

Explore Computers Pvt. Ltd. Vs. Cals Ltd. and anr.

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Court : Delhi

Decided On : Jul-03-2006

Reported in : IV(2006)BC441; 2006(2)CTLJ12(Del); 131(2006)DLT477; 2006(90)DRJ480

Judge : Sanjay Kishan Kaul, J.

Acts : [Companies Act, 1956](#); Negotiable Instruments Act, 1882 - Sections 105, 106, 107, 138 and 142; [Contract Act, 1872](#) - Sections 28; Contract (Amendment) Act, 1996; [Limitation Act, 1963](#); [Code of Civil Procedure \(CPC\) , 1908](#) - Order 2, Rules 3 and 6

Appeal No. : CS (OS) No. 2240/1998

Appellant : Explore Computers Pvt. Ltd.

Respondent : Cals Ltd. and anr.

Advocate for Def. : S.L. Gupta, Adv.

Advocate for Pet/Ap. : Rajesh Katyal, Adv

Judgement :

Sanjay Kishan Kaul, J.

1. The plaintiff is a private limited company incorporated and registered under the [Companies Act, 1956](#) and is engaged in the business of sales and purchase of computers and network products. The defendant No. 1 is a limited company dealing in supplying computers and network products.

2. The plaintiff approached defendant No. 1 with a request for supply of computers and placed an order dated 02.07.1996 for supply of 33 computers of Pentium 100 with Intel CPU at the rate of Rs 45,662 for each computer totalling to a value of Rs 15,06,850/-. The plaintiff paid a sum of Rs 10 lakhs as advance towards the execution of the said order with the condition that defendant No. 1 would secure the said amount by way of a bank guarantee. The purchase order was signed both by the plaintiff and defendant No. 1 incorporating the terms and conditions between the parties.

3. In view of the arrangement arrived at between the plaintiff and defendant No. 1, the defendant No. 1 requested defendant No. 2 to issue a bank guarantee in favor of the plaintiff to secure the advance deposit. The defendant No. 2 thus issued a bank guarantee bearing No. 25/35 dated 10-07-1996 for Rs 10 lakhs in pursuance of the purchase order dated 02.07.1996. The bank guarantee was valid up to 12.01.1997.

4. The bank guarantee was extended up to 11.07.1997 and according to the plaintiff the claim period was extended up to 11.08.1997. The bank guarantee was thereafter extended up to 10.10.1997 with a claim period specified as 10.11.1997. The amount under the bank guarantee was payable on demand from the plaintiff.

5. The plaintiff claims that the defendant No. 1 failed to perform its part of the contract and even sent a letter dated 29.10.1996 to the plaintiff stating that due to delay in import of raw materials, the defendant No. 1 may not be in a position to execute the order up to 30.10.1996. Thereafter defendant No. 1 by its letter dated 29.10.1996 cancelled the order and promised to return the advance of Rs 10 lakhs. The amount was however not paid despite being called upon by the plaintiff.

6. The plaintiff requested defendant No. 2 to make the payment after invocation of the bank guarantee No. 25/35 as per letter dated 19.07.2007 which was received

by the defendant No. 2-bank on the same date. The bank guarantee was, however, extended with a date of expiry up to 11.07.1997 and date of claim up to 11.08.1997. These dates were further extended up to 10.10.1997 and 10.11.1997 respectively. The plaintiff claims that despite all assurances of the officers of defendant No. 2-bank, the payment was not made and the plaintiff even sent a letter to Reserve Bank of India on 30.09.1997 with a copy to the Head Office of defendant No. 2, but to no avail. The plaintiff initiated proceedings before the banking ombudsman, but the plaintiff failed to get a favorable order and the case was closed.

7. Defendant No. 1 is stated to have issued a refund of the advance payment by cheque No. 236139 dated 26.09.1997 for Rs. 10 lakh towards the principal amount received by it and a further cheque bearing No. 220422 dated 26.09.1997 for Rs 30,000 in favor of the plaintiff in view of the cancellation of the order. Both the cheques were drawn on the Bank of India, Lajpat Nagar Branch, New Delhi. Plaintiff presented the cheques for payment, but the cheques were returned back with the endorsement 'exceeds arrangement' The plaintiff thus filed a complaint under Section 138 and 142 of the Negotiable Instruments Act, 1882 and the complaint is stated to be pending before the Court of Metropolitan Magistrate.

8. The plaintiff approached defendant No. 2 about the failure of defendant No. 1 to perform its part of the agreement and breach thereof and requested for payment, but defendant No. 2 did not oblige. The original bank guarantee along with extended bank guarantee were submitted to defendant No. 2 but in view its failure to make the payment, a legal notice dated 08.05.1998 was sent through counsel to defendant No. 2. Defendant No. 2, however, refuted its liability vide the letter dated 12.06.1998.

9. The plaintiff claims that a sum of Rs 20,34,392 is due and payable inclusive of interest up to 12.10.1998 in respect of the refund of advance of the purchase order, the agreement and the bank guarantee as per its books of accounts.

10. Apart from the aforesaid transaction, a second transaction took place between the plaintiff and defendant No. 1 in pursuance to a purchase order dated 16.08.1996 placed by the plaintiff on defendant No. 1 for supply of 24 computers

of Pentium 100 with Intel CPU at the rate of 43,750 for a total value of Rs 10,50,000 and the purchase agreement was signed by both the said parties. The plaintiff again paid a sum of Rs 7 lakhs as advance towards the execution of the said order with the condition that the said deposit would be secured by way of a bank guarantee.

11. Defendant No. 1 in a similar manner requested defendant No. 2 to issue the bank guarantee to secure the said advance and defendant No. 2 accordingly issued bank guarantee No. 25/56 dated 28.07.1996 for Rs 7,35,000. The bank guarantee was extended by defendant No. 2 with date of validity extended up to 21.08.1997 and date of claim up to 21.09.1997.

