



NC: 2025:KHC:3734
WP No. 2193 of 2021

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 27TH DAY OF JANUARY, 2025

BEFORE

THE HON'BLE MR JUSTICE SURAJ GOVINDARAJ

WRIT PETITION NO. 2193 OF 2021 (GM-RES)

R

BETWEEN

M/S NHDPL SOUTH PRIVATE LIMITED
(FORMERLY KNOWN AS NHDPL PROPERTIES PVT. LTD
AND PREVIOUSLY KNOWN AS
NITESH HOUSING DEVELOPERS PRIVATE LIMITED)
HAVING ITS OFFICE AT NO.110, LEVEL 1,
ANDREWS BUILDING, M.G. ROAD,
BENGALURU-560 001,
ALSO HAVING OFFICE AT NO. 7, 7TH FLOOR,
NITESH TIMES SQUARE,
M.G. ROAD, BENGALURU-560 001,
REPRESENTED BY ITS AUTHORIZED SIGNATORY,
K.B. SWAMY.

...PETITIONER

(BY SRI. UDAYA HOLLA., SENIOR ADVOCATE FOR
SRI. SIDDHARTH SUMAN., ADVOCATE)

AND

1. UNION BANK OF INDIA
VILE PARLE (W) BRANCH,
SHIV SHAKTI, II VITHAL NAGAR,
COOP. HOUSING SOCIETY,
10TH ROAD, J.V.P.D. SCHEME,
VILE PARLE (W)
MUMBAI-400 049,
REPRESENTED BY ITS
BRANCH MANAGER.
2. THE RESERVE BANK OF INDIA
NEW CENTRAL OFFICE BUILDING,
SHAHID BHAGAT SINGH ROAD,





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FORT, MUMBAI,
MAHARASHTRA-400 001.
REP BY ITS DIRECTOR

3. THE BANKING OMBUDSMAN MUMBAI
C/O. RESERVE BANK OF INDIA
4TH FLOOR,
RBI BYCULLA OFFICE BUILDING,
OPP MUMBAI CENTRAL RAILWAY STATION
BYCULLA, MUMBAI-400 008.

...RESPONDENTS

(BY SMT. DIVYA PURANDAR., ADVOCATE FOR R1;
SRI. S.R. KAMALACHAR., ADVOCATE FOR R3;
V/O DATED 19.12.2024 R2-SERVED AND UNREPRESENTED)

THIS WRIT PETITION IS FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA PRAYING TO ISSUE A WRIT IN THE NATURE OF CERTIORARI QUASHING THE ORDER DATED 21.12.2020 (ANNEXURE-G) PASSED BY THE 3RD RESPONDENT REJECTING THE COMPLAINT OF THE PETITIONER AND CONSEQUENTLY, ALLOW THE COMPLAINT OF THE PETITIONER AND ETC.

THIS WRIT PETITION COMING ON FOR ORDERS AND HAVING BEEN RESERVED FOR ORDERS ON 20.12.2024, THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

ORDER

1. The Petitioner is before this Court seeking for the following reliefs:

- a. *Issue a writ in the nature of certiorari to quashing the order dated 21.12.2020 (Annexure-G) passed by the 3rd Respondent rejecting the complaint of the petitioner and consequently, allow the complaint of the petitioner.*



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- b. Issue a writ in the nature of Mandamus against the 1st Respondent directing it to invoke the bank guarantees 408101GL0001716 dated 20.7.2016 and No.408101GL0001816 dated 20.7.2016.*
- c. Issue such other writ, order or further relief, as this Hon'ble Court deems fit, to meet the ends of justice.*

2. The petitioner claims to be engaged in the business of real estate development. One such project undertaken by the petitioner was the development of land situated at Sy.Nos.114 and 139 of Byrathi Village at Bidarahalli Hobli, Bangalore East, Karnataka known as 'Nitesh Melbourne Park'. The petitioner had entered into an agreement for civil works to be undertaken for the project with a company known as Al Fara'a Infra Projects Private Limited (for short, 'M/s.Al Fara') vide an agreement dated 27.4.2016. In furtherance of Article 11 thereof, a Performance Guarantee in the form of irrevocable Bank guarantee had to be issued, which was so issued, drawn on Respondent No.1 - Union Bank of India. On 20.7.2016 for a sum of



Rs.2,78,75,127/-, a Bank Guarantee bearing No.408101GL0001716 (for short 'BG-1') and on 20.7.2016 for a sum of Rs.5,57,50,254/-, a Bank Guarantee bearing No.408101GL0001816 (for short, 'BG-2') were issued. Both these bank guarantees were extended from time to time and by virtue of the last renewal, the bank guarantees were valid upto 31.3.2019 and 30.4.2019 respectively.

3. The project work being in progress, the term of the aforesaid unconditional bank guarantees coming to an end were required to be extended. As per the usual practice, the petitioner, on 29.3.2019, wrote to Respondent No.1 in relation to the bank guarantee dated 20.7.2016, which was expiring on 31.3.2019, and requested for renewal of the bank guarantee. In the event of the bank guarantee not being renewed, the Petitioner called upon the Bank to treat the same as a letter for invocation and deposit the proceeds



into the bank account of the Petitioner by providing the details of the bank account.

4. On 26.4.2019, the Petitioner wrote to Respondent No.1-Bank with reference to the aforesaid bank guarantee dated 20.7.2016, which was expiring on 30.4.2019, with a similar request.
5. The Petitioner followed the matter with the Respondent No.1-Bank. Respondent No.1 had indicated that since the physical copy of the letter for renewal/invocation was received on 1.4.2019 and 2.5.2019 respectively, the letters having been received after lapse of the bank guarantees, the request for renewal/invocation could not be entertained.
6. Contending that the same is an improper stand on part of the Bank and being of the belief that the Bank and the Contractor were in collusion with each other, the Petitioner lodged a complaint with Respondent No.3 - the Banking Ombudsman, Mumbai, in March-



April 2020. However, due to pandemic, the said complaint was not considered, and finally, acknowledgement came to be issued on 3.10.2020. On 21.12.2020, the said complaint came to be dismissed by the Ombudsman stating that the same does not relate to deficiency of service. It is challenging the said order and seeking for consequent reliefs, the Petitioner is before this Court.

7. Sri.Udaya Holla, learned Senior Counsel appearing for the Petitioner would firstly submit that:

7.1. Respondent No.1 - Bank, was duty bound to honour the bank guarantee. Not having done so, makes the Respondent - Bank liable for the consequence thereof. What was required was only for the Petitioner to inform the Bank about the invocation. Once the Bank was made aware of the invocation, the Bank had nothing more to do but to accept the same and transfer the amounts to the Petitioner.



7.2. He submits that an email correspondence also creates a contract and in this regard, he refers to Section 4 of the Information Technology Act, 2000, which is reproduced hereunder for easy reference.

4. Legal recognition of electronic records.-

Where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is-

(a) rendered or made available in an electronic form; and

(b) accessible so as to be usable for a subsequent reference.

7.3. Referring to the aforesaid Section 4, he submits that, any matter in writing or in the typewritten or printed form being the requirement of any law, then, such requirement would also be satisfied, if the same is made available in electronic form so long as it is accessible to be usable for a subsequent reference. In the



present matter, he submits that an email which had been issued by the Petitioner, being in electronic form and being accessible, for subsequent use satisfies the requirement of Section 4 of IT Act and as such, the Bank cannot insist on a physical copy. The Bank ought to have acted on an electronic copy.

7.4. He relies upon the decision of this Court in the case of ***Sudarshan Cargo Pvt. Ltd., vs. M/s.Techvac Engineering Pvt. Ltd.***,¹ more particularly Paras 14, 15 and 21 thereof, which are reproduced hereunder for easy reference.

