs.

SUIT No.2999 of 2005

- (i) The Suit stands dismissed.
- (ii) The parties shall bear their own costs.

Pending Notices of Motion / Interim Applications stand disposed.

Decrees be drawn accordingly.

(N.J.JAMADAR, J.)