PETITIONER:
U.P. Co-OPERATIVE FEDERATION LTD.

Vs.

RESPONDENT:
SINGH CONSULTANTS & ENGINEERS (P) LTD.

DATE OF JUDGMENT19/11/1987

BENCH:
OZA, G.L. (J)
BENCH:
OZA, G.L. (J)
SHETTY, K.J. (J)

CITATION:
1988 AIR 2239 1988 SCR Supl. (2) 859
1988 SCC (4) 274 JT 1988 (3) 640
1988 SCALE (2)571

ACT:
Performance of contract-guaranteed performance in accordance with time schedule prescribed-Failure to perform obligation within time stipulated-Effect of-Bank guarantee Right to invoke-To injunction against.

HEADNOTE:
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The appellant, a State Government enterprise, on or about May 17, 1983, entered into a contract with the respondent, a private limited company, for the supply and installation of a vanaspati manufacturing plant at a place in the district of Nainital. The contract bond contemplated guaranteed performance of the work at various stages in accordance with the time schedule prescribed and provided for completion and commissioning of the plant after trial run by May 15, 1984. According to the appellant, the time was essentially and indisputably the essence of the contract.

As per the terms and conditions of the contract bond, according to the appellant, the respondent was to furnish a performance bank guarantee for Rs.16.5 lakhs and yet another bank guarantee for Rs.33 lakhs as security for the monies advanced by the appellant to the respondent for undertaking the work. Both these guarantees as also the contract bond entitled the appellant to invoke them and call for their realisation and encashment on the failure of the respondent to perform the obligations for which the appellant was made the sole judge.

It was alleged that the respondent defaulted at various stages and finally failed to complete the work within the stipulated time. The appellant invoked the two guarantees one after the other, and thereafter proceeded to have the plant completed, etc. According to the appellant, the plant could actually be commissioned for commercial production in July/August, 1985.

The respondent, on August 4, 1986, filed an application under section 41 of the Arbitration Act, 1940 (The Act) in the court of the Civil Judge, praying for an injunction restraining the appellant from realis-
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ing and encashing the bank guarantees. The Civil Judge dismissed the application. The respondent filed a revision petition before the High Court, which allowed the same, holding that the invocation of the performance guarantees was illegal, and the contentions of the appellant that the performance guarantees constituted independent and separate contracts between the guarantor bank and the beneficiary and created independent rights, liabilities and obligations under the guarantee bonds themselves, as being "technical pleas". The High Court, however, directed the respondent to keep alive the bank guarantee during the pendency of the arbitration proceedings. The appellant then moved this Court for relief by special leave.

Allowing the appeal, The Court,

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HELD: Per Sabyasachi Mukharji, J.

Under the terms agreed to between the parties, there is no scope of injunction. The High Court proceeded on the basis that this was not an injunction sought against the bank but against the appellant. But the net effect of the injunction is to restrain the bank from performing the bank guarantee. That cannot be done. One cannot do indirectly what one is not free to do directly. The respondent was not to suffer any injustice which was irretrievable. The respondent can sue the appellant for damages. There cannot be any basis in the case for apprehension that irretrievable damage would be caused, if any. His Lordship was of the opinion that this was not a case in which injunction should be granted. An irrevocable commitment either in the form of confirmed bank guarantee or irrevocable letter of credit cannot be interfered with except if a case of fraud or a case of a question of apprehension of irretrievable injustice has been made out. This is the well-settled principle of the law in England. This is also the well-settled principle of law in India. No fraud and no question of irretrievable injustice was involved in the case. [1138C-F]

In order to restrain the operation either of irrevocable letter of credit or of confirmed letter of credit or of bank guarantee, there should be a serious dispute and a good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties; otherwise, the very purpose of bank guarantees would be negatived and the fabric of trading operation would be jeopardised. The commitments of the banks must be honoured free from interference by the courts; otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases, that is, in

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cases of fraud or in cases of irretrievable injustice that the court should interfere. This is not a case where irretrievable injustice would be done by enforcement of the bank guarantee. This is also not a case where a strong prima facie case of-fraud in entering into a transaction was made out. The High Court should not have interfered with the bank guarantee. The judgment and order of the High Court set aside. The order of the Civil Judge restored.[1141A-B; 1142D-H]

Per K. Jagannatha Shetty, J. (concurring):

The crux of the matter relates to the obligation assumed by the bank under a performance guarantee. [1143B]

Whether the obligation is similar to the one arising under a letter of credit? Whether the Court could interfere in regard to such obligation, and if so, under what

circumstances? These are the questions raised in the appeal. [1143B-C]

The primary question for consideration is whether the High Court was justified in restraining the appellant from invoking the bank guarantees. The basic nature of the case relates to the obligations assumed by the bank under the guarantees given to the appellant. If under the law, the bank cannot be prevented by the respondent from honouring the credit guarantees, the appellant also cannot be restrained from invoking the guarantees. What applies to the bank must equally apply to the appellant. Therefore, the frame of the suit by not impleading the bank cannot make any difference in the position of law. Equally, it would be futile to contend that the court was justified in granting the injunction since it has found a prima facie case in favour of the respondent. The question of examining the prima facie case or balance of convenience does not arise if the court cannot interfere with the unconditional commitment made by the bank in the guarantees in question. [1144C-D; 1145A-B]

The modern documentary credit had its origin from letters of credit. The letter of credit has developed over hundreds of years of international trade. It was intended to facilitate the transfer of goods between distant and unfamiliar buyer and seller. It was found difficult for a buyer to pay for goods prior to their delivery. The bank's letter of credit came to bridge this gap. In such transactions, the seller (beneficiary) receives payment from the issuing bank when he presents a demand as per the terms of the documents. The bank must pay if the documents are in order and the terms of credit are satisfied. The bank,
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however, was not allowed to determine whether the seller had actually shipped the goods or whether the goods conformed to the requirements of the contract. Any dispute between the seller and the buyer must be settled between themselves. The Courts, however, in carving out an exception to this rule of absolute independence, held that if there has been a "fraud in the transaction", the bank could dishonour beneficiary's demand for payment. The Courts have generally permitted dishonour only on the fraud of the beneficiary, not the fraud of somebody else. [1145C, E-H; 1146A]

In modern commercial transactions, various devices are used to ensure performance by the contracting parties. The traditional letter of credit has taken a new meaning. Stand-by letters of credit are also used in business circles. Performance bond and guarantee bond are also devices increasingly adopted in transactions. The Courts have treated ch documents as analogous to letter of credit. l 1148E]