14. Section 18 of the Limitation Act prescribes that acknowledgement of liability if made in writing before the expiration of the prescribed period, a fresh period of limitation has to be computed from the time when the acknowledgement was so signed. Thus, essential requirements of a valid acknowledgement under Section 18 of the Limitation Act, 1963 are:

(a) It must be in writing;

¹ 2013 SCC Online Kar 5063



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(b) Must be signed by the party against whom such right is claimed;

The word 'writing' employed in Section 18 refers to paper based traditional manual writing.

15. *However, the Information Technology Act, 2000 (hereinafter referred to as 'IT Act, 2000' for brevity) provides for legal recognition for transactions carried out by means of electronic data/electronic communication which involve the use of alternatives to paper based methods of communication and storage of information. The IT Act, 2000 came in to force with effect from 17.10.2000. On account of advanced technology taking giant steps and the business transactions being conducted through the use of digital technology and communication systems, said Act came into force. It also requires to be noticed that on account of the business community as well as individuals increasingly using computers to create, transmit and store information in the electronic form instead of traditional paper documents and for facilitating e-commerce and e-governance, the above said Act came into force. It would be necessary to note the Statement and Objects of IT Act, 2000 for better understanding of the said enactment and the relevancy of its application to the facts on hand and for answering the point formulated herein above. It reads as under:*

"New communication systems and digital technology have made dramatic changes in the way we live. A revolution is occurring in the way people transact business. Businesses and consumers are increasingly using computers to create, transmit and store information in the electronic form instead of traditional paper



documents. Information stored in electronic form has many advantages. It is cheaper, easier to store, retrieve and speedier to communicate. Although people are aware of these advantages, they are reluctant to conduct business or conclude any transaction in the electronic form due to lack of appropriate legal framework. The two principal hurdles which stand in the way of facilitating electronic commerce and electronic governance are the requirements as to writing and signature for legal recognition. At present many legal provisions assume the existence of paper based records and documents and records which should bear signatures. The Law of Evidence is traditionally based upon paper based records and oral testimony. Since electronic commerce eliminates the need for paper based transactions, hence to facilitate e-commerce, the need for legal changes have become an urgent necessity. International trade through the medium of e-commerce is growing rapidly in the past few years and many countries have switched over from traditional paper based commerce to e-commerce.

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3. There is need for bringing in suitable amendments in the existing laws in our country to facilitate e-commerce. It is, therefore, proposed to provide for legal recognition of electronic records and digital signatures. This will enable the conclusion of contracts and the creation of rights and obligations through the electronic medium. It is also proposed to provide for a regulatory regime to supervise the Certifying Authorities issuing Digital Signature Certificates. To prevent the possible misuse arising out of transactions and other dealings concluded over the electronic medium, it is also



proposed to create civil and criminal liabilities for contravention of the provisions of the proposed legislature.

4. With a view to facilitate Electronic Governance, it is proposed to provide for the Use and acceptance of electronic records and digital signatures in the Government offices and its agencies. This will make the citizens interaction with the Government offices hassle free.

5. It is also proposed to make consequential amendments in the Penal Code, 1860 and the Indian Evidence Act, 1872 to provide for necessary changes in the various provisions which deal with offences relating to documents and paper based transactions. It is also proposed to amend the Reserve Bank of India Act, 1934 to facilitate electronic fund transfers between the financial institutions and banks and the Bankers' Books Evidence Act, 1891 to give legal sanctity for books of account maintained in the electronic form by the banks.

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7. xxx"

Electronic Mail, most commonly referred to as, is a method of exchanging digital messages from one person to another person or from an author to recipient. Modern e-mail operated across internet by computer net work and it is based on store and forward modem. E-mail is an electronically transmitted correspondence between two or more persons. Thus, any communication between the sender and the recipient would result in privity of transaction. Some of the provisions which have relevance to the word 'e-mail' under IT Act, 2000 are extracted herein below:



"2. Definitions.— (1) In this Act unless the context otherwise requires,—

(b) "addressee"— means a person who is intended by the originator to receive the electronic record but does not include any intermediary;

(r) "electronic form", with reference to information, means any information generated, sent, received, or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device;

(t) "electronic record" means data, record or data generated, image or sound stored, received or sent in electronic form or micro film or computer generated micro fiche.

(v) "information" includes data, message, text, images, sound, voice, codes, computer programmes, software and databases or microfilm or computer generated microfiche.

(za) "originator" means a person who sends, generates, stores or transmits any electronic message; or causes any electronic message to be sent, generated, stored or transmitted to any other person but does not include an intermediary.

4. Legal recognition of electronic records.— Where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is—

(a) rendered or made available in an electronic form; and



(b) accessible so as to be usable for a subsequent reference.

Section 4 of The IT Act, 2000 provides that if information or any other matter is to be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, the requirement is deemed to have been satisfied if such information or matter is rendered or made available in an 'electronic form' and same is accessible to be used for a subsequent reference.

21. *A harmonious reading of Section 4 together with definition clauses as extracted hereinabove would indicate that on account of digital and new communication systems having taken giant steps and the business community as well as individuals are undisputedly using computers to create, transmit and store information in the electronic form rather than using the traditional paper documents and as such the information so generated, transmitted and received are to be construed as meeting the requirement of Section 18 of the Limitation Act, particularly in view of the fact that Section 4 contains a non obstante clause. Since respondent does not dispute the information transmitted by it is in electronic form to the petitioner by way of message through the use of computer and its network as not having been sent by it to the petitioner, the acknowledgement as found in the e-mails dated 14.01.2010 and 06.04.2010 originating from the respondent to the addressee namely, petitioner, such e-mails have to be construed and read as a due and proper acknowledgement and it would meet the parameters laid down under Section 18 of the Limitation Act, 1963 to constitute a valid and legal acknowledgement of debt due.*



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7.5. By relying on the aforesaid judgment, he submits that the word 'writing' under Section 4 of the IT Act, would also include electronic form. Thus, an email which had been addressed by the Petitioner to Respondent No.1 - Bank is in writing, though in electronic form, and therefore the Bank could not have avoided the encashment of the bank guarantee on the make-believe contention that the said invocation letter was not in the physical form of writing.

7.6. He relies upon the decision of the Honb'e Apex Court in the case of ***Trimex International FZE Limited, Dubai vs. Vedanta Aluminium Limited, India***², more particularly Para 60 thereof, which is reproduced hereunder for easy reference:

² (2010) 3 SCC 1



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60. *It is clear that in the absence of signed agreement between the parties, it would be possible to infer from various documents duly approved and signed by the parties in the form of exchange of e-mails, letter, telex, telegrams and other means of telecommunication.*

7.7. By referring to the above, he submits that a contract can be created even by exchange of emails, letters, telex, telegrams, and other means of telecommunication. With the advent of the IT Act, the same have all been recognized and the Bank cannot avoid or evade the reference to an electronic mail.

7.8. He refers to the judgment of the Hon'ble Allahabad High Court in the case of **Rajendra vs. State of U.P. and another**³, more particularly Para 14 thereof, which is reproduced here under for easy reference:

14. *Therefore, Section 4 of the IT Act very clearly provides that notwithstanding anything contained in such law which provides notice in written form then written will also include the notice rendered or made available in electronic form, which should be available for subsequent reference. The word "electronic form" is defined*

³ 2024 SCC OnLine All 2207



in Section 2(1)(r) of the IT Act, which provides any information generated, sent, received or stored in media, magnetic, optical, computer memory, microfilm, computer generated microfiche or similar device. Therefore, it is clear from the provision the notice mentioned in Section 138 of the NI Act will also include e-mail or WhatsApp if the same remains available for subsequent reference.

7.9. By referring to the above, he submits that the Hon'ble Allahabad High Court has categorically held that even a notice by way of email would satisfy the requirement of Section 138 of the Negotiable Instruments Act and as such would satisfy the requirement of the contract between the parties, making the invocation valid.