12. The defendant No. 1 is again stated to have failed to perform the part of the contract and sent a letter dated 22.11.1996 claiming delay in imports which would result in delay of delivery. Not only that defendant No. 1 vide the said letter also informed that they would supply the machines by reducing the price by 20 per cent. However by the subsequent letter dated 29.11.1996, defendant No. 1 expressed its inability to meet the commitments to supply the computers up to 30.11.1996 and cancelled the order vide the said letter and promised to return the advance money. Defendant No. 2 is stated to have given confirmation of having furnished the bank guarantee in favor of the plaintiff vide the endorsements made on the letter dated 28.08.1996 and 01.03.1997 of the plaintiff as also the letter dated 25.03.1997 issued by defendant No. 2.

13. The defendant No. 1 is stated to have prepared a cheque bearing No. 236191 dated 21.08.1997 for Rs 7 lakhs and another cheque bearing No. 236190 dated 21.08.1997 for Rs 17,5000 both drawn on Bank of India, Lajpat Nagar Branch, New Delhi along with a letter dated 21.08.1997 addressed to the plaintiff, but simultaneously informed the plaintiff that there was no balance in the account of defendant No. 1 and thus requested the plaintiff to present the two cheques after some time when the cheques would be honoured. The plaintiff approached defendant No. 2 and invoked the bank guarantee by presenting the letter dated 21.08.1997 along with the original bank guarantees as extended which was received by defendant No. 2 on 23.08.1997. The payments were, however, not

made.

14. Defendant No. 1 is stated to have refunded the advance payment received by cheque No. 236191 dated 21.08.1997 for Rs 7 lakhs towards the principal and another cheque No. 236190 dated 21.08.1997 for Rs 30,000 both drawn on bank of India, Lajpat Nagar after cancellation of the order. These cheques were presented for payment but were returned back with the endorsement 'exceeds arrangement' as per the memo dated 26.09.1997 of the bank. A complaint was thus filed by the plaintiff under Section 138 and 142 of the Negotiable Instruments Act which is stated to be pending before the Metropolitan Magistrate.

15. The plaintiff pressed defendant No. 2 about its legal obligations, but defendant No. 2 failed to accede to the request. Legal notices were also sent dated 29.09.1997 and 08.05.1998, but defendant No. 2 in its reply dated 24.10.1997 denied the liability claiming that the demand had been lodged beyond the stipulated date and the bank guarantee already stood expired.

16. The plaintiff claims that as per its regular books of accounts, a sum of Rs 13,76,410 is due on account of the advance along with interest accrued thereon as on 12.10.1998. The grievance of the plaintiff is that neither defendant No. 1 nor defendant No. 2 have made payments of the refund of advance due to them along with accrued interest thereon. Legal proceedings were also initiated by sister concern of the plaintiff. The defendant No. 2 is stated to be taking a false plea of the claim being lodged beyond the stipulated date and the dispute revolves around the date of expiry of bank guarantee as also the date of the claim period since according to the plaintiff it was permissible for the plaintiff to lodge the claim beyond the date of expiry of the bank guarantee so long as it was within the date prescribed for the claim period while the contention of defendant No. 2 is to the contrary.

17. The plaintiff also seeks to challenge the last clause of the bank guarantee which limits the rights of the plaintiff to file a suit/claim only up to the claim period as the same is alleged to be void in view of the provisions of Section 28 of the Indian [Contract Act, 1872](#). The plaintiff thus claims the right to file a suit in accordance with the [Limitation Act, 1963](#) as the rights granted by the Limitation

Act cannot be abridged by the provisions made in the bank guarantee. The plaintiff has thus filed a suit for recovery of the amount mentioned aforesaid along with interest at the rate of 36 per cent per annum from 13.10.1998 till the date of realization.

18. On service of summons on the defendants only defendant No. 2 put in appearance. The right of defendant No. 1 to file the written statement was closed on 05.08.1999 and thereafter also the said defendant never put in any appearance. The suit was thus contested only by defendant No. 2.

19. Defendant No. 2 resisted the claim and the liability to pay the amount stating, inter alia, that the bank guarantees had not been invoked within their validity period and the letters of invocation were not as per the terms of the bank guarantees. The defendant claimed that in the letter of invocation of the plaintiff, it was nowhere stated that the plaintiff had suffered losses under its contract with defendant No. 1 and in view thereof defendant No. 2 was not liable to make the payment. A further plea taken by the defendant was that once the bank guarantee is extended any invocation within the old period is meaningless and there is thus novation of contract. The plaintiff is stated to have acted in terms of the novated contract by seeking to invoke the bank guarantee during the extended period of validity period but since same was done invalidly the payment was not made. The distinction between the date of expiry of the bank guarantee and the claim period is explained and it is stated that the bank guarantee had to be invoked before its expiry and the second period specified was for filing a suit or a claim which should not be treated as the period within which the bank guarantee should be invoked.

20. The bank guarantee No. 25/35 is stated to have been extended only up to 11.07.1997 and the invocation took place on 19.07.1997 beyond the period and thus the payment was not to be made in pursuance of the invocation letter. The subsequent extension of bank guarantee was made by letter dated 23.07.1997 but only up to 10.10.1997 and the plaintiff did not invoke the bank guarantee within the extended period.

21. The defendant No. 2 has disputed its liability for the suit amount and has claimed that its liability was only for the value of the two bank guarantees of Rs 10

lakhs and Rs 7.35 lakhs respectively in case they had been invoked within time and as per the terms of the bank guarantee.

22. Insofar as bank guarantee No. 25/56 is concerned, the validity period was up to 22.02.1997 which was extended up to 21.08.1997 but the bank guarantee was invoked only on 23.08.1997. The letter of the plaintiff was dated 21.08.1997 but it was served on the defendant No. 2-bank only on 23.08.1997. The alleged assurance to make payment by any of its officers is also denied. The issues were framed on 22.08.2000 which are as under:

- (1) whether the suit is liable to be dismissed for misguide of causes of action
- (2) Whether plaintiff's invocation of the bank guarantees being 25/35 and 25/36 vide letters dated 19.07.1997 and 23.08.1997 respectively is in accordance with the requirements of the guarantee
- (3) Whether the plaintiff invoked the bank guarantees within the period specified in the bank guarantees If not, its effect
- (4) Whether the defense of the defendant No. 2 of invocation beyond time is barred by the amended Section 28 of the Contract Act
- (5) Whether the plaintiff is entitled to any interest, if so, at what rate
- (6) Relief.