Whether it is a traditional letter of credit or a new device, like performance bond or performance guarantee, the obligation of the bank appears to be the same. Since the bank pledges its own credit, involving its reputation, it has no defence except in the case of fraud. The nature of the fraud that the courts talk about is the fraud of an 'egregious nature as to vitiate the entire underlying transaction". It is the fraud of the beneficiary, not fraud of somebody else. The bank cannot be compelled to honour the credit in such cases. In such cases, it would be proper for the bank to ask the buyer to approach the court for an injunction. The court, however, should not lightly interfere with the operation of irrevocable documentary credit. In order to restrain the operation of irrevocable letter of credit, performance bond or guarantee, there should be a

serious dispute to be tried and there should be a good prima Facie act of fraud . [1149E-H; 1150A]

The sound banking system may, however, require more caution in the issuance of irrevocable documentary credit. It would be for the banks to safeguard themselves by other means, and, generally, not for the courts to come to their rescue with injunctions unless there is established fraud. The appeal must be allowed, and the order of the civil judge, restored. [1150D-E]

Hamzeh Melas & Sons v. British Imex Industries Ltd., [1958] 2 Q.B.D. 127; Elian and Rabbath (Trading as Elian & Rabbath v. Mastas and Mastas & ors., [1966] 2 Lloyd's List Law Reports 495; R.D. Harbottle (Mercantile) Ltd. and Another v. Nahonal Westminster

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Bank Ltd. and Ors., [1977] 2 All England Law Reports 862; Edward owen Engineering Ltd. v. Barclays Bank International Ltd, [1978] 1 All England Law Reports 976; United City Merchants (Investments) Ltd. & Ors. v. Royal Bank of Canada

JUDGMENT:

v. State Bank of India & Ors. AIR 1979 Calcutta 44; State Bank of India v; The Economic Trading Co. S.A.A. & ors., AIR 1975 Calcutta 145; B.S. Auila Company Pvt. Ltd. v. Kaluram Mahadeo Prasad & Ors., AIR 1983 Calcutta 106; Union of India & ors. v. Meena Steels Ltd. & Another, AIR 1985 Allahabad 282; Arul Murugan Traders v. Rashtriya Chemicals & Fertilizers Ltd. Bombay and another, AIR 1986 Madras 161; Tarapore & Co. Madras v. M/s. V/o Tractors Export, Moscow & Anr., [1969] 2 SCR 920; United Commercial Bank v. Bank of India & ors., [1981] 3 SCR 300; Centax (India) Ltd. v. Vinmar Impex Inc. and others, [1986] 4 SCC 136; United Commercial Bank v. Bank of India & Ors., [1981] 3 SCR 300 and Bolivinter oil SA v. Chase Mannettan Bank & Ors., [1984] 1 All E.R. 351 at 352, referred to.

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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3054 of 1987.

From the Judgment and order dated 20.2. 1987 of the Allahabad High Court in Civil Revision No. 157 of 1986.

A.B. Diwan, Sandeep Narain and Shri Narain for the Appellant.

V.M. Tarkunde, Shakeel Ahmed Syed for the Respondent.

The following Judgments were delivered by

SABYASACHI MUKHARJI, J. Special Leave granted.

In the Special Leave Petition notice was issued on 13th of July, 1987 and it was directed that the matter would be disposed of at the notice stage. After hearing the rival contentions, we grant leave to appeal and dispose of the appeal by the order hereunder.

This is an appeal from the judgment and order of the learned single judge of the Allahabad High Court Lucknow Bench) in Revision Petition No. 157 of 1986. It appears that the appellant, a State Government enterprise, on or about 17th of May, 1983 entered into a contract with the respondent-a private limited company for the supply and installation of a Vanaspati manufacturing plant at Harducharu

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in the District of Nainital, in the State of Uttar Pradesh. The contract bond contemplated, according to the appellant, guaranteed performance of work at various stages in accordance with the time schedule prescribed therein and

provided for completion and commissioning of the plant after due trial run by the 15th May, 1984. The appellant contends that time was essentially and indisputably the essence of the contract.

The contention of the appellant was that as per the terms and conditions of the contract bond, the respondent was to furnish a performance bank guarantee for Rs 16.5 lakhs and yet another bank guarantee for Rs.33 lakhs as security for the monies advanced by the appellant to the respondent for undertaking the work. Both these two guarantees as also the contract bond entitled the appellant to invoke them and call for their realisation and encashment on the respondent's failing to perform the obligations for which the appellant was made the sole judge

The 15th of May, 1984 was the date fixed for completion and commissioning of the plant after 15 days' trial run for commercial production. It was alleged that between the 26th of December, 1984 and 28th of January, 1985 the respondent defaulted at various stages and finally failed to complete the work within the stipulated time. The appellant invoked the two guarantees one after the other. The appellant thereafter on 15th March, 1985 proceeded to have the plant completed and the plant was formally inaugurated. The appellant contends that the plant could actually be commissioned for commercial production in July/August, 1985. The respondent on 4th of August, 1986 filed a petition under section 41 of the Arbitration Act 1940 (hereinafter called the Arbitration Act), in the Court of the Civil Judge, Lucknow praying for an order restraining the appellant from realising and encashing the bank guarantees. The learned Civil Judge for the reasons indicated in his order dated 8.8.86 declined to issue any injunction and dismissed the application

Being aggrieved by the aforesaid decision, the respondent went up before the Allahabad High Court. The learned Single Judge of the Allahabad High Court, by the impugned judgment of 20th February, 1987, allowed the revision petition and held that the invocation of the performance guarantees were illegal and further held the contentions of the appellant that the performance guarantees constituted independent and separate contracts between the guarantor bank and the beneficiary and created independent rights, liabilities and obligations

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under the guarantee bonds themselves, as being "technical pleas."

On 17th May, 1983, as mentioned hereinbefore, an agreement had been executed between the appellant and the respondent wherein it was decided as follows:

> "WHEREAS THE PCF (the appellant herein) has decided to set up a Vanaspati Plant of 62 5 M.T. per day Vanaspati Capacity, comprising of 70 M.T. per day hardening capacity based on 95% usage of soyabean oil as raw oil 62.5 M.T. per day, post refining capacity, 72 M.T. deodoursisation capacity and 72 M.T filling and packing capacity, complete with all necessary utilities such as water and steam Distribution Equipments oil Storage Section Electrification and Distribution Equipments Automatic Weighing filling and packing/sealing equipments and fire-fighting equipments etc, at Halducharu, District Nainital (UP) lying at Bareilly-Haldwani road about 3.5 Kms. from Lalkuan towards Haldwani." and the agreement further stated:-

"AND WHEREAS the seller (the respondent herein) has undertaken to provide technical know-how and fabricate, design, engineer, manufacture, procure, import, supply, erect, instal, give trial runs and commission the Vanaspati Complex as referred to above complete in all respects at Halducharu District-Nainital (U.P.) as per specifications contained at Annexures 'A' to 'Q' and signed by both the parties in token of incorporation as an integral part of this agreement with guaranteed performance on the terms and conditions hereinafter appearing and contained.

AND WHEREAS the contract price here-in-after mentioned is based on the 'Seller's undertaking to com mission and make ready for commercial production the said Vanaspati Complex by May 15, 1984 and if the seller fails to do so the contract price shall stand reduced to the extent as hereinafter provided.

AND WHEREAS the contract price hereinafter mentioned is also based on the guaranteed performance of the said Vanaspati Complex as here-in-after provided and it is a term of this Agreement that if the said Vanaspati Complex fails to give the guaranteed performance as hereinafter

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specified, the contract price shall stand reduced to the extent hereinafter provided."

Clause 1.6 stipulated that the date of commissioning and handing over shall be the date on which the PCF takes over the complete Plant after successful commissioning and fulfilling of guaranteed performance specified in the agreement. This clause further stated:

"The seller shall be deemed to have completed the erection and-commissioning after giving successful trial runs for continuous period of 15 days with all the Plants working simultaneously. However, the seller should fulfil the Warrantees of individual plants separately also as given in the specifications. The complete Warrantees/Performance guarantees shall be demonstrated by the seller over a continuous period of 15 days."

Thus the mutual obligations of the sellers as well as purchasers were stated in the contract. It is not necessary to set out in detail all the clauses, but clauses 5 2 and 5 3 are relevant and provide as follows:

"5.2 In case the seller fails to fulfil and his obligations as referred to in this agreement the PCF shall be at liberty to get the same completed through and other agency or agencies without the approval of the seller and all the additional expenses so incurred by the P.C.F. shall be recoverable from the seller.

5.3 The seller also agrees to exclude/include some of the machines equipments components from the plant as may be desired by the PCF during the course of this agreement, and cost of such machines equipments components on reasonable actual basis shall deducted/added to from the contract price and thus the reduced/increased contract price shall be paid by the PCF However, the PCF should intimate such exclusion/inclusion within two months from the date of signing of the agreement. The said price of Rs.1,65,00,000 (Rs.

One crores and sixty five lakhs only) shall be paid by the PCF to the seller in the following manners:-

on or about 25th of June, 1983 two bank guarantees were executed by Bank of India, Ghaziabad and the bank guarantee 1132 numbered ]7/16 provided,inter alia, as follows:-

"NOW, THEREFORE, the Bank hereby guarantees to make unconditional payment of Rs.16.5 lacs (Rupees six teen lacs fifty thousand only) to the Federation on demand at its office at Lucknow without any further question or reference to the seller on the seller's failure to fulfil the terms of the sale on the following terms and conditions (emphasis supplied)

A) The sole judge for deciding whether the seller has failed to fulfil the terms of the sale, shall be the PCF.

B) This guarantee shall be valid upto twelve months from the date of issue. i.e upto 24.6.84.

C) Claims. if any must reach to be Bank in writing on or before expiry date of this guarantee after which the Bank will no longer be liable to make payments to the pCF

D) Bank's liability under this guarantee deed is limited to Rs.16.5 lacs (Rupees sixteen lacs fifty thousand only).

E) This guarantee shall not be revoked by the Bank in any case before the expiry of its date without written permission of the Federation.

The Bank guarantee No. 17/ 15 of the said date further went on to provide as follows:-

"AND WHEREAS to secure the said advance, the seller requested the Bank to furnish a Bank Guarantee of the said amount of Rs.33 lacs (Rupees thirty three lacs) in favour of the PCF and the Bank accepted the said request and agreed to issue the required Bank guarantee in favour of the Feder ation.

Now, therefore, in consideration of the aforesaid advance of the said sum of Rs 33 lacs (Rupees thirty three lacs only) to be paid by the PCF to the seller as aforesaid the Bank hereby agrees and guarantees to make unconditionally immediate payment to the Federation at its office 1133 at Lucknow of the sum of Rs.33 lacks (Rupees thirty three lacs only) or any part thereof, as the case may be, due to the PCF from the seller at any time on receipt of the notice of demand without any question or reference to the PCF or to the seller on the seller's failure to fulfil the terms of the said advance on the following terms and conditions:-

(Emphasis supplied)

1) The PCF shall be sole judge to decide whether the seller has failed to fulfil any terms and conditions of the said advance and on account of the said failure what amount has become payable to the PCF under this guarantee

2) This Guarantee shall be valid upto 15 5.84 (Fifteenth May 1984) after which period this guarantee shall stand cancelled and revoked.

3) The claims of the PCF, if any, under this guarantee, must reach the Bank on or before the

date of expiry of this guarantee and after the date of expiry, no claim will be entertained by the Bank.

4) The Bank shall not revoke this guarantee in any case before its expiry date of 15.5 1984 except with the writ- ten permission of the PCF."

I have set out in extenso the terms in order to highlight the fact that under the terms agreed to between the parties, there is no scope of injunction .

The trial Court in its judgment held that the Bank should be kept to fulfil its obligations and commitments and the Court should not come in the way But that principle was distinguished by the High Court on the ground that the respondent was seeking relief against the U.P. Cooperative Federation Ltd. and the subject matter of the dispute itself being as to whether the bank guarantee could be invoked and encashed The High Court was of the view that even otherwise it cannot be doubted that the appellant cannot be permitted to take advantage of illegally invoking a bank guarantee on a technical plea that the guarantee was independent of the contract and involving only the bank and the opposite party at pleasure. The High Court was of the view that prima facie it appeared that the plant was handed over

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after a trial run and that the commercial production had started and A this has not been assailed as a fact. The High Court was of the view, that in these circumstances this cannot be said that the invocation order was final and irrevocable. The High Court was further of the view that having taken over the possession of the plant it was necessary to consider all the aspects and held that the bank guarantees could not be invoked. The High Court was of the view that it was not a question of restraining the performance of any bank guarantee.