7.10. He refers to and relies upon the judgment of the Hon'ble Apex Court in the case of ***Shakti Bhog Foods Limited vs. Kola Shipping Limited***⁴, more particularly Paras 14, 15 and 17 thereof, which are reproduced hereunder for easy reference:

⁴ (2009) 2 SCC 134



14. *In our view, we should give reasons for dismissing this appeal. We have already noted that by the charter party agreement dated 18-7-2005 the appellant agreed to load and the respondent agreed to carry 13,500 tons of cargo from Kakinada to the Port of Cotonou. We have also observed that the said charter party agreement provided for arbitration in Box 25 and Clause 19 and that the disputes pertaining to the same were to be referred to arbitration in London under the English Arbitration Act. The appellant herein has not refuted the signature on the front page of the charter party agreement. We cannot entertain his claim that such a signature would not amount to a valid arbitration agreement. For this purpose, it would be relevant to quote Section 7 of the Act:*

"7. Arbitration agreement.—(1) In this Part, 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or



(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

Therefore, it is clear from the provisions made under Section 7 of the Act that the existence of an arbitration agreement can be inferred from a document signed by the parties, or an exchange of letters, telex, telegrams or other means of telecommunication, which provide a record of the agreement.

15. *In the present case, the appellant had not denied the fact that it had signed the first page of the charter party agreement. Moreover, the subsequent correspondences between the parties also lead us to conclude that there was indeed a charter party agreement, which existed between the parties. We cannot accept the contention of the appellant that under Section 7 of the Act the letter/faxes or mails or any other communications will have to contain the arbitration clause in the absence of any agreement. The expressions of Section 7 do not specify any requirement to this effect.*

17. *The appellant contended that the respondent did not file the original charter party agreement in any of the proceedings before any of the lower courts. We would want to reiterate that as far as the provision of Section 7 of the Act is concerned, an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate*



agreement and furthermore an arbitration is considered to be in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement or an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other. So from the provisions of Section 7, it is clear that a charter party agreement need not be in writing signed by both parties and this could as well be made out from the acts of the parties to the agreement by way of their exchange of letters and information through fax, e-mails, etc.

7.11.By referring to the above, he submits that a contract could also be created and made out from the act of the parties to the agreement by way of their exchange of letters, information through fax, emails, etc.

7.12.When a contract can be so created, a communication by way of email would satisfy the requirement of invocation, which has been illegally and unlawfully denied by the Bank.

7.13.He refers to the decision of the Hon'ble Bombay High Court in the case of **Dr.Madhav**



***Vishwanath Dawalbhakta (Decd) through
LRs Dr.Nitin M.Dawalbhakta & ors., vs.
M/s.Bendale Brothers⁵***, more particularly
Para 12 thereof, which is reproduced hereunder
for easy reference:

12. *Thus, in sub-rule (i) and (ii), the substituted service means fixing the copies of the summons on different place as mentioned in the Rule. However, the sub-rule (iii) gives further option that the summons can be served in such other manner as the Court thinks fit. Thus, the manner which the Court opts for should be akin to the earlier mode of service, which is mentioned in the Rule. For this, the Court can take into account the modern ways of service which are available due to internet connection. It can be served also by courier or by email or by WhatsApp etc. The Court should be satisfied about such service. Rule 1A gives a specific option to the Court to serve the defendant by an advertisement or notice in the newspaper which should be daily newspaper circulated in the locality whether it was known to have actually or voluntarily residing or carrying out business. The phrase used in Rule 1A "where the Court acting under sub-rule(1)" contemplates when the Court passes the order of service by publication, in fact the court is using the powers by choosing a mode which is "such other manner as the Court thinks fit", as mentioned in sub-rule (1) of Rule 20 Order 5. The finding given by the learned trial Court Judge in the present case that after publication*

⁵ 2018 SCC OnLine BOM 2652



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in the newspaper, the copy of the newspaper is to be affixed at the conspicuous place or at the residence, is incorrect. No such pasting of the newspaper is required.

7.14.Placing reliance on the above, he submitted that a service of notice could be effected by email and WhatsApp and the email addressed by the Petitioner to the Bank seeking for either extension of the bank guarantee or on failure thereof to treat the letter as invocation of the bank guarantee is proper and valid.

7.15.He submits that a Writ Petition in relation to contractual matters is also maintainable. This he submits on an apprehension that such an issue would be raised by the Respondents. In this regard, he relies upon the judgment of the Hon'ble Apex Court in the case of ***Zonal Manager, Central Bank of India vs. Devi Ispat Limited and others***⁶, more particularly

⁶ (2010) 11 SCC 186



Para 22 thereof, which is reproduced hereunder for easy reference:

22. *In ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd. [(2004) 3 SCC 553] Santosh Hegde, J. has exhaustively dealt with the maintainability of writ petition under Article 226 in contractual matters. In the said case, contract of insurance was executed between ABL International Ltd. and another and Export Credit Guarantee Corporation of India Ltd. and others. Having failed to persuade the first respondent therein, to adhere to the contract of insurance between it and the appellant, the appellant filed a writ petition before a learned Single Judge of the Calcutta High Court, inter alia, praying for quashing of the letters of repudiation issued by the first respondent. It also consequentially prayed for a direction to the first respondent to make payment of the dues to it under the contract of insurance. The learned Single Judge, after hearing the parties, came to the conclusion that though the dispute between the parties arose out of a contract, the first respondent being "State" for the purpose of Article 12, was bound by the terms of the contract, therefore, for such non-performance, a writ was maintainable and after considering the arguments of the parties in regard to the liability under the contract of insurance, allowed the writ petition and issued the writ and directions as prayed for by the appellants in the writ petition.*

7.16. By relying on the above, he submits that a public sector bank discharging public functions



who has failed to return the title deeds to the borrower could be issued a mandamus in the writ jurisdiction.

7.17. He refers to the judgment of Hon'ble Delhi High Court in the case of ***DLF Limited vs. Punjab National Bank***⁷, more particularly Paras 1, 2, 4 and 29 thereof, which are reproduced hereunder for easy reference:

1. The petition impugns the demand by the respondent Bank of "pre-payment charges" without there being a provision therefor in the Loan Agreement. Notice of the petition was issued and vide interim order dated 21st December, 2010, the respondent Bank was restrained from downgrading the loan account of the petitioner and/or reporting the default alleged of the petitioner in payment of pre-payment charges to the Credit Information Bureau (India) Limited (CIBIL) or to the Reserve Bank of India (RBI). The petitioner thereafter applied for release of the security deposited with the respondent Bank averring that while the security was furnished to secure the loan of Rs. 1,000 crores which stands pre-paid and the demand now remaining and impugned is only of pre-payment charges of Rs. 20 crores only. Certain proposals for amicable interim arrangement to the said effect were discussed between the parties but without any success.

⁷ 2011 SCC OnLine Delhi 2465



During the course thereof, on suggestion of the senior counsels for the parties, arguments on the writ petition itself were heard.

2. *The challenge by the petitioner is on the grounds:—*

(i) that even though the entire loan amount together with interest due thereon had been remitted by the petitioner and received by the respondent Bank, the respondent Bank was illegally withholding the security of the petitioner of over Rs. 1,000 crores for the reason of alleged default in payment of pre-payment charges of Rs. 20 crores @ 2% of the loan amount of Rs. 1,000 crores;

(ii) the respondent Bank in the loan subject matter of the present petition did not disclose any such pre-payment charges and is thus not entitled to claim the same. The said argument is buttressed from the fact that another Loan Agreement executed between the petitioner and the respondent Bank shortly after the Loan Agreement subject matter of this petition prescribed pre-payment charges of 1%;

(iii) it is contended that the claim of the respondent Bank for pre-payment charges without there being a provision therefor in the agreement is violative of the RBI guidelines;

(iv) that the RBI guidelines dated 25th November, 2008 and 12th November, 2010 mandate the Banks to upfront disclose to the borrower all the information in relation to the loan including information regarding pre-payment options and charges;

(v) it is contended that the claim for pre-payment charges is also violative of the Fair Practices Code notified by the respondent Bank



itself requiring pre-payment charges to be notified at the stage of application for processing of loan itself;

(vi) that since pre-payment was out of internal accruals of the petitioner, the levy of pre-payment penalty was unjustified.