23. The plaintiff summoned the ahalmad of the Court of the Metropolitan Magistrate as PW1 to prove the complaint filed by the plaintiff in respect of the cheques of defendant No. 1 which had bounced. Cheques as also the memos of the bank were proved by the said witness as ExPW1/1-ExPW1/7. The second witness PW2 is Mr. Arvind Aggarwal, officer of the Bank of India, who produced the original bank guarantee No. 25/20 in favor of M/s Coralle Software Pvt. Ltd for a sum of Rs 1,20,000 and proved the same as ExPW2/1. The bank guarantee was invoked by the letter ExPW2/2 and the payment against the same was made by the bank vide letter dated 10.04.2000 ExPW2/3. The said bank guarantee was valid up to 31.03.2000 and the claim period specified was up to 30.04.2000.

24. The third witness of the plaintiff PW3 is Sh. Praveen Kumar, Director of the plaintiff-company, who produced the minute book to prove the Board Resolution dated 25.09.1998. The resolution was proved as ExPW3/1. The witness identified his signatures on the plaint. The witness affirmed to the facts as narrated in the plaint. The purchase order and the agreement were proved by the said witness as ExPW3/3 and ExPW3/4 in respect of the first purchase order. The cancellation letter was proved as ExPW3/5. It may be stated that the bank guarantees are undisputed. The first bank guarantee is Ex D-1 dated 10.07.1996 which was extended vide ExD-3 dated 08.01.1997 up to 11.07.1997. The plaintiff sought invocation of the bank guarantee vide letter dated 19.07.1997 (Exp1 = ExD5). The legal notices and the replies ere also proved as also the various communications. The witness also proved the statements of accounts. The other bank guarantee being already exhibited as Ex D-2, all the co-related documents were also proved by the said witness.

25. Defendant No. 2 examined Sh. Surinder Kumar Malhotra, Deputy Chief Manager of Bank of India, Arya Samaj Road, Karol Bagh as its sole witness to prove the case of the defendant. The witness admitted that defendant No. 2 had initiated legal action against defendant No. 1 for recovery of the bank dues before the Debts Recovery Tribunal. A question arose as to whether in the claim filed by the bank the amount under the bank guarantees had been included. In this behalf, directions were passed subsequently by the Court and the said witness was called up to file an affidavit. DW1 after verifying from the records of the Branch filed an affidavit to the effect that the amount of the bank guarantees subject matter of the present suit had not been included in the claim filed by defendant No. 2 against defendant No. 1

26. The witness both in the examination in chief and cross examination stated that there was distinction between the two dates 'valid up to' and 'claim up to'. The valid period is stated to be the date by which the claim could be lodged with the defendant No. 2-bank and the claim period is stated to be the date by which the suit can be filed. The witness also stated in the cross examination that even if a bank guarantee was invoked beyond the original period, nothing precluded the bank from subsequently extending the bank guarantee without the consent of the

plaintiff. The witness also denied the suggestion that in similar circumstances, the Darya Ganj Branch of defendant No. 2 had made payment of the bank guarantee.

27. Learned Counsel for the parties were heard at length and the findings on the issues are as under:

Issue No. 1: Whether the suit is liable to be dismissed for misguide of causes of action.

28. The facts set out show that there were two purchase orders placed by the plaintiff on defendant No. 1 both for supply of computers and advance was given against both the contract. In a similar fashion, defendant No. 1 furnished bank guarantees in favor of the plaintiff, issued by defendant No. 2 bank being bank guarantees No. 25/35 (ExD-1) and bank guarantee No. 25/56(ExD-2). The issuing bank for both the bank guarantees was defendant No. 2 and both the bank guarantees had been issued at the request of defendant No. 1. Both the bank guarantees were to secure the advance given by the plaintiff to defendant No. 1.

29. The provisions of Order 2 Rule 3 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'Code') permit a plaintiff to unite several causes of action against the same defendants jointly. This is of course subject to the power of the Court under Order 2 Rule 6 of the Code to order separate trial where it may embarrass or delay the trial or is otherwise inconvenient. The facts of the present case show that the defense raised by the contesting defendant No. 2 bank is identical and the matter is really one of construction of the terms of the bank guarantees and the contents of the invocation letters. This was thus a fit case for joinder of causes of action and a joint trial.

30. In view of the aforesaid facts and circumstances, the suit is not liable to be dismissed for misguide of causes of action and the issue is answered in favor of the plaintiff.

Issue No. 2: Whether plaintiff's invocation of the bank guarantees being 25/35 and 25/36 vide letters dated 19.07.1997 and 23.08.1997 respectively is in accordance with the requirements of the guarantee.

31. The bank guarantee No. 25/35 was invoked vide letter dated 19.07.1997. In order to appreciate the rights and obligations of the parties, it would be necessary to reproduce the bank guarantee as well as the invocation letter. The bank guarantee ExD-1 is as under:

In consideration of M/s EXPLORE COMPUTERS PRIVATE LIMITED, having its head office at 4353/4C, Darya Ganj, New Delhi (hereinafter called 'the Buyer') having agreed to pay advance price of Rs 10,00 lacs (Ten Lacs only) M/s CALS LIMITED, having its registered office at E-44/13, Okhla Phase II, New Delhi 110020 (hereinafter called 'the said Supplier') under the terms and conditions of the Supply Order dated 02.07.1996 made between the Buyer and the Supplier for Rs 15,06,850/- (Rupees Fifteen lacs Six Thousand Eight Hundred Fifty Only) (hereinafter called the said agreement), for the due fulfillment by the said Supplier of the terms and conditions contained in the said Agreement on production of the Bank Guarantee of Rs 10.00 Lacs (Ten Lacs only), We Bank of India, Lajpat Nagar Branch, Feroze Gandhi Marg, New Delhi (hereinafter referred to as 'the Bank') at the request of CALS LIMITED, do hereby undertake to pay to the Buyer an amount not exceeding Rs 10.00 lacs (Ten lacs only) against any loss or damage caused to or suffered or would be caused to or suffered by the Buyer by reason of any breach by the said Supplier of any of the terms and conditions contained in the said Agreement.

2. We, Bank of India, Lajpat Nagar Branch, Feroze Gandhi Marg, New Delhi, having our Head Office at Express Towers, Nariman Point, Bombay 400021 do hereby undertake to pay to the Buyer the amounts due and payable under this guarantee without any demur, merely on demand from the Buyer stating that the amount claimed is due by way of loss or damage caused to or would be caused to or suffered by the Buyer by reason of breach by the said Supplier of any of the terms and conditions contained in the said Agreement or by reason of the Supplier's failure to perform the said Agreement. Any such demand made on the Bank shall be conclusive as regards the amount due and payable by the Bank under this guarantee immediately without demur. However, our liability under this guarantee shall be restricted to an amount not exceeding Rs 10.00 lacs (Ten lacs only)

3. We undertake to any to the Buyer any money as demanded notwithstanding any disputes raised by the Supplier in any suit or proceeding pending before any Court or Tribunal relating thereto, our liability under this present being absolute and unequivocal.

The payment so made by us under this bond shall be valid discharged our liability for payment hereunder and the Supplier shall have no claim against us for making such payment.

We, Bank of India, Lajpat Nagar Branch, Feroze Gandhi Marg, New Delhi, further agree that the guarantee herein contained shall remain in full force and effect during the period that would be taken for the performance of the said Agreement and that it shall continue to be enforceable till all the dues of the Buyer under or by virtue of the said Agreement have been fully paid and its claim satisfied or discharged or the Buyer certifies that the terms and conditions of the said agreement have been fully and properly carried out by the supplier and accordingly discharges this guarantee. Unless a demand or claim under this guarantee is made on us in writing on or before 12.02.1997 we shall be discharged from all liability under this guarantee thereafter.

We, Bank of India, Lajpat Nagar Branch, Feroze Gandhi Marg, New Delhi, further agree with the Buyer that, the Buyer shall have the fullest liberty without our consent and without affecting in any manner our obligations hereunder to vary any of the terms and conditions of the said Agreement or to extend time of performance by the said supplier from time to time or to postpone for any time or from time to time any of the powers exercisable by the Buyer against the said Supplier and to forbearance or enforce any of the terms and conditions relating to the said agreement and we shall not be relieved from our liability by reasons of any such variation, or extension being granted to the said Supplier or for any forbearance, act or omission on the part of the Buyer or any indulgence by the Buyer to the said supplier or by any such matter or thing whatsoever which under the law relating to sureties would but for this provision, have effect or so relieving us.

This guarantee will not be discharged due to the change in the constitution of the Bank or the Supplier.

We, Bank of India, Lajpat Nagar Branch, New Delhi, lastly undertake not to revoke this guarantee during its currency except with the previous consent of the buyer in writing.

We undertake to pay to the buyer the amount hereby guaranteed immediately on being served with the notice, requiring the payment of the amount either by hand delivery or by registered post or speed post without referring to the Seller.

Notwithstanding anything contained herein above, our liability under this guarantee shall be limited to an amount of Rs 10.00 lacs (Rupees ten lacs only), and shall remain valid up to 12.01.1997 unless suit to enforce any claim under the guarantee is filed against us on or before 12.02.1997 all the rights of Explore Computers Private Limited shall be relieved and discharged from all liabilities there under.

In witness whereof the Bank, through its authorized officer has set its hand stamped on tis 10th day of July 1996 at New Delhi.

32. The invocation letter dated 19.07.1997 ExD-5 (= Exp1) is as under:

To

The Manager

Bank of India

Lajpat Nagar Branch

Feroze Gandhi Marg,

NEW DELHI

Sub: Payment towards your bank guarantee No. 25/35 dated 10.07.1996 on behalf of CALS LTD for Rs 10,00,000/- extended up to 11.07.1997.

Dear Sir,

This is with reference to above mentioned bank guarantee issued to us by your bank on behalf of CALS LTD you are requested to make us the payment of Rs 10,00,000.00 immediately by hand delivery immediately on presentation of this bank guarantee as per the terms of the bank guarantee.

The above mentioned bank guarantee has been invoked due to cancellation of the purchase order.

You are further noticed that any delay in payment as per above will make you liable to pay us interest @ 3% per month for the delaying period of payment after presentation of this bank guarantee without prejudice to the other rights available to us.

33. The recital of the bank guarantee shows that the amount had been advanced by the plaintiff to defendant No. 1 as per the supply order and in view thereof the bank guarantee was being furnished against any loss or damage suffered by the buyer (the plaintiff) by reason of breach by the supplier (the defendant No. 1). The bank guarantee was payable by the bank without any demur merely on demand from the buyer stating that the amount claimed was by way of loss or damage caused to the buyer-plaintiff by reason of breach by supplier-defendant No. 1 of the terms and conditions of the agreement or by reason of the Supplier's failure to perform the said Agreement. The amount was payable notwithstanding any dispute raised by defendant No. 1 in any legal proceedings.

34. The letter of invocation dated 19.07.1997 states that the bank guarantee was being invoked due to cancellation of the purchase order.

35. The submission of the learned Counsel for defendant No. 2 was that the invocation of the bank guarantee was not in accordance with the terms of the bank guarantee since the bank guarantee laid down the condition that the beneficiary had to state that the amount claimed is due by way of loss or damage caused to the beneficiary. No such statement had been made in the letter of invocation. It was submitted that the liability of a bank is strictly as per the terms of the bank

guarantee because the bank only deals with the documents.

36. Learned Counsel referred to the judgment of the Division Bench of this Court in Harprasad and Company v. Sudharshan Steel Mills : AIR1980 Delhi174 where it was held that the absolute liability would arise only on the terms of the bank guarantee being fulfilled. The Division Bench observed that it was necessary for the beneficiary to show that it had become entitled to recover the amount under the bank guarantee because of the failure of the other party to perform any of its obligations under the contract. The beneficiary had made no attempt to show in the facts of that case that it had complied with the conditions of the bank guarantee. The bank was held to have an obligation and duty to satisfy itself that the demand made by the beneficiary under the bank guarantee was made in accordance with the terms of the bank guarantee. It was observed in para 12 as under:

In this connection we may point out that the Punjab National Bank in this case, as every other bank issuing a bank guarantee, has a duty to perform. The bank must not, take up the position that it would be willing to pay the amount of the bank guarantee on a mere demand simply because its customer who has got the bank guarantee issued in favor of the other party to the contract has already secured the bank against any loss that may be caused by the recovery of the amount of the bank guarantee from the bank by the other party in the contract. The bank has itself a duty to satisfy itself that the demand by the beneficiary under the bank guarantee is made in accordance with the terms of the bank guarantee. For instance, if in the present case the appellant has simply called upon the bank to pay the money under the bank guarantee, such a notice in writing is not in accordance with the terms of the bank guarantee. It is the duty of the bank to satisfy itself that the demand is made on the ground that in the judgment the appellant respondent No. 1 has failed to fulfill any of the obligations under the contract. Further, the bank has to see that the judgment is exercised in respect of some definite obligation to be performed by the respondent under the contract. It is not sufficient for the appellant merely to reiterate parrot-like words of the bank guarantee. The statement by the appellant in the notice in writing that respondent No. 1 has failed to carry out and fulfill any of the obligations assumed under the

said contract would simply be unintelligible. 'Any of the obligations' are meaningless words unless and until a reference is made to some particular obligation which respondent No. 1 has failed to carry out in the judgment of the appellant. The duty of the appellant in making the demand on the bank is like the duty of the plaintiff to disclose the cause of action in the plaint. Just as a plaint is liable to be rejected for non-disclosure of the cause of action, a demand by the beneficiary of the bank guarantee is liable to be rejected by the bank if it does not state the facts showing that the conditions of the bank guarantee have been fulfilled. Just as the allegations in the plaint have to be assumed to be true at the stage plaint is to be entertained, similarly the allegations in the demand would have to be assumed to be true by the bank provided that the proper allegations are made just as a proper pleading has to be made in the plaint. The bank is not to enquire into the truth of the allegations just as the Court is not to enquire into the truth of the pleadings at the stage of the filing of the plaint.

37. Learned Counsel for the plaintiff on the other hand submitted that the invocation letter had specifically mentioned that the bank guarantee had been invoked due to the cancellation of the purchase order. Learned Counsel thus submitted that the order itself had been cancelled and the amount secured by the bank guarantee being by way of advance left no doubt that the bank was obliged to make the payment of the amount. It was not a case where there was loss or damage caused by inferior or defective goods being supplied but there being no supply at all by defendant No. 1. Learned Counsel relied upon the judgment of the learned Single Judge of the Delhi High Court in *Bhushan Industrial Co. Pvt Ltd v. Cimmco International and Anr.* 1983 (54) Comp cas 157. The judgment carved out the distinction between a performance guarantee and an advance payment guarantee to hold that under a performance guarantee, the bank is liable to make payment only after breach of contract and after the affected party has suffered loss or damage due to breach. However in an advance payment guarantee there is absolute obligation on the bank to make payment to the affected party in the event of non performance of the contract and the bank is not concerned with the reason for non performance of the contract. An advance payment guarantee was held to be much more of the characteristics of a promissory note than of the characteristics of a guarantee. It was thus held to be virtually a promissory note

payable on demand and to have many similarities to a confirmed letter of credit. The facts of the case were that a letter had been addressed by the beneficiary stating that the opposite party had failed to deliver goods under the contract of supply and it was held that in such a case nothing more was required. The bank was not concerned with the question as to the reason for the failure to deliver the goods.

38. In my considered view the letter of invocation meets the requirement of the terms and conditions of the bank guarantee. It has to be kept in mind that the bank was to secure the advance given by the plaintiff to defendant No. 1. Any loss or damage caused or suffered by the buyer by reason of breach by the supplier was to give cause to the encashment of the bank guarantee. The supplies in the present case were not made at all. Thus the very purpose for which the advance had been given was defeated since the defendant No. 1 cancelled the contract on account of its inability to supply the goods. The plaintiff has proved on record that such cancellation did take place by defendant No. 1 by proving the relevant documents even though for purpose of invocation of the bank guarantee it was not obliged to do so. Defendant No. 1 even issued cheques towards refund of the payment of the advance but those cheques were also dishonoured and the same have been proved by PW1. Thus the statement made in the invocation letter dated 19.07.1997 to the effect that the bank guarantee was being invoked due to the cancellation of the purchase order would suffice to meet the terms and conditions of the bank guarantee.

39. The bank is obliged to verify that the cause of action for invoking the bank guarantee has been made out as per the invocation letter. However, the bank is not required to go into the merits of the same, the bank guarantee being unconditional. The statement made in the letter dated 19.07.1997, in my considered view, shows the conditions of a bank guarantee having been fulfilled and thus falls within the parameters of law laid down in M/s Harparshad and Company case (supra). Avadh Behari Rohtagi, J has very succinctly set out the distinction to be made in case of an advance payment guarantee in Bhushan Industrial Company Pvt Ltd case (supra). The present guarantee was really in the nature of an advance guarantee apart from the obligation cast on defendant No. 1

to perform and comply with the terms of the contract failing which the bank guarantee was encashable. This is one reason why the bank had to see nothing else in view of the fact that the purchase order itself had been cancelled and there was no supply made under the purchase order.

40. I am thus of the considered view that the invocation of the bank guarantee was as per the terms of the bank guarantee.

41. Now coming to the second bank guarantee bearing No. 25/56 (Ex D-2) which was invoked vide the letter dated 21.08.1987 (Ex D-7) received by the bank on 23.08.1997. The terms of the bank guarantee in the recitals are identical. The bank guarantee was issued for the same reason except for a different value of advance and at a different date. Thus the principles applicable in case of the earlier bank guarantee would ipso facto apply to the second bank guarantee and thus, I am of the considered view, that the invocation of the bank guarantee is as per the terms and conditions of the bank guarantee.

42. Issues No. 3 & 4

Issue No. 3 Whether the plaintiff invoked the bank guarantees within the period specified in the bank guarantees If not, its effect

Issue No. 4 Whether the defense of the defendant No. 2 of invocation beyond time is barred by the amended Section 28 of the Contract Act.

43. The question as to whether the bank guarantee was invoked within the time prescribed becomes extremely crucial. The controversy really relates to the two different dates specified in the bank guarantees and the meaning to be given to the said two dates. The initial portion of the bank guarantee stipulates that the bank guarantee will continue to be enforceable till all dues of the buyer have been fully paid and its claim satisfied and the obligations performed by the supplier whereupon the purchaser discharges the guarantee. This is followed by 'unless a demand or claim under the guarantee is made on us in writing on or before 12.02.1997, we shall be discharged from all liability under this guarantee thereafter'. This date of 12.02.1997 stands extended up to 11.08.1997 as per the

extended bank guarantee (ExD-3).

44. The last paragraph stipulates that the bank guarantee is valid up to 12.01.1997 unless a suit to enforce any claim under the guarantee is filed against the bank on or before 12.02.1997. Once again ExD-3 extends these dates to 11.07.1997 and 11.08.1997.

45. It was the submission of the learned Counsel for the plaintiff that the stipulated date thus was 11.08.1997 and the bank guarantee was invoked on 19.07.1997 within the stipulated period of time. On the other hand, learned Counsel for defendant No. 2 contended that the period for invocation of the bank guarantee had expired on 11.07.1997 and thus the invocation letter dated 19.07.1997 was beyond the stipulated date. The second date of 11.08.1997 was in respect of the claim period for filing any suit. It may be useful to re-produce even ExD-3 as under:

To,

Explore Computers Private Limited

4353/4C, Darya Ganj

New Delhi

Dear Sir,

Our Bank Guarantee No. 25/35 dated 10.07.1996 for Rs 10.00 lacs, Expiry Date 12.01.1997

At the request of M/s CALS LIMITED, New Delhi, we the Bank of India hereby extend the validity of the Bank Guarantee No. 25/35 dated 10.07.1996 up to 11.07.1997.

All other terms and conditions of the said Bank Guarantee will remain same.

Notwithstanding anything mentioned hereinabove, our liability under tis Guarantee is restricted to Rs 10.00 Lacs(Rupees Ten Lacs Only), it will remain in force up to

11.07.1997 unless a suit to enforce any claim is filed against us on or before 11.08.1997 all your rights under the said guarantee shall be forfeited and we shall be released and discharged from all liabilities there under.

46. Learned Counsel for the plaintiff in addition submitted there could not be any restriction on the time period for filing a suit or claim as that would be hit by the provisions of Section 28 of the Indian [Contract Act, 1872](#) (hereinafter referred to as the Contract Act). In this behalf learned Counsel submitted that the provisions of Section 28 were amended by the Indian Contract (Amendment) Act, 1996 which received the assent of the President on 08.01.1997. The said Section prior to amendment read as under:

Section 28 Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

47. After amendment was brought into force, the Section read as under:

Section 28 Every agreement,

a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

b) which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his right, is void to that extent.

48. The effect of the amendment of Section 28 thus made it clear that any clause extinguishing the right of a party or discharging any party from the liability in respect of any contract on expiry of specific period so as to restrict the time period would be void.

49. Learned Counsel referred to the judgment of the learned single Judge of this Court in Union of India v. Simplex Concrete Piles India : 108(2003)DLT732 where one of the questions raised was in respect of the arbitration clause in an agreement requiring the claim to be filed within 90 days from the date the final bill was raised for payment. It was held that the said clause in the arbitration agreement limiting the time during which a claim can be made by a party would be clearly against public policy and would be void under Section 28 of the Contract Act. Learned Counsel for defendant No. 2 on the other hand contended that the bank was within its right to curtail the period within which a claim could be filed through suit or a legal proceeding against a bank within one month of the expiry of the bank guarantee. Learned Counsel in this behalf referred to the judgment of the Supreme Court in National Insurance Co. Ltd v. Sujir Ganesh Nayak & Co. and Anr. : [1997]3SCR202 ; It was held that an agreement which curtails the period of limitation and prescribes a shorter period than prescribed by law would be void as offending Section 28 of the Contract Act. This was so because such an agreement would seek to restrict a party from enforcing his right in Court after the period prescribed under the agreement expires even though the period prescribed by law for enforcement of his relief has yet not expired.

50. However, there was possibility of agreements which do not seek to curtail the time for enforcement of the right but which provide for forfeiture or waiver of a right itself if no action is commenced within the period stipulated by the agreement and such a clause would not fall within the mischief of Section 28 of the Act.

51. After discussing the effect of the various judgments, it was observed in Para 17 as under:

From the case law referred to above the legal position that emerges is that an agreement which in effect seeks to curtail the period of limitation and prescribes a shorter period than that prescribed by law would be void as offending Section 28 of the Contract Act. That is because such an agreement would seek to restrict the party from enforcing his right in Court after the period prescribed under the agreement expires even though the period prescribed by law for the enforcement of his right has yet not expired. But there could be agreement which do not seek to

curtail the time for enforcement of the right but which provides for the forfeiture or waiver of the right itself if no action is commenced within the period stipulated by the agreement. Such a clause in the agreement would not fall within the mischief of Section 28 of the Contract Act. to put it differently, curtailment of the period of limitation is not permissible in view of Section 28 but extinction of the right itself unless exercised within a specified time is permissible and can be enforced. If the policy of insurance provides that if a claim is made and rejected and no action is commenced within the time stated in the policy the benefits flowing from the policy shall stand extinguished and any subsequent action would be time-barred. Such a clause would fall outside the scope of Section 28 of the Contract Act. This in brief, seems to be the settled legal position. We may now apply it to the facts of this case.

52. Learned Counsel also relied upon the observations made by the Supreme Court in *State of Maharashtra v. Dr. M.N. Kaul (dead) by his legal representatives and Anr.* : AIR 1967 SC1634 where it was held that a guarantee is enforceable or not depends upon the terms under which the guarantor binds himself. The exception to this is in case of ambiguity when all other rules of construction fail the Courts interpret the guarantee *contra proferentem* against the guarantor or use the recitals to control the meaning of the operative part where this is possible. However the cardinal rule remained that a guarantor must not be made liable beyond the terms of his engagement. In the facts of the case the guarantee was to remain in force for one calendar month after the pronouncement of the judgment and/or a period of 12 months from the date of execution of the guarantee whichever be later and/or the drawing and sealing of the order of the Supreme Court finally disposing of the petition. It was held that the time limit fixed was an integral part of the guarantee and the contention of the bank that the guarantee was no longer enforceable was held to be right.

53. On a conspectus of the aforesaid judgments, two aspects have to be noted. The first is that it is the terms of the bank guarantee which have to be given due weight and the second is the distinction which is sought to be carved out in *National Insurance Company case (supra)* between a clause curtailing the period of limitation being void under Section 28 of the Contract Act and a clause which

provides for forfeiture or waiver of a right if no action is commenced within the period stipulated by the agreement. Insofar as the second aspect is concerned, it cannot be lost sight of that the judgment in National Insurance Company Case (supra) was delivered on 23.03.1997 and thus related to the provisions of Section 28 as it stood prior to the amendment because that was the substantive law in force at the time when the cause of action had arisen. The amendment to Section 28 was made with effect from 08.01.1997 and it is not disputed that the cause of action in respect of the subject matter in the present suit arose after the amendment. Sub Clause (b) of the amended Section 28 deals with the clauses which extinguish the rights of any party thereto or discharge any party from any liability being void under the said Section. Thus the scope of Section 28 has been widened whereby Clause (a) deals with the position prior to the amendment alone and Clause (b) is in addition.

54. In view of the amended Section coming into force, the distinction sought to be carved out earlier by the legal pronouncements would not hold good.

55. In my considered view it is not open for defendant No. 2 to contend that if any suit or claim is not filed within one month of the expiry of the bank guarantee, the right of the plaintiff to institute any legal proceedings itself is extinguished. Such a plea would fly in the face of the amended Section 28 as defendant No. 2 cannot be discharged from the liability nor can the rights of the plaintiff be extinguished by inclusion of the clause providing so. I am thus of the considered view that to the extent there is restriction on any suit or claim being filed by the plaintiff beyond a period of one month from the expiry of the bank guarantee, the said clause would not prohibit the plaintiff from instituting the suit as it would be barred by the provisions of the amended Section 28 of the Contract Act.

56. The question however remains whether the same principal would apply in case of the invocation of the bank guarantee which is distinct from a suit or claim to be filed by the plaintiff on account of refusal of defendant No. 2 to pay the amount under the bank guarantee. That is the first question mentioned above. In my considered view, Section 28 would have no play in such a case where matter is only relating to the terms of the guarantee to the extent it requires a party to invoke

the guarantee during the life time of the guarantee. The sequesterto this would be to consider whether the plaintiff did invoke the bank guarantee within this period specified. The answer to this question depends on the interpretation of the terms of the bank guarantee in view of the two dates stipulated and the different phraseologies used for the same. The observations of the Supreme Court in State of Maharashtra v. Dr.M.N.Kaul case (supra) do make it clear that it is the terms under which the guarantor has bound himself which have to be seen and in case of ambiguity when all other rules of construction fail, the guarantee must be interpreted contra preferentum. On a reading of the bank guarantee, in my considered view, there is really no ambiguity if the guarantee is read as a whole. The last paragraph of the bank guarantee is being once again re-produced for purposes of reference

Notwithstanding anything contained herein above, our liability under this guarantee shall be limited to an amount of Rs 10.00 lacs (Rupees ten lacs only), and shall remain valid up to 12.01.1997 unless suit to enforce any claim under the guarantee is filed against us on or before 12.02.1997 all the rights of Explore Computers Private Limited shall be relieved and discharged from all liabilities there under.

57. The said clause, a 'notwithstanding' clause, makes it clear that irrespective of what had been stated prior to Clause (a) in the bank guarantee, the liability of the bank under the guarantee was limited to the amount specified and was to remain valid only up to dates specified which was 22.02.1997 (extended up to 11.07.1997 by Ex D-3). The second qualification was that the suit to enforce any such claim under the guarantee was to be filed on or before 22.03.1997 (extended up to 11.08.1997 as per ExD-3). Thus two things had to be done: a) the claim under the bank guarantee had to be lodged prior to a particular date and b) the suit had to be filed before another date one month thereafter. It is only the second part of the guarantee which would be hit by Section 28 of the Contract Act and the first part would remain alive. In fact this is the view even expressed in the Food Corporation of India v. National Insurance Company Case (supra). It may be noticed that the Supreme Court in the said judgment has taken note of the earlier judgment in the Food Corporation of India v. New India Insurance Company Limited :

[1994]1SCR939 where it was held that the restriction contained in the insurance agreement that a person to be indemnified shall have no right after six months from termination of the principal contract does not mean that the suit to enforce insurance has to be filed within six months. Only the payment had to be made to the insurer within six months and it is a condition precedent for filing the suit. In the facts and circumstances, there is similarity between the views expressed in the Food Corporation of India Case (supra) and the present case.

58. The portion which stipulates that the defendant No. 2 bank is liable to pay the amount till discharged under the guarantee followed by the expression ' Unless a demand for claim under this guarantee is made on us in writing on or before 12.02.1997 we shall be discharged from all liability under this guarantee thereafter.' has to be thus read subject to the 'notwithstanding' in the last clause. Thus the earlier clause only provided the extinguishment of right unless a demand or claim is made by that date and if the same is read with the last paragraph, it clearly implies that the endeavor was to limit the period of limitation for filing of a suit or a claim which cannot be sustained but insofar as the time period of the bank guarantee is concerned, that was not the same date.

59. The conclusion of the aforesaid reading is that the bank guarantee expired on 11.07.1997. The invocation letter is dated 19.07.1997 and thus the invocation was beyond the date when the bank guarantee stood expired.

60. In respect of the second bank guarantee, the said bank guarantee expired on 21.08.1997 and the same was invoked vide a letter dated 21.08.1997 but delivered to the bank admittedly on 23.08.1997. Thus the invocation letter even in respect of the second bank guarantee was after the bank guarantee had expired. In such a case the bank had no obligation to make the payment to the plaintiff, the bank guarantee having been invoked beyond the period of guarantee itself. There is another aspect which arises in this bank guarantee inasmuch as the bank guarantee was subsequently extended on 23.07.1997. It is not clear as to why such an extension was made but it was obviously as per some mutual arrangement. The cause would only arise once this bank guarantee was extended on 23.07.1997 and the prior invocation letter when the bank guarantee stood

expired cannot thus be said to be a valid invocation. If that was a valid invocation, there would be no occasion to extend the bank guarantee on 23.07.1997. It is not disputed that the plaintiff never invoked the bank guarantee after 23.07.1997 within the time extended and thus there was once again no question of the defendant No. 2 making payment in pursuance thereto.

61. Learned Counsel for the plaintiff did seek to emphasis that a reading of the three documents ExPW2/1 to ExPW2/3 show that the defendant No. 2 bank in another case had made payment of the bank guarantee where the bank guarantee was invoked beyond the date of the term of the bank guarantee but with then claim period. The answer to the same given by learned Counsel for defendant No. 2 is that the same cannot be a binding factor in the present case and if the bank mistakenly had made payment earlier of a bank guarantee, that does not preclude the bank from taking a defense in the present case. I find force in the contention of the learned Counsel for the defendant No. 2 since one has to see the terms of the bank guarantee and the defense of the bank to determine whether same would stand scrutiny of law.

62. Learned Counsel for the plaintiff also made a faint endeavor to rely on the provisions of Section 105, 106 and 107 of the Negotiable Instruments Act to contend that payment can be asked for within a reasonable period of time but could not seriously dispute that once the time periods are specified in the bank guarantee itself, it is the terms of the bank guarantee which are material.

63. Learned Counsel for the defendant No. 2 also emphasized that in respect of bank guarantee No. 25/56, the same was invoked for the full amount of Rs 7,35,000 though the advance was only of Rs 7 lakhs as would be more than apparent from the cancellation dated 29.11.2006 which is ExPW3/15. Learned Counsel also referred to the fact that the cheque was received by the plaintiff on 21.08.1997 (ExPW1/5) from defendant No. 1 and returned on 26.09.1997 (ExPw1/7) on account of insufficiency of funds and thus there could not have been any occasion to invoke the bank guarantee on 21.08.1997 which was served on 23.08.1997(ExD-7). However these aspects are not required to be gone into since in view of the aforesaid facts as also by reason of the fact that it is not the function

of the bank to sit in judgment over quantification of the claim made by the plaintiff.

64. In view of the aforesaid, I am of the considered view, that the invocation letters addressed by the plaintiff to defendant No. 2 were after the expiry of the term of the bank guarantee and thus defendant No. 2 was not liable to pay the amount. The second portion of the bank guarantee restricting the time period for filing of the suit however is hit by Section 28 of the Contract Act as held aforesaid.

65. Issues No. 3 & 4 are answered accordingly.

Issue No. 5 :Whether the plaintiff is entitled to any interest, if so, at what rate

66. The plaintiff has claimed interest at the rate of 36 per cent per annum. Interest has been claimed on the basis that the agreements executed between the plaintiff and defendant No. 1 which are ExPW3/4 and ExPW3/13 containing similar conditions as under: 'any default in payment of dues on cancellation of order, the supplier will be liable to pay interest at the rate of 36 per cent per annum on the entire amount due from the date of default without prejudice to the other rights available to the buyer.

67. Learned Counsel for defendant No. 2 has on the other hand submitted that the said documents are bilateral documents between the plaintiff and defendant No. 1 and do not bind the defendant No. 2-bank. It was submitted that there was no agreed rate of interest.

68. There is no doubt that a bank guarantee is an independent contract but the matter being one of commercial transaction, the plaintiff would be entitled to interest at the commercial lending rates of the defendant No. 2-bank. However no evidence has been placed in this behalf though the prevailing commercial rates during that period of time have varied from 16 per cent to 18 per cent. Defendant No. 2-bank in any case has been held not liable in view of the issues answered aforesaid and the question would only be of the liability of defendant No. 1 who had agreed to pay interest in terms of the contract at 36 per cent per annum.

69. I am of the considered view that the rate of interest at 36 per cent per annum would be exorbitant even at the then prevailing rates of interest and I am of the

considered view that the plaintiff is entitled to interest at the rate of 18 per cent simple interest from due date till date of recovery. The defendant No. 1 had cancelled the order and would thus be liable to pay/refund the amount forthwith along with interest. Defendant No. 1 issued cheques but the cheques bounced. Interest would thus be payable from the date the plaintiff gave the advance to defendant No. 1. The advance of Rs 10 lakhs was given on 16.07.1996 while the advance of 7 lakhs was given on 28.08.1996. The interest would thus be payable on the two amounts from the said date.

Issue No. 6: Relief

70. In view of the discussion aforesaid, it is not in disputed that the plaintiff had advanced amount to defendant No. 1 of Rs 10 lakhs on 16.07.1996 and Rs 7 lakhs on 28.08.1996 respectively. The defendant No. 1 failed to supply the goods and in fact cancelled the orders in view of its inability to supply the goods. Defendant No. 1 promised to make the refund of the advance amount but failed to pay the amount. The cheques issued by defendant No. 1 issued toward the principal and interest bounced for which separate criminal proceedings are stated to have been initiated.

71. In view of the aforesaid, there can be little doubt that insofar as defendant No. 1 is concerned, it is liable to the plaintiff for the said amounts of Rs 10 lakhs and 7 lakhs along with interest at the rate of 18 per cent per annum from 16.07.1996 and 28.08.1996 respectively. Defendant No. 1 despite service did not even choose to appear or defend the suit. The plaintiff proved the agreements as well as the bounced cheques apart from the letters of termination of the defendant. The agreements are ExPW3/4 and ExPW3/13. The termination letters are ExPW3/5 and ExPW3/15. In both the letters a reference has been made that the defendant No. 1 is arranging to return the advance which ultimately did not materialize. Insofar as defendant No. 2 is concerned, it has already been held that the bank guarantee was not invoked by the plaintiff within the time period stipulated and thus defendant No. 2-bank is absolved of the liability to make the payment.

72. A decree is passed in favor of the plaintiff and against defendant No. 1 for a sum of Rs 17 lakhs along with interest at the rate of 18 per cent per annum on Rs

10 lakhs from 16.07.1996 and on Rs 7 lakh from 28.08.1996 till date of realization. The plaintiff shall also be entitled to proportionate costs. The suit qua defendant No. 2 is dismissed with no order as to cost.

73. Decree sheet be drawn up accordingly.

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