I am, however, unable to agree. The principles upon which the bank guarantees could be invoked or restrained are well-settled our attention was also drawn to several decisions of the High Court as well as of this Court. Reference had also been made to some of the English decisions. So far as the position of English law is concerned, the principles by now are well-settled. I will refer to some of the decisions and explain the position.

The question arose before the Court of Appeal in England in Hamzeh Melas & Sons v. British Imex Industries Ltd., [1958] 2 Q.B .D. 127. There the plaintiffs, a Jordanian firm, contracted to purchase from the defendants, a British firm, a large quantity of reinforced steel rods, to be delivered in two instalments Payment was to be effected by the opening in favour of the defendants of two confirmed letters of credit with the Midland Bank Ltd., in London, one in respect of each instalment. The letters of credit were duly opened and the first was realized by the defendants on the delivery of the first instalment. The plaintiffs complained that instalment was defective and sought an injunction to bar the defendants from realizing the second letter of credit. Justice Donovan refused the application. The plaintiffs appealed to the Court of Appeal in England. It was held that although the Court had wide jurisdiction to grant injunction, this was not a case in which, in the exercise of its discretion, it ought to do so. The Court of Appeal emphasised that an elaborate commercial system had been built up on the footing that a confirmed letter of credit constituted a bargain between the banker and the vendor of the goods, which imposed upon the banker an absolute obligations to pay, irrespective of any dispute

there might be between the parties whether or not the goods were up to contract. The principle was that commercial trading must go on the solemn guarantee either by the letter of credit or by bank guarantee or irrespective of any dispute between contracting parties whether or not the goods were upto contract. The banks cannot be absolved of their responsibility to meet the obligations. Lord Jenkins L.J. Observed that a vendor of goods selling against a con
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firmed letter of credit was selling under the assurance that nothing would prevent it from receiving the price. That was of no mean advantage when goods manufactured in one country were sold in another. Though, in this case no international trade was involved, bank guarantee was uninvocable and on that assurance parties have bargained This principle enunciated by Lord Justice Jenkins has been invokved by this Court in some decisions in case of confirmed bank guarantee.

The Court of Appeal in England had occasion once again to consider this question in Elian and Rabbath (Trading as Elian & Rabbath). v. Matsas and Matsas & ors., [1966] 2 Lloyd's List Law Reports 495. In that case injunction was granted to prevent irretrievable injustice. There the facts were peculiar In that case the first defendants' Greek motor vessel Flora M was chartered by Lebanese charterers for carriage of plaintiffs' cargo (consigned to Hungary) from Beirut to Rijeka. Discharge was delayed at Rijeka and shipowners exercised lien on cargo in respect of demurrage Third defendant bank put up guarantee in London in favour of second defendants (first defendants' London agents) to secure release of cargo. There was a claim by Yugoslavians to distrain on goods, involving ship in further delay and master of Flora M, on lifting original lien, immediately exercised another lien in respect of extra delay (which was raised when Hungarian buyers put up 2000) Two years later, shipowners claimed arbitration with charterers to assess demurrage for which first lien was exercised and claimed to enforce guarantee. Plaintiff claimed declaration that guarantee was not valid and injunction to restrain shipowners or their agents from enforcing guarantee First and second defendants appealed against granting of injunction by Blain, J. It was held by the Court of Appeal that it was a special case in which the Court should grant an injunction to prevent what might be irretrievable injustice. Lord Denning, M R., observed that although the shippers were not parties to the bank guarantee, nevertheless they had a most imporant interest in it. If the Midland Bank Ltd., paid under this guarantee, they would claim against the Lebanese bank, who in turn would claim against the shippers. The shippers would certainly be debited with the account. On being so debited, they would have to sue the shipowners for breach of their promise express or implied, to release the goods. Lord Denning, M R, further posed the question were the shippers to be forced to take that course? or can they short-circuit the dispute by suing the shipowners at once for an injunction? He further observed on page 497 of the Report that this was a special case in which injunction should be granted. Lord Denning, M R. went on to observe that
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there was a prima facie ground for saying that, on the telex messages A which passed (and indeed, on the first three lines of the guarantee) the shipowners promised that, if the bank guarantee was given, they would release the goods. He further observed that the only lien they had in mind at that time was the lien for demurrage. But would anyone suppose

that the goods would be held for another lien? It can well be argued that the guarantee was given on the understanding that the lien was raised and no further lien imposed, and that when the shipowners, in breach of that understanding imposed a further lien, they were disabled from acting on the guarantee But as mentioned here-in-before, this was a very special case and I shall notice that Lord Denning, M R. treated this as a very special case and in later decision he expressed his views on this matter.

This question was again considered by the Queen s Bench Division by Mr. Justice Kerr in R.D. Harbottle (Mercantile) Ltd. and Another v. National Westminister Bank Ltd. and others, [1977] 2 All England Law Reports 862. In this case injunction was sought on a question in respect of a performance bond. The learned Single Judge Kerr, J. gave the following views:-

> "i) only in exceptional cases would the courts interfere with the machinery of irrevocable obligations assumed by banks. In the case of a confirmed performance guarantee, just as in the case of a confirmed letter of credit, the bank was only concerned to ensure that the terms of its mandate and confirmation had been complied with and was in no way concerned with any contractual disputes which might have arisen between the buyers and sellers. Accordingly, since demands for payment had been made by the buyers under the guarantees and the plaintiffs had not established that the demands were fraudulent or other special circumstances, there were no grounds for continuing the injunctions.
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> "ii) It was right to discharge the injunctions against the bank, the fact that the Egyptian defendants had taken no part in the proceedings could not be a good ground for maintaining those injunctions. Further, equally strong considerations applied in favour of the discharge of the injunctions against the Egyptian defendants, and their failure to participate in the proceedings did not preclude the court from discharging the injunctions against them."

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In my opinion the aforesaid represents the correct state of the A law. The Court dealt with three different types of cases which need not be dilated here

In Edward Owen Engineering Ltd. v. Barclays Bank International Ltd., [1978] 1 All England Law Reports 1976. English suppliers, entered into a contract with Libyan buyers to supply goods to them in Libya The contract was subject to a condition precedent that the plaintiffs would arrange for a performance bond or guarantee to be given, for ten per cent of the contract price, guaranteeing performance of their obligations under the contract. Accordingly, the plaintiffs instructed the defendants their bankers to give on their behalf a performance guarantee for the sum of pound 50,203. Acting on those instructions the defendants requested a bank in Libya to issue performance bond to the buyers for that sum, and promised the Libyan bank that they would pay the amount of the guarantee on first demand, without any conditions or proof. The Libyan bank issued a letter of guarantee for pound 50,203 to the buyers The contract between the plaintiffs and the buyers provided for payment of the price of the goods supplied by a confirmed letter of credit. The letter of credit opened by the buyers was not a confirmed letter of credit and did not therefore,

comply with the contract Because of that non-compliance the plaintiffs repudiated the contract. Although it was the buyers who appeared to be in default and not the plaintiffs, the buyers nevertheless claimed on the guarantee given by the Libyan bank who in turn claimed against the defendants on the guarantee they had given The plaintiffs issued a writ against the defendants claiming an injunction to restrain them from paying any sum under the performance guarantee A judge granted the plaintiffs an interim injunction in the terms of the injunction claimed by the writ but subsequently another judge discharged the injunction The plaintiffs appealed to the Court of Appeal in England. It was held by a Bench consisting of Lord Denning M. R., Browne and Geoffrey Lane, LJ that a performance guarantee was similar to a confirmed letter of credit. Where therefore, a bank had given a performance guarantee it was required to honour the guarantee according to its terms and was not concerned whether either party to the contract which underlay the guarantee was in default The only exception to that rule was where fraud by one of the parties to the underlying contract had been established and the bank had notice of the fraud. Accordingly, as the defendants' guarantee provided for payment on demand without proof or conditions, and was in the nature of a promissory note payable on demand and the plaintiffs had not established fraud on the part of the buyers, the defendants were re-
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quired to honour their guarantee on the demand made by the Libyan Bank. It followed that the judge had been right to discharge the injunction and that the appeal would be dismissed.

Lord Denning, M.R. held that Justice Kerr was right in discharging the injunction and reiterated that the bank must honour its commitment. The principle must be that upon that basis trade and commerce are conducted. Lord Denning, M.R., indicated at page '984 that seeing that the bank must pay, and will probably come down on the English suppliers on their counter-guarantee, it followed that the only remedy of the English suppliers was to sue the Libyan customers for damages. The contract contained a clause giving exclusive jurisdiction to the courts of Libya.

In the instant case, the learned Judge has proceeded on the basis that this was not an injunction sought against the bank but this was the injunction sought against the appellant But the net effect of the injunction is to restrain the bank from performing the bank guarantee That cannot be done. One cannot do indirectly what one is not free to do directly. But a maltreated man in such circumstances is not remedyless The respondent was not to suffer any injustice which was irretrievable. The respondent can sue the appellant for damages. In this case there cannot be any basis for apprehension that irretrievable damages would be caused if any. I am of the opinion that this is not a case in which injunction should be granted An irrevocable commitment either in the form of confirmed bank guarantee or irrevocable letter of credit cannot be interfered with except in case of fraud or in case of question of apprehension of irretrievable injustice has been made out. This is the well-settled principle of the law in England. This is also a well-settled principle of law in India, as I shall presently notice from some of the decisions of the High Court and decisions of this Court.

In the instant case there was no fraud involved and no question of irretrievable in justice was involved.

Before, however, I deal with the decisions of India

reference may be made to a decision of the House of Lords in United City Merchants (Investments) Ltd. and others v. Royal Bank of Canada and others, [1982] 2 All England Law Reports 720 where it was reiterated that the whole commercial purpose for which the system of confirmed irrevocable documentary credits had been developed in international trade was to give the seller of goods an assured right to be paid before he
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parted with control of the goods without risk of the payment being refused reduced or deferred because of a dispute with the buyer. It followed that the contractual duty owed by an issuing or confirming bank to the buyer to honour the credit notified by him on presentation of apparently conforming documents by the seller was matched by a corresponding contractual liability on the part of the bank to the seller to pay him the amount of the credit on presentation of the documents The bank's duty to the seller was only vitiated if there was fraud on the part of the seller, and the bank remained under a duty to pay the amount of the credit to the seller even if the documents presented, although conforming on their face with the terms of the credit, nevertheless contained a statement of material fact that was not accurate. These principles must in my opinion apply in case of bank guarantees in internal trade within a country.

I may notice that in India, the trend of law is on the same line In the case of Texmaco Ltd. v. State Bank of India and others, A.I.R. 1979 Calcutta 44, one of us (Sabyasachi Mukharji) held that in the absence of special equities arising from a particular situation which might entitle the party on whose behalf guarantee is given to an injunction restraining the bank in performance of bank guarantee and in the absence of any clear fraud, the Bank must pay to the party in whose favour guarantee is given on demand, if so stipulated, and whether the terms are such have to be found out from the performance guarantee as such. There the Court held that where though the guarantee was given for the performance by the party on whose behalf guarantee was given, in an orderly manner its contractual obligation, the obligation was undertaken by the bank to repay the amount on "first demand" and 'without contestation, demur or protest and without reference to such party and without questioning the legal relationship subsisting between the party in whose favour guarantee was given and the party on whose behalf guarantee was given," and the guarantee also stipulated that the bank should forthwith pay the amount due notwithstanding any dispute between the parties," it must be deemed that the moment a demand was made without protest and contestation, the bank had obliged itself to pay irrespective of any dispute as to whether there had been performance in an orderly manner of the contractual obligation by the party. Consequently, in such a case, the party on whose behalf guarantee was given was not entitled to an injunction restraining the bank in performance of its guarantee It appears that special equities mentioned therein may be a situation where the injunction was sought for to prevent injustice which was irretrievable in the words of Lord Justice Danckwerts in Elian and
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Rabbath (Trading as Elian & Rabbath) v. Matsas and Matsas & Ors. (supra).

The same view was more or less expressed by the High Court of Calcutta in its decision in the case of State Bank of India v. The Economic Trading Co. S.A.A. and others, A.I.R. 1975 Calcutta 145. See also a decision in the case of

B.S. Aujla Company Pvt. Ltd. v. Kaluram Mahadeo Prosad and others, A. I . R . 1983 Calcutta 106. In the instant case I have emphasised the terms of the Bank guarantee.

Our attention was drawn to Bench decision of the Allahabad High Court in the case of Union of India and others v. Meena Steels Ltd. and Another, AIR 1985 Allahabad 282. There a suit by a company was filed restraining Railways to encash bank guarantee. In that suit application was made for temporary injunction. The Court was of the view that the matter would still be referred to arbitration and in those circumstances if bank guarantees were permitted to be encashed, if would be improper. I am however, unable to sustain this view, in view of the well-settled principle on which bank guarantees are operated.

Our attention was also drawn to the judgment of the learned single Judge of the Madras High Court in Arul Murugan Traders v. Rashtriya Chemicals and Fertilizers Ltd. Bombay and another, A.I.R. 1986 Madras 161 where the learned Single Judge expressed the opinion that there was no absolute rule prohibiting grant of interim injunction relating to Bank guarantees and in exceptional case courts would interfere with the machinery of irrevocable obligations assumed by banks, and that the plaintiff must establish prima facie case, meaning thereby that there is a bona fide contention between the parties or serious question to be tried and further the balance of convenience was also a relevant factor. If the element of fraud exists, then courts step in to prevent one of the parties to the contract from deriving unjust enrichment by invoking bank guarantee. In that case the learned Single Judge came to the conclusion that the suit involved serious questions to be tried and particularly relating to the plea of fraud, which was a significant factor to be taken into account and claim for interdicting the enforcement of bank guarantee should have been allowed.

I am however, of the opinion that these observations must be strictly considered in the light of the principle enunciated. It is not the decision that there should be a prima facie case. In order to restrain

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the operation either of irrevocable letter of credit or of confirmed letter of credit or of bank guarantee, there should be serious dispute and there should be good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Otherwise the very purpose of bank guarantees would be negatived and the fabric of trading operation will get jeopardised.

In Tarapore & Co. Madras v. M/s V/o Tractors Export, Moscow and Anr. [1969] 2 S R 920 this Court observed that irrevocable letter of credit had a definite implication. It was independent of and unqualified by the contract of sale or other underlying transactions. It was a machanism of great importance in international trade and any interference with that mechanism was bound to have serious repercussions on the international trade of this country The Court reiterated that the autonomy of an irrevocable letter of credit was entitled to protection and except in very exceptional circumstances courts should not interfere with that autonomy

These observations a fortiori apply to a bank guarantee because upon bank guarantee revolves many of the internal trade and transactions in a country. In United Commercial Bank v. Bank of India and others, [1981] 3 S C.R. 300, this Court was dealing with injunction restraining the bank in

respect of letter of credit. This Court observed that the High Court was wrong in granting the temporary injunction restraining the appellant bank from recalling the amount paid to the respondent bank. This Court reiterated that Courts usually refrain from granting injunction to restrain the performance of the contractual obligations arising out of a letter of credit, or a bank guarantee between one bank and another. If such temporary injunction were to be granted in a transaction between a banker and a banker, restraining a bank from recalling the amount due when payment was made under reserve to another bank or in terms of the letter of guarantee or credit executed by it the whole banking system in the country would fail

The Court however, observed that the opening of a confirmed letter of credit constituted a bargain between the banker and the seller of the goods which imposed on the banker an absolute obligation to pay. The banker was not bound or entitled to honour the bills of exchange drawn by the seller unless they and such accompanying documents as might be required thereunder, were in exact compliance with the terms of the credit.

This principle was again reiterated by this Court in Centax
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(India) Ltd. v. Vinmar Impex Inc. and others, [1986] 4 S.C.C. 136 A where the appellant entered into a contract with the respondent company of Singapore for supply of certain goods to it. The Contract, inter alia stipulated that the bills of lading should mention 'shipping mark 5202'. Pursuant to the contract, at the request of the appellant the Allahabad Bank opened a letter of credit, it favour of the respondent. The respondent thereupon despatched the goods covered by the bills of lading

This Court was concerned with the bank guarantee and referred to the previous decision of this Court in United Commercial Bank v. Bank of India and others, (supra). This Court found that this case was covered. The Court observed that the Court should not, in transaction between a banker and banker, grant an injunction at the instance of the beneficiary of an irrevocable letter of credit, restraining the issuing bank from recalling the amount paid under reserve from the negotiating bank, acting on behalf of the beneficiary against a document of guarantee, indemnity at the instance of the beneficiary

On the basis of these principles I reiterate that commitments of banks must be honoured free from interference by the courts. Otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice be done, the Court should interfere.

Mr. Tarkunde submitted before us that in this case the grievance of the appellant was that there was delay in performance and defective machinery had been supplied. He submitted that if at this stage appellant was allowed to enforce the bank guarantee, damage would be done. He submitted before us that appellant could not be permitted to take advantage of illegality by invoking the bank guarantee. But in my opinion these contentions cannot deter us in view of the principle well-settled that there should not be interference in trade. This is not a case where irretrievable injustice would be done by enforcement of bank guarantee. This is also not a case where a strong prima facie case of fraud in entering into a transaction was made out. If that is the position, then the High Court should not

have interfered with the bank guarantee.

In the aforesaid view of the matter, this appeal must be allowed The Judgment and order or the Allahabad High Court dated 20 2.87 must be set aside and the order of the learned civil Judge Lucknow dated 8.8 86 restored.

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In the facts and circumstances of the case parties will bear their own costs of this appeal.

JAGANNATHA SHETTY, J. l agree respectfully with the judgment of my learned brother Sabyasachi Mukherji, J. I wish, however, to draw attention to some of the aspects of the matter to which I attach importance. The crux of the matter relates to the obligation assumed by the bank under a performance guarantee. Whether the obligation is similar to the one arising under a letter of credit? Whether the Court could interfere in regard to such obligation, and if so, under what circumstances? These are the questions raised in this appeal.

The facts which are relevant for my purpose are these:

On May 17, 1983, M/s. Singh Consultants & Engineers (Pvt.) Ltd. ("SCE (P) Ltd.") entered into a contract with U.P. Cooperative Federation Ltd. ("UPCOF Ltd.") for constructing a Vanaspati manufacturing plant at Haldpur, District Nainital, U.P. The contract required that UPCOF Ltd. should be given two bank guarantees for proper construction and successful commissioning of the plant. In accordance with the terms of the contract,the Bank of India gave two guarantees in favour of UPCOF Ltd., one for Rs.16,50,000 and another for Rs.33,00,000. These contain similar terms and conditions. Thereunder, the bank has undertaken not to revoke the guarantee in any event before the expiry of the due date. The Bank has also undertaken to make unconditional payments on demand. without reference to SCE (P) Ltd. The guarantee also provides that the UPCOF Ltd. was the sole judge for deciding whether SCE(P) Ltd. has fulfilled the terms of the contract or not. The guarantee was thus undisputedly irrevocable with absolute discretion for UPCOF Ltd. to invoke the same.

The dispute arose between the parties as to the erection and performance of the plant. The SCE(P) Ltd. apprehending that the bank guarantees would be invoked by the UPCOF Ltd, approached the Court of the Civil Judge, Lucknow for a restraint order against the latter. The action was brought under Sec. 41 of the Arbitration Act read with order 39 r. 1 and 2 of the Code of Civil Procedure contending inter-alia, that there was no default in the construction or delivery of possession of the plant. But the UPCOF Ltd. had a different version. It contended that the construction was not within the time schedule and performance of the plant was not up to the mark. It also

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contended that the Court should not grant injunction in the matter.

The trial court refused to interdict UPCOF Ltd. the SCE(P) Ltd. took up the matter in revision before Lucknow Bench of the Allahabad High Court. The learned Judge before whom the matter came up for disposal was of the view that SCE(P) Ltd. has made out a prima facie case . It has prima facie proved that the plant was delivered after a trial run and commercial production had started. So stating, learned Judge allowed the revision and granted the relief sought for. The UPCOF Ltd. was restrained from invoking the bank guarantees. The learned Judge, however, issued a direction to SCE(P) Ltd. to keep alive the bank guarantees during the

pendency of the arbitration proceedings.

The UPCOF Ltd. by special leave has come up before this Court challenging the validity of the order of the High Court. The Primary question for consideration is whether the High Court was justified in restraining the appellant from invoking the Bank guarantees? The submission of Mr. A.B. Diwan learned counsel for the appellant rested on the law governing the irrevocable letter of credit where courts keep themselves away from the liability assumed by the banks. In support of the submission, the counsel strongly relied upon the two decisions of this Court: (i) United Commercial Bank v.. Bank of India & Ors., [1981] 3 SCR 300 and (ii) Centax (India) Ltd. v. Vinmar Impex Inc. & Ors. [1986] 4 SCC 136. Mr. V.M. Tarkunde, learned counsel for the respondent or the other hand, urged that both the said decisions are not relevant since the present case concerns with rights and obligations of parties under a construction contract. The rights under the contract in question are justiciable in the Court of law. The performance guarantee given by the Bank flows from the terms of the construction contract. But the issues to be determined in the suit do not relate to the obligations of the bank under the guarantees given and the bank is also not a party to the suit. The counsel further urged that the respondent has established a prima facie case to justify the grant of injunction and this Court should not interfere with the discretionary relief granted.

The argument for the respondent is attractive but it seems to overlook the basic nature of the case. The basic nature of the case relates to the obligations assumed by the bank under the guarantees given to UPCOF Ltd. If under law, the bank cannot be prevented by SCE(P) Ltd from honouring the credit guarantees, the UPCOF Ltd. also cannot be restrained from invoking the guarantees. What applies
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to the bank must equally apply to UPCOF Ltd. Therefore, the frame of the suit by not impleading the bank cannot make any difference in the position of law. Equally, it would he futile to contend that the court was justified in granting the injunction since it has found a prima facie case in favour of the SCE(P) Ltd. The question of examining the prima facie case or balance of convenience does not arise if the court cannot interfere with the unconditional commitment made by the bank in the guarantees in question.

The modern documentary credit had its origin from letters of credit. We may, therefore, begin the discussion with the traditional letter of credit. Paul R. Verkuil in an article [Bank Solvency and Guaranty Letters of Credit, Standford Law Review V. 25 (1972-73 at p. 719)] explains the salient features of a letter of credit in these terms: C

> "The letter of credit is a contract. The issuing party-usually a bank-promises to pay the 'beneficiary'-traditionally a seller of goods-on demand if the beneficiary presents whatever documents may be required by the letter. They are normally the only two parties involved in the contract. The bank which issues a letter of credit acts as a principal, not as agent for its customer, and engages its own credit. The letter of credit thus 'evidences-irrevocable obligation to honour the draft presented by the beneficiary upon compliance with the terms of the credit."

The letter of credit has been developed over hundreds of years of international trade. It was most commonly used in conjunction with the sale of goods between geographically distant parties. It was intended to facilitate the transfer

of goods between distant and unfamiliar buyer and seller. It was found difficult for the seller to rely upon the credit of an unknown customer. It was also found difficult for a buyer to pay for goods prior to their delivery. The bank's letter of credit came into existence to bridge this gap. In such transactions, the seller (beneficiary) receives payment from issuing bank when he presents a demand as per terms of the documents. The bank must pay if the documents are in order and the terms of credit are satisfied. The bank, however, was not allowed to determine whether the seller had actually shipped the goods or whether the goods conformed to the requirements of the contract. Any dispute between the buyer and the seller must be settled between themselves. The Courts, however, carved out an exception to this rule of absolute independence. The Courts held that if there has been "fraud in the transaction

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the bank could dishonour beneficiary's demand for payment. The A Courts have generally permitted dishonour only on the fraud of the beneficiary, not the fraud of somebody else.

It was perhaps for the first time the said exception of fraud to the rule of absolute independence of the letter of credit has been applied by Shientag, J. in the American case of Sztejn v. J. Henry Schroder Banking Corporation, (31 N.Y.S. 2d 631). Mr. Sztejn wanted to buy some bristles from India and so he entered into a deal with an Indian seller to sell him a quantity. The issuing bank issued a letter of credit to the Indian seller that provided that, upon receipt of appropriate documents, the bank would pay for the shipment. Somehow Mr. Sztejn discovered that the shipment made was not crates of bristles, but crates of worthless material and rubbish. He went to his bank which probably informed him that the letter of credit was an independent undertaking of the bank and it must pay.

Mr. Sztejn did not take that sitting down. He went to court and he sought an injunction. Now in 1941 people just did not get injunctions against payment under letters of credit. The defendant bank, against its customer, filed the equivalent of a motion to dismiss for failure to state a claim. In that posture all the allegations of the complaint were taken as true, and those allegations were gross fraud that the holders in due course were involved. On those facts, the court issued an injunction against payment.

The exception of fraud created in the above case has been codified in sec. 5-114 of the Uniform Commercial Code. It has been accepted by Courts in England. See: (i) Hamzeb Milas and Sons v. British Lmex Industries Ltd. [1958] 2 QBD 127], (ii) R.D. Harbottle (Mercantile) Ltd. and another v. National West-Minister Bank Ltd. [1977] 2 All E.R. 862; (iii) Edward Owen Engineering Ltd. v. Barclays Bank International Ltd., [1978] l All E.R. 976 and (iv) UCM (Investment) v. Royal Bank of India, [1982] 2 All E.R. 720. The last case is of the House of Lords where Lord Diplock in his speech said (at p. 725):

> "The whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade is to give to the seller an assured right to be paid before he parts with control of the goods and that does not permit of the any dispute with the buyer as to the performance of the contract of sale being used as a ground for non-payment or reduction or deferment of payment.

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> "To this general statement of principle as to

the contractual obligations of the confirming bank to the seller, there is one established exception: that is, where the seller, for the purpose of drawing on the credit, fradulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue. Although there does not appear among the English authorities any case in which this exception has been applied, it is well established in the American cases, of which the leading or 'landmark' case is Sztejn v. Henry Schroder Banking Corp., [1941] 3 1 NYS 2d 63 1. This judgment of the New York Court of Appeals was referred to with approval by the English Court of Appeal in Edward Owen Engineering Ltd. v. Barclays Bank International Ltd. [1978] 1 All E.R. 979 (1978) QB 159 though this was actually a case about a performance bond under which a bank assumes obligation to a buyer analogous to those assumed by a confirming bank to the seller under a documentary credit. The exception for fraud on the part of the beneficiary seeking to avail himself of the credit is a clear application to the maxim ex trupi cause non oritur actio or if plain English is to be preferred, 'fraud unravels all', the courts will not allow their process to be used by a dishonest person to carry out a fraud."

This was also the view taken by this Court in United Commercial Bank case [1981] 3 SCR 300. There A.P. Sen, J. speaking for the Court, said (pages 323 and 324):

"The rule is well established that a bank issuing or confirming a letter of credit is not concerned with the underlying contract between the buyer and seller. Duties of a bank under a letter of credit are created by the document itself, but in any case it has the power and is subject to the limitations which are given or imposed by it, in the absence of the appropriate provisions in the letter of credit.

"It is somewhat unfortunate that the High Court should have granted a temporary injunction, as it has been done in this case, to restrain the appellant from making a recall of the amount of Rs.85,84,456 from the Bank of India in terms of the letter of guarantee or indemnity executed by it. The courts usually refrain from granting injunction to

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restrain the performance of the contractual obligations arising out of a letter of credit or a bank guarantee between one bank and another. If such temporary injunctions were to be granted in a transaction between a banker and a banker, restraining a bank from recalling the amount due when payment is made under reserve to another bank or in terms of the letter of guarantee or credit executed by it, the whole banking system in the country would fail.

"In view of the banker's obligation under an irrevocable letter of credit to pay, his buyer-customer cannot instruct him not to pay."

In Centax (India) Ltd., [1986] 4 SCC 136, this Court again speaking through A.P. Sen, J. following the decision in the United Commercial Bank case said: "We do not see why

the same principles should not apply to a banker's letter of indemnity."

It is true that both the decisions of this Court dealt with a contract to sell specific commodities or a transaction of sale of goods with an irrevocable letter of credit. But in modern commercial transactions, various devices are used to ensure performance by the contracting parties. The traditional letter of credit has taken a new meaning. In business circles, standby letters of credit are also used. Performance bond and guarantee bond are also the devices increasingly adopted in transactions. The Courts have treated such documents as analogous to letter of cedit.

A case involving the obligations under a performance guarantee was considered by the Court of Appeal in Edward Owen Engineering Ltd. v. Barclay's Bank International Ltd., [1978] 1 All E.R. 976. The facts in that case are these: English sellers entered into a contract to supply and erect glass-houses in Libya. The Libyan buyers were to open an irrevocable letter of credit in favour of the sellers. The sellers told their English bank to give a performance guarantee. The English bank instructed a Libyan bank to issue a performance bond in favour of the buyers for a certain sum and gave their guarantee payable on demand without proof or conditions to cover that sum. The Libyan bank issued a bond accordingly. The sellers received no confirmed letter of credit and refused to proceed with the contract. The sellers obtained in interim injunction to prevent the English bank from paying on the guarantee. On appeal Lord Denning M.R. said:

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> "So as on takes instance after instance these performance guarantees are virtually promissory notes payable on demand. So long as the Libyan customers make an honest demand, the banks are bound to pay and the banks will rarely, if ever, be in a position to know whether the demand is honest or not. At any rate they will not be able to prove it to be dishonest. So these will have to pay. "

And said:

> "All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer: nor with question whether the supplier has performed his contractual obligation or not; nor with the question whether supplier is in default or not. The bank must pay according to its guarantees, on demand if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has noticed. "

Whether it is a traditional letter of credit or a new device like performance bond or performance guarantee, the obligation of banks appears to be the same. If the documentary credits are irrevocable and independent, the banks must pay when demand is made. Since the bank pledges its own credit involving its reputation, it has no defence except in the case of fraud. The bank's obligations of course should not be extended to protect the unscrupulous seller, that is the seller who is responsible for the fraud. But, the banker must be sure of his ground before declining to pay. The nature of the fraud that the Courts talk about

is fraud of an "egregious nature as to vitiate the entire underlying transaction". It is fraud of the beneficiary, not the fraud of somebody else. If the bank detects with a minimal investigation the fraudulent action of the seller, the payment could be refused. The bank cannot be compelled to honour the credit in such cases. But it may be very difficult for the bank to take a decision on the alleged fraudulent action. In such cases, it would be proper for the bank to ask the buyer to approach the Court for an injunction.

The Court, however, should not lightly interfere with the operation of irrevocable documentary credit. I agree with my learned

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brother that in order to restrain the operation of irrevocable letter of credit, performance bond or guarantee, there should be serious dispute to be tried and there should be a good prima facie acts of fraud. As Sir John Donaldson M.R. said in Bolivinter oil SA v. Chase Mannattan Bank & ors. [1984] 1 All E.R. 35 1 at 352:

> "The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged."

From the above discussion, what appears to me is this: The sound banking system may, however, require more caution in the issuance of irrevocable documentary credits. It would be for the banks to safeguard themselves by other means and generally not for the court to come to their rescue with injunctions unless there is established fraud. In the result, this appeal must be allowed. The judgment and order of the Allahabad High Court dated February 20, 1987 must be set aside and the order of learned Civil Judge, Lucknow dated August 8, 1986 restored.

S.L. Appeal allowed.

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