(vii) that the petitioner had notified the respondent Bank that it was utilizing its own internal funds for pre-paying the loan;

(viii) the maintainability of the writ is sought to be justified by relying upon Sardar Associates v. Punjab & Sind Bank, (2009) 8 SCC 257 laying down that if in terms of the guidelines issued by the RBI, a right is created in a borrower, writ of mandamus could be issued;

(ix) that the action of the respondent Bank was thus illegal and arbitrary;

4. *The senior counsel for the petitioner in addition to the arguments already noticed above has contended that the terms of the Loan Agreement between the parties having been reduced to writing, no other evidence can be looked at under Sections 91 & 92 of the Indian Evidence Act, 1872 and thus the only question involved is of the interpretation of the Loan Agreement and the RBI guidelines and Fair Practices Code aforesaid and no disputed question of fact requiring any further evidence can be said to be arising in the matter. Reliance is placed on ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd., (2004) 3 SCC 553 laying down that in appropriate cases the writ court has jurisdiction to entertain a writ petition involving disputed questions of fact and that where disputed*



questions of fact pertaining to the interpretation/meaning of documents are involved the Courts can very well go into the same and decide the objections if the facts so permit; it was further held that merely because one of the parties wants to dispute the meaning of a document, would not make it a disputed fact.

29. *The petition therefore succeeds and is allowed. The demand of the respondent Bank on the petitioner for pre-payment charges of Rs. 20 crores on the loan subject matter of this writ petition is found to be without any basis and is quashed. Resultantly, the respondent Bank also stands restrained from threatening actions in pursuance to the said demand. The respondent Bank is also directed to within six weeks of today return to the petitioner the security placed by the petitioner with the respondent Bank for re-payment of the loan and which loan already stands re-paid. Upon default by the respondent Bank in so releasing the security within the time aforesaid, the petitioner, besides other remedies shall also be entitled to interest @ 1% per annum on the value of the security. The petitioner is also awarded costs of Rs. 20,000/- of this petition payable by the respondent Bank within six weeks aforesaid.*

7.18. By referring to the above, he submits that the Hon'ble Delhi High Court has come to a categorical conclusion, that a Bank is amenable to a writ jurisdiction.



7.19. On the basis of the above, he submits that the action on part of the Respondent - Bank being contrary to the applicable law, the Banking Ombudsman who has been set up under the Banking Ombudsman Scheme was required to look into these aspects and take action against the Bank who had violated the applicable law and/or who had not complied with the obligation under the bank guarantee, and as such, he submits that the Writ Petition is required to be allowed and the relief sought for be granted.

8. Ms. Divya Purandar, learned counsel appearing for the Respondent No.1 - Bank, would however submit that:

8.1. This Court ought not to excise writ jurisdiction in respect of contractual matters since there is no infringement of any rights guaranteed under Part III of the Constitution of India. There are



disputed questions of fact which cannot be gone into by this Court in writ proceedings.

8.2. She, however, admits that Respondent No.1 - Bank had sanctioned credit facilities to M/s.Al Fara on 11.2.2016 and had also issued the subject bank guarantees, as indicated supra on behalf of the said M/s.Al Fara.

8.3. Insofar as BG No.1, which had been initially issued on 21.6.2016, the same was valid until 30.9.2018, which came to be extended up to 31.3.2019, which was not extended by M/s.Al Fara and as such, ceased to be valid from the midnight of 31.3.2019.

8.4. In respect of BG-2, it was valid only until 30.4.2019 and was not renewed by M/s.Al Fara.

8.5. Her submission is that the renewal of the bank guarantee can only be made by the person who has availed of the services of the bank



guarantee by making payment of the bank guarantee commission. No renewal can be made at the request of the petitioner. The only option that the Petitioner had was to invoke the bank guarantee and seek for payment in terms of the bank guarantee by submitting a hard copy of such demand. The same not having been done, there is no demand and as such, there was no requirement for the Bank to make payment of any amounts to the Petitioner.

8.6. She refers to Clause 14 of the Performance Bank Guarantee agreement and submits that it is clearly stated therein that any notice by way of request, demand or other communication given with or required by the guarantee shall be made in writing and to be sent by post or delivered by hand. In that background, she submits that the invocation of the bank guarantee in the present case is not in writing



and has not been sent by post or delivered by hand. Therefore, there was no requirement for the Bank to act on the alleged invocation made by the Petitioner. The hard copy having been submitted much later by that time the bank guarantee had expired and therefore there is no obligation on the Bank to make payment of any amounts to the Petitioner.

8.7. It is contended that the Bank not being aware of the official registered email-ID of a third party beneficiary like the Petitioner, nor there being any mechanism to verify the authenticity of the email sent, the email sent by the Petitioner could not be verified and acted upon and it is for that reason that a physical copy is insisted upon by the Bank.

8.8. She further submits that since in the said email, there was a request made for renewal of the bank guarantee; such renewal could only be



sought for by the borrower on whose behalf the bank guarantee had been issued. The beneficiary, like the Petitioner, could not seek for extension or renewal of the bank guarantee. The borrower not having sought for renewal, no renewal was granted. Invocation not being in accordance with the contract, invocation was not accepted. As such, she submits that there is nothing wrong in the actions on the part of the Bank. It is the Petitioner who has not acted in terms of the agreement and there is no vested right on the part of the Petitioner to either approach the Banking Ombudsman or this Court. The Banking Ombudsman, taking into consideration the aforesaid facts, has dismissed the claim of the Petitioner.

8.9. She submits that even the said borrower has defaulted on the repayment of all credit facilities and the account of the borrower has



been classified as NPA on 31.8.2018. The Bank has moved an application under Section 19 of the Recovery of Debts and Bankruptcy Act, 1993 (for short, 'RDB Act') as also initiated proceedings under the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (for short, 'Sarfaesi Act'. The National Company Law Tribunal has passed an order of liquidation against the borrower in C.P.No.4533/2018 on 18.7.2022. Therefore, there is no obligation on part of the Bank to make payment of any monies to the Petitioner.

8.10. She submits that Section 4 of the IT Act would not be applicable to the facts. The agreement requiring the invocation to be in writing delivered by post or by hand an email cannot be read into the agreement of bank guarantee. The bank guarantee has to be strictly construed



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and invocation contrary to the terms of the bank guarantee are not binding on the Bank. If at all the Petitioner had invoked the bank guarantee in terms of the agreement entered into, the Bank would have abided by such invocation and made payment of the due amounts. Unfortunately, the Petitioner has not done the needful in accordance with law. Therefore, the Bank is not duty bound to make payment of any amounts to the Petitioner.

8.11. She relies upon the decision of the Hon'ble Kerala High Court in the case of ***Cochin Port Trust vs. Bank of India and another***⁸, more particularly Paras 7, 11 and 14 thereof, which are reproduced hereunder for easy reference:

7. The 1st respondent contended that the petitioner cannot have any advantage by the incorporation of a clause in terms of the said Exception 3 to Section 28 of the Indian Contract Act, in the Bank Guarantee. The right of the petitioner to have the Bank Guarantee

⁸ W.P.(C) No.22760/2019 (T) dated 26.4.2021



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invoked, is only during the currency of the Bank Guarantee and not during the extended claim period of one year. No relief can therefore be given to the petitioner in this writ petition.

11. *Ext.P8 Bank Guarantee Extension reads as follows:-*

"Extension of BG No.00151PEBG140103 dated 21.07.2014 from 01.11.2018 to 31.03.2019 for `19,40,000/- on behalf of Shrikhande Consultant Pvt. Ltd.

At the request of M/s. Shrikhande Consultants Pvt. Ltd. we the Bank of India, Dadar (west) Branch Mumbai 400 028 extend the validity of captioned Bank Guarantees upto 31.03.2019. All the other terms and conditions shall remain unchanged.

We are liable to pay the guarantee amount or any part thereof under this Bank Guarantee only if you serve upon us a written claimer demand on or before expiry of this renewed guarantee. All other terms & condition mentioned in the guarantee as originally issued/renewed earlier remained unchanged.

The Bank Guarantee shall be valid upto 31.03.2019 with one year claim period i.e. upto 31.03.2019.

Notwithstanding anything contained here above our liability under the Guarantee is restricted to `19,40,000/- (Rupees Nineteen Lac Forty Thousand Only) and this guarantee is valid upto 31.03.2019.

We shall be released and discharged from all liabilities hereunder unless a written



claim for payment under this guarantee is lodged/claimed on or before 31.03.2020 irrespective of whether or not the original guarantee is returned to us."

It is evident that the validity of the said guarantee is only up to 31.03.2019. Even according to the petitioner, demands were made only on 28.06.2019, 29.06.2019 and 01.07.2019 which dates are subsequent to the period of validity of Bank Guarantee.

14. *The extended period of claim provided for under Exception 3 to Section 28 of the Contract Act is therefore intended for extinguishment of the rights or discharge of any party from any liability under a Bank Guarantee/agreement. To arise a right under the Bank Guarantee Agreement, a demand has to be made within the period of validity of the Agreement. Having not made any demand within the validity period of the Bank Guarantee, the petitioner is not entitled to invoke the Guarantee during the claim period after the expiry of the validity period of the Bank Guarantee.*

8.12. By referring to the above, she submits, the right for invocation of the bank guarantee can only be exercised, during the currency of the bank guarantee, and not after the expiry. To give rise to a right under a bank guarantee, a demand is required to be made within a period of validity of the agreement. In the present



case, the invocation being made subsequent to the expiry of the bank guarantee, there is no obligation on the part of the Bank to make payment of any monies.

8.13. She relies upon the decision of the Hon'ble Apex Court in the case of ***Hindustan Construction Co. Ltd., vs. State of Bihar and others***⁹, more particularly Paras 8 and 9 thereof, which are reproduced hereunder for easy reference:

8. Now, a bank guarantee is the common mode of securing payment of money in commercial dealings as the beneficiary, under the guarantee, is entitled to realise the whole of the amount under that guarantee in terms thereof irrespective of any pending dispute between the person on whose behalf the guarantee was given and the beneficiary. In contracts awarded to private individuals by the Government, which involve huge expenditure, as, for example, construction contracts, bank guarantees are usually required to be furnished in favour of the Government to secure payments made to the contractor as "advance" from time to time during the course of the contract as also to secure performance of the work entrusted under the contract. Such guarantees are encashable in terms thereof on the lapse of the

⁹ (1999) 8 SCC 436



contractor either in the performance of the work or in paying back to the Government "advance", the guarantee is invoked and the amount is recovered from the bank. It is for this reason that the courts are reluctant in granting an injunction against the invocation of bank guarantee, except in the case of fraud, which should be an established fraud, or where irretrievable injury was likely to be caused to the guarantor. This was the principle laid down by this Court in various decisions. In U.P. Coop. Federation Ltd. v. Singh Consultants & Engineers (P) Ltd. [(1988) 1 SCC 174] the law laid down in Bolivinter Oil SA v. Chase Manhattan Bank [(1984) 1 All ER 351 (CA)] was approved and it was held that an unconditional bank guarantee could be invoked in terms thereof by the person in whose favour the bank guarantee was given and the courts would not grant any injunction restraining the invocation except in the case of fraud or irretrievable injury. In Svenska Handelsbanken v. Indian Charge Chrome [(1994) 1 SCC 502] , Larsen & Toubro Ltd. v. Maharashtra SEB [(1995) 6 SCC 68] , Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd. [(1995) 6 SCC 76] , National Thermal Power Corpn. Ltd. v. Flowmore (P) Ltd. [(1995) 4 SCC 515] , State of Maharashtra v. National Construction Co. [(1996) 1 SCC 735] , Hindustan Steelworks Construction Ltd. v. Tarapore & Co. [(1996) 5 SCC 34] as also in U.P. State Sugar Corpn. v. Sumac International Ltd. [(1997) 1 SCC 568] the same principle has been laid down and reiterated.

9. *What is important, therefore, is that the bank guarantee should be in unequivocal terms, unconditional and recite that the amount*



would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the bank guarantee or the person on whose behalf the guarantee was furnished. The terms of the bank guarantee are, therefore, extremely material. Since the bank guarantee represents an independent contract between the bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the bank guarantee, or else, the invocation itself would be bad.

8.14. By referring to the above, she submits that the Courts normally would not involve themselves in aspects of commerce; bank guarantee being an aspect of commerce, this Court ought not to intercede in the present matter. The terms of the bank guarantee are to be read *stricto sensu* and any invocation would have to be strictly in accordance with the said terms. In the present matter, the invocation not being made in terms of the agreement, the invocation could be made accepted by Respondent No.1 - Bank.



8.15. She relies upon the decision of the Hon'ble Calcutta High Court in the case of **Besco Ltd., vs. State Bank of India 7 Anr.**,¹⁰ the relevant portions being as under:

In terms of the aforesaid Bank Guarantee (s) we hereby call upon you to extend the said bank guarantee(s) for a period of 6 (six) months from the date of expiry since the requirement of these bank guarantee(s) is/are yet to be fulfilled. In case, we do not receive any extension, this may be treated as our claim against the said bank guarantee".

The second defendant has stated at paragraph 20 of its said affidavit that not only did the bank act contrary to the beneficiary's demand of March 10, 2008, it also failed to adhere to the beneficiary's subsequent instructions of May 8, 2008 and August 2, 2008. The later letters had been issued in furtherance of the first.

As has been noticed above, notwithstanding the bank guarantee being unconditional to the extent of the bank's liability thereunder and further to the extent that the bank could not have relied on any dispute between the plaintiff and the beneficiary for the purpose of refusing payment thereunder, the beneficiary's entitlement to receive payment was only upon the strict compliance of the terms of the guarantee. The opening clause required an assertion to be made by the beneficiary that there was a default committed by the "contractor". It also required the beneficiary to

¹⁰ 2009 SCC OnLine Cal 2406



assess in money terms the extent of the default.

Since the two subsequent letters that the second defendant relies on were issued after March 31, 2008, it is not necessary to consider such letters at all. However, it would appear from the copies of the such subsequent letters of May 8, 2008 and August 2, 2008 that the beneficiary had merely complained to the bank that the bank had failed to extend the validity of the guarantee. But, nothing in the bank guarantee entitled the beneficiary to either demand any extension thereof or obliged the bank to accede to a request by the beneficiary for extending the validity thereof.

8.16. Referring to the above extracted portions, she submits that the bank guarantee being unconditional, the beneficiaries' entitlement to receive payment was only upon the strict compliance of the terms of the guarantee. In the present case, the invocation not being in terms of the agreement, the Refusal to make payment is proper and correct.

8.17. In the above circumstances and on the basis of the above arguments, she submits that the order passed by the Banking Ombudsman is



proper and correct and the present petition as filed is required to be dismissed.

9. Heard Sri.Udaya Holla, learned Senior Counsel appearing for the Petitioner, Smt.Divya Purandar, learned counsel appearing for Respondent No.1 and Sri.S.R.Kamalacharan, learned counsel appearing for Respondent No.3 and perused papers.

10. The points that would arise for consideration by this Court are:

- 1)Whether the invocation of the bank guarantee made by the Petitioner by email can be said to be in writing and thus as per the terms of the bank guarantee?**
- 2)If the invocation were to be proper, is the Respondent Bank justified in not making payment of the monies?**
- 3)Whether the order passed by the Banking Ombudsman is proper and correct?**
- 4)What order?**



11. Before answering the above points the relevant clauses and correspondence in regards thereto would have to be looked into which are as under:

11.1. The arguments of both the counsel having been extracted hereinabove, what is required to be seen is the relevant Clauses of the bank guarantee relating to invocation.

11.2. Insofar as BG-1 dated 20.07.2016, the relevant clause relating to invocation is Clause 14, which is reproduced hereunder for easy reference:

14. Any notice by way of request, demand or other communication given in connection with or required by this Guarantee shall be made in writing (entirely in the English language) may be sent by hand or post to the Bank addressed as aforesaid.

11.3. BG-1 was renewed on 31.12.2018. The relevant Clause is Clause 3 thereof, which is reproduced hereunder for easy reference:

Date: 31.12.2018

To:

Nitesh Housing Developers Private Limited



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7th Floor, Nitesh Times Square,

No-8, M.G Road

Bangalore-560001 India

Subject: *Our Bank Guarantee No. 408101GL0001716 Dated 21 June. 2016 for INR 2.78.75.127/- favoring yourselves issued on account of M/s. Alfara'a Infra Projects Private Limited.*

Amendment No. 4

At the request of our principal Alfara'a Infraprojects Pvt. Ltd., 101/102,157 Floor, Baba House, Near Cinemax Theatre, Chakala, Andheri (East) Mumbai-400093 the above mentioned performance guarantee is extended as follows:

1. Extend the validity of the captioned guarantee upto 31st March, 2019.

2. Extend the Claim period of the captioned guarantee upto 31st March, 2019.

All other terms and conditions remain unchanged.

This extension is an integral part of the above referred guarantee and should be read with the original Bank Guarantee issued on 21 June, 2016.

Notwithstanding anything contained herein above:

1. Our maximum liability under this Bank Guarantee shall not exceed INR 2,78,75,127/- (Rupees Two



Crores Seventy Eight Lakhs Seventy Five Thousand One Hundred Twenty Seven Only)

2. This Bank Guarantee shall be valid only up to 31 March, 2019.

3. We are liable to pay the guaranteed amount or any part thereof under this Bank Guarantee only and only if we receive a written claim or demand on or before 31 March, 2019.

For Union Bank of India

Authorised Signatory

11.4. Insofar as BG-2 dated 20.7.2016, the relevant clause relating to invocation is Clause 14, which is reproduced hereunder for easy reference:

14. *Any notice by way of request, demand or other communication given in connection with or required by this Performance Guarantee shall be made in writing (entirely in the English language) may be sent by hand or post to the bank addressed as aforesaid.*

11.5. The invocation email sent on 29.3.2019 at 7.01 p.m. is reproduced hereunder for easy reference:



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Dear Sir,

We are enclosing BG extension request for BG bearing No.4081101GL0001716 dated 20.07.2016 expiring on 31.03.2019 or Rs. 2,78,75,127-00 of M/s Alfaraa Infraprojects Pvt. Ltd. Hard Copy is being sent to your bank by speed post/courier today. Kindly do the needful.

*Thanks & Regards
Santhosh Kumar B.R.
DGM-Finance, Banking & Treasury*

11.6.The letter dated 19.3.2019 which had been attached to the email dated 29.3.2019 is reproduced hereunder for easy reference:

" 19 March 2009

*The Manager
Union Bank of India,
10th Road, JVPD Scheme Branch,
Shiva Shakti, 11, Vithal Nagar Co-op. Hsg. Soc.
Vile-Parle (West)
Mumbai-400 049*

Sub: Revocation of Bank Guarantee against Mobilisation Advance.

Ref: BG No-408101GL0001716 Issued Date-20.07.2016-Expired on 31.03.2019



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Dear Sir

We refer to our request letter dated 29-03-2019 (Copy attached regarding extension or revocation of above mentioned bank guarantee in the event bank guarantee is not extended we have not received extended Bank Guarantee till date. Under the circumstances our instructions to invoke the bank guarantee become operative

Kindly Share with us the bank advise as a confirmation that you have credited our below mentioned bank account on account of invocation

<i>Account No.</i>	<i>002281400002792</i>
<i>Bank Name</i>	<i>Yes Bank</i>
<i>Branch</i>	<i>Kasturba Road Branch</i>
<i>IFS Code</i>	<i>yesb0000022</i>

On getting your bank advise that money has been credited to our account, Original Bank Guarantee will be returned to you

Yours truly,

For Nitesh Housing Developers Pvt Ltd

Sd/-

DGM- Finance, Banking & Treasury"



11.7.The reply of the Bank sent on 30.3.2019 at 5.33pm is reproduced hereunder for easy reference:

"Sir,

It is to inform you that any renewal/extension of the Bank guarantee can be done only after the original letter for the same is received by the bank through post/courier.

Thank you"

11.8.Thereafter, the Petitioner has followed up with emails dated 5.04.2019, 9.4.2019, 16.4.2019, 17.4.2019, 30.4.2019, 3.5.2019, and 13.5.2019, which shockingly have not invoked any response from the Bank.

11.9.The subsequent letter dated 29.3.2019 attached to the email dated 29-3-2019 is reproduced hereunder for easy reference:

"29th March 2019

The Manager,

Union Bank of India,

10 Road, JVPD Scheme Branch,



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Shiv Shakti, 11, Vithal Nagar Co-op. Hsg. Soc.,

Vile-Parle (West) Mumbai-400 049.

Dear Sir,

Sub: Extension Bank Guarantee against Mobilization Advance.

Ref: BG No-40810IGL0001716 Issued Date-20.07.2016 - Expiry on 31.03.2019

We refer to the Bank Guarantee issued by you in our favour for Rs. 2,78,75,127/- (Rupees Two Crores Seventy Eight Lakhs Seventy Five Thousand One Hundred and Twenty Seven only) on behalf of M/s Alfaraa Infraprojects Pvt Ltd having its registered office at 101/102, Baba House, Near Cinemax Theatre, Chakala, Andheri (East), Mumbai 400 093. The Bank Guarantee is expiring on 31.03.2019. Kindly arrange to renew the same and send us the renewal letter.

In the event if the BG is not renewed we here by invoke the BG and we request you to kindly transfer the amount to below mentioned account.

<i>Account No.</i>	<i>002281400002792</i>
<i>Bank Name</i>	<i>Yes Bank</i>
<i>Branch</i>	<i>Kasturba Road Branch</i>
<i>IFS Code</i>	<i>yesb0000022</i>



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In case the BG is renewed before the date of expiry, request you to kindly send the original renewed BG to us.

Yours truly,

For Nitesh Housing Developers Pvt Ltd

Sd/-

DGM Banking & Treasury"

11.10. Insofar as BG-2 is concerned, the email in relation thereto addressed on 26.4.2019, is reproduced hereunder for easy reference:

*"From: Santhosh Kumar BR
Sent: 26 April 2019 11:08 AM
To: BH Vile Parle West (vileparlew@unionbankofindia.com)
Cc. cbsvileparlew@unionbankofindia.com;
Girish.K@alfaraainfrapr.com;
Munawar.Ali@alfaraa.com; Elangovan Subbiah; Kamal Daluka; Arun Kumar J
Subject: Renewal of BG 40810IGL0001816 Dated 20.07.2016 expiring on 30.04.2019
Kind Attn: Mr. Bhavye Sehgal*

Dear Sir,

We are enclosing BG extension/Invocation request for BG bearing No.40810IGL0001816 dated 20.07.2016 expiring on 30.04.2019 for Rs. 5,57,50,254-00 of M/s Alfaraa Infroprojects Pvt. Ltd. Hard Copy is being sent to your Bank by speed post/courier today. Kindly to the needful.

Thanks & Regards

Santhos Kumar B.R.



DGM-Finance, Banking & Treasury”

11.11.A reminder was issued thereto, on 13.5.2019,
both of which did not evoke any response.

11.12.The document attached to the email dated
26.4.2019 is reproduced hereunder for easy
reference:

“26th April 2019

*The Manager,
Union Bank of India,
10 Road, JVPD Scheme Branch,
Shiv Shakti, 11, Vithal Nagar Co-op. Hsg. Soc.,
Vile-Parle (West) Mumbai-400 049.*

Dear Sir,

Sub: Extension Bank Guarantee against Performance.

*Ref: BG No-40810IGL0001816 Issued Date-
20.07.2016 - Expiry on 30.04.2019*

*We refer to the Bank Guarantee issued by you in our
favour for Rs. 5,57,50,254/- (Rupees Five Crores Fifty
Seven Lakhs Fifty Thousand Two Hundred and Fifty
Four only) on behalf of M/s Alfaraa Infraprojects Pvt
Ltd having its registered office at 101/102, Baba
House, Near Cinemax Theatre, Chakala, Andheri
(East), Mumbai 400 093. The Bank Guarantee is*



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expiring on 30.04.2019. Kindly arrange to renew the same and send us the renewal letter.

In the event if the BG is not renewed we here by invoke the BG and we request you to kindly transfer the amount to below mentioned account.

<i>Account No.</i>	<i>002281400002792</i>
<i>Bank Name</i>	<i>Yes Bank</i>
<i>Branch</i>	<i>Kasturba Road Branch</i>
<i>IFS Code</i>	<i>yesb0000022</i>

In case the BG is renewed before the date of expiry, request you to kindly send the original renewed BG to us.

Yours truly,

For Nitesh Housing Developers Pvt Ltd

Sd/-

DGM Banking & Treasury"

11.13. It is these documents and the contents thereof which have been extracted hereinabove which would have to be appreciated by this Court in order to answer the above points.



12. **Answer to Point No.1 : Whether the invocation of the bank guarantee made by the Petitioner by email can be said to be in writing and thus as per the terms of the bank guarantee?**

12.1. The submission of Mr. Udaya Holla, learned Senior Counsel appearing for the Petitioner is that an email would qualify to be a correspondence in writing in terms of Section 4 of the IT Act. The submission of Ms. Divya Purandar, however, is that writing would mean physical writing and the document would have to be delivered physically to the Bank.

12.2. Section 4 of the IT Act has been reproduced hereinabove, which would clearly indicate that a document in the electronic form would also satisfy the requirement of a document to be made physically available. It is rather shocking that the Bank has taken such a stand in the present matter, refusing to accept an email and is insisting on a physical copy. In today's time and age, all Banks, including the Respondent



No.1 - Union Bank of India, have resorted to electronic clearance and electronic correspondence. All the details pertaining to debits and credits to a particular account are informed through SMS, by email; a statement of account is forwarded by the Bank by way of email. Of course, the Bank even charges for these services, and the same are not free. When the Bank charges for SMS, email, Statements which are transmitted electronically, either by SMS or email and now by the latest methodology of WhatsApp, as also by way of utilization of AI chatbots, it is rather incongruous and dishonest on part of the Bank to contend that any correspondence would have to be done only physically and the document of invocation of the bank guarantee has to be physically handed over to the Bank at the office so designated, either by hand or by post.



12.3.The reason for the same is not too far to see.

The pleadings by the Respondent - Bank clearly and categorically establish the reason why such a stand has been taken by the Bank. Even as stated by the Bank, the bank account of the borrower was classified as NPA on 31.8.2018; proceedings have been initiated by the Bank under Section 19 of the RDB Act; Notices had been issued under Sub-section (2) of Section 13 of the SARFAESI Act. The NCLT has passed an order of liquidation against the borrower on 18.7.2022. Subsequently, on 18.7.2022, the Bank apparently had come to a conclusion that if the bank guarantee had been permitted to be invoked and the amounts paid to the Petitioner, there is no manner and methodology of the Bank being able to recover the amounts covered under the bank guarantee from the borrower, since the borrower's account had already been classified as a NPA.



12.4.It is apparently for this reason that the Bank has acted in such a dishonest manner and refused to accept the invocation of the bank guarantee and has sought to contend that the invocation had to be made by way of a physical document.

12.5.As held by this Court in ***Sudarshan Cargo Pvt. Ltd.'s***, case (supra), new communication system and digital technology having made a dramatic change, an electronic mail is a method of exchanging digital messages from one person to another person or from an author to a recipient and in terms of Section 4 of the IT Act, if information or any other matter is to be in writing or in the typewritten or printed form, then notwithstanding anything contained in such law, the requirement is deemed to have been satisfied if such information or matter is rendered or made available in an electronic



form. Thus, even though the agreement speaks of in writing to be delivered by post or at the office of the Bank, an email would also satisfy the said requirement, and an email is also one in writing. When an email would satisfy the requirement of law, the same would also satisfy the requirement of an agreement.

12.6. The Hon'ble Apex Court in ***Trimex International FZE Limited, Dubai's*** case (supra) has also held that an agreement can be inferred from the exchange of emails, letters, telex, telegrams. When an agreement itself can be inferred from emails, a communication issued by email, would also, in my considered opinion, satisfy the requirement of the request to be in writing. Similar is the finding by the Allahabad High Court in Rajendra's case (supra).



12.7. The Hon'ble Apex Court in ***Shakti Bhog Foods***

Limited's case (supra) has held that an arbitration agreement can also be in the form of an email. The Hon'ble Bombay High Court in ***Bendale Brothers'*** case (supra) has held that service of notice can be effected by courier or by email or WhatsApp. These decisions would categorically indicate that email is a recognized mode of communication; typing being a form of writing and an email being in a typed format, the email addressed by the petitioner is in writing and cannot be contended to be otherwise as sought to be done by the Bank in the present case.

12.8. The reference by Ms. Divya Purandar on ***Cochin***

Port Trust's case (supra) to contend that the invocation of the bank guarantee has to be made strictly in terms of the bank guarantee to contend that writing will have to be in physical writing, therefore cannot be accepted. So long



as the invocation is in writing, an email being in writing, the same would be in conformity with the bank guarantee. Similar is the situation in respect of the decision in a ***Hindustan Construction Company Limited's case (supra)*** and ***Besco Limited's*** case. It therefore cannot be said that the invocation made by the petitioner of the bank guarantee is not in terms of the bank guarantee.

12.9. The other submission made by Ms. Divya Purandar, learned counsel for the Bank, is that the Petitioner could not have sought for renewal of the bank guarantee. Such a renewal would have been granted only on a request made by the borrower upon the borrower making payment of the bank guarantee commission. In this regard, if the above extracted letters dated 29.3.2019 in respect of BG1 and the letter dated 26.4.2019 in respect



of BG2 are seen, it can be clearly made out that the Petitioner has informed the date of expiry of the bank guarantee and sought for renewal of the same by issuing a renewal letter and has categorically stated that, if in the event BG is not renewed, the BG would stand invoked and requested the transfer of the amount to the bank accounts which have been furnished in the said letter.

12.10. Thus, the letters dated 29.3.2019 and 26.4.2019 are not letters for renewal of the bank guarantee but are optional inasmuch as the Bank could either renew the bank guarantee or make payment of the amounts covered under the bank guarantee by treating the said letter as an invocation of the bank guarantee. Thus, again a dishonest stand has been taken by the Bank to contend that the letters dated 29.3.2019 and 26.4.2019 were



not for invocation but were only for renewal. These are proved to be otherwise, even on the basis of exfacie reading of the aforesaid letters.

12.11. Though initially a contention was raised by the Counsel for Respondent No. 1 that the documents now produced along with the petition dated 29.3.2019 and 26.4.2019 were not the ones which were attached with the email, the bank itself has produced the very same documents along with the memo dated 19.12.2024. Thus, the existence of these documents and the contents of the documents are clearly established, thereby establishing the dishonest stand on part of the Bank. In that view of the matter, I hold that Clause 14 of both the agreements extracted hereinabove, requiring any notice by way of request, demand or other communication, given with or required by the guarantee, shall be made in writing, may



be sent by hand or post to the Bank addressed as aforesaid would include an email addressed by the beneficiary of the bank guarantee, in this case the Petitioner, to the Bank and such an email would be sufficient compliance with Clause 14 of both BG1 and BG2.

12.12. Insofar as BG1 is concerned, which has been renewed, Clause 3 of the renewal dated 31.12.2018 which has been extracted hereinabove makes a very simple requirement of a written claim or demand being received on 31.3.2019 and the earlier requirement of it being sent by hand or post to the Bank is not reiterated in the renewal. This would categorically indicate that even the Bank did not place much relevance as on that date on a physical copy.

12.13. Thus, I answer Point No.1 by holding that the invocation made by the Petitioner, by issuing an



email with the invocation letter attached thereto, the said letter making it clear that if the bank guarantee was not renewed; the letter was to be treated as invocation of the bank guarantee is in compliance with Clause 14 of both BG1 and BG2.

13. **Answer to Point No.2: If the invocation were to be proper, is the Respondent Bank justified in not making payment of the monies?**

13.1. In view of my answer to Point No.1, that the Petitioner had invoked the bank guarantee in a proper manner, in terms of Clause (1) of BG-1 and Clause (1) of BG-2 which have been extracted hereinabove, it is clear that upon receipt of a first written demand or demands, the Bank, without further proof of conditions, without demur, reservation, contest, recourse or protest, and without any enquiry of the beneficiary or the contractor, shall make payment of the amounts without any deduction.



13.2. There being a categorical undertaking given by the Bank, which is unconditional, it was required of the Bank to have complied with the invocation of the bank guarantee and make payment of the due amounts. As aforesaid and observed, the Bank has chosen not to do so since the account of the borrower had been designated as a NPA and proceedings had been initiated by the Bank against the borrower.

13.3. This is also shocking for the reason that the correspondence which have been addressed by the Petitioner to the Bank have remained unanswered. The contention of course of Ms. Divya Purandar, learned counsel for the Bank, is that the email ID of a third party like the Petitioner not being available, there is no manner of verification of the invocation by the Bank and it is for that reason that the bank



guarantee was not honoured. Such a submission, to my considered opinion, is an afterthought and again completely dishonest. The Bank is expected to be an independent third party, and plays a very important role in commercial matters. If the Bank itself were to act in such an untrustworthy manner, and the Bank would not comply with the obligations vested with it, which are relied upon by contractual parties, the very fulcrum of business and commerce would collapse. The invocation being proper, there being an obligation on part of the Bank to pay, whether the borrower's account had become NPA, whether the Bank had initiated proceedings against the borrower or not, is of no consequence and in terms of Clause (9) of both the BGs, which is reproduced hereinabove, the Bank would not stand discharged by insolvency, winding up, reorganization, amalgamation, or



liquidation of the contractor, (including any appointment of a receiver, administrator, administrative receiver, or supervisor, or any of its assets).

13.4. The fact that the Bank has chosen to plead the above facts in the present objection would clearly, categorically, and unimpeachably establish the conduct on part of the Bank to be completely malafide and the failure on part of the Bank to honour the bank guarantee is not on the basis of the alleged improper invocation of the right of the beneficiary, but apparently on the fear of the Bank not being able to recover the monies from the borrower.

13.5. Thus, I answer point No.2 by holding that the invocation made by the Petitioner being proper and correct, the Bank had no other alternative but to make payment of the monies covered under the Bank Guarantee.



14. **Answer to Point No.3: Whether the order passed by the Banking Ombudsman is proper and correct?**

14.1. The Petitioner had invoked the provisions of the Banking Ombudsman Scheme 2006 and filed a complaint with the Banking Ombudsman. Though ofcourse there is a delay in registering the same and assigning a number, the same being during the COVID times, I am of the considered opinion that those aspects need not be looked into by this Court in these proceedings.

14.2. What would have to be looked into is the order passed by the Banking Ombudsman at Annexure-G to the petition, which is reproduced hereunder for easy reference:

"Date 21/12/2020

Mahesh A S

9739466740



NC: 2025:KHC:3734
WP No. 2193 of 2021

No. 18. Chitrakoot, 1st Cross, high Grounds

Bangalore 560001

Dear Sir/Madam

The Banking Ombudsman Scheme 2006 (BOS-2006)

*2 Complaint No: 202021013006130 dated 03/10/2020
against UNION BANK OF INDIA*

Please refer to your captioned complaint.

2. It is observed that the complaint is not on grounds of deficiency under clause 8(1)/8(2) of BOS 2006. We therefore, regret our to deal with your complaint and close the same under Clause 8 of the Banking Ombudsman Scheme 2006.

3. This communication is sent to you as per the orders of the Banking Ombudsman.

4. Details of BOS-2006 are available at our website www.rbi.org.in/commonman.

Yours faithfully,

p. Banking Ombudsman

BO Mumbai"

14.3. The only reason given by the Banking Ombudsman is that the complaint is not on grounds of deficiency under Sub-Clause (1) of Clause 8 or Sub-Clause (2) of Clause 8 of the Banking Ombudsman Scheme 2006 and a regret has been made out by the Banking



Ombudsman, expressing inability to deal with the complaint and the complaint has been closed.

14.4. Before doing so, there is no opportunity which has been granted by the Ombudsman to the Petitioner to make out its case. Clause 8 of the Banking Ombudsman Scheme 2006 comes under Chapter 4 relating to procedure for redressal of grievance and is reproduced hereunder for easy reference:

"CHAPTER IV

PROCEDURE FOR REDRESSAL OF GRIEVANCE

8. GROUNDS OF COMPLAINT

(1) Any person may file a complaint with the Banking Ombudsman having Jurisdiction on any one of the following grounds alleging deficiency in banking Including internet banking or other services.

(a) non-payment or inordinate delay in the payment or collection of cheques, drafts, bills etc.

(b) non-acceptance, without sufficient cause, of small denomination notes tendered for any purpose, and for charging of commission in respect thereof:



- (c). non-acceptance, without sufficient cause, of coins tendered and for charging of commission in respect thereof;*
- (d). non-payment or delay in payment of inward remittances;*
- (e). failure to issue or delay in issue of drafts, pay orders or bankers' cheques.*
- (f). non-adherence to prescribed working hours:*
- (g). failure to provide or delay in providing a banking facility (other than loans and advances) promised in writing by a bank or its direct selling agents;*
- (h). delays, non-credit of proceeds to parties' accounts, non-payment of deposit or non-observance of the Reserve Bank directives, if any, applicable to rate of interest on deposits in any savings, current or other account maintained with a bank;*
- (i). complaints from Non-Resident Indians having accounts in India in relation to their remittances from abroad, deposits and other bank- related matters;*
- (j). refusal to open deposit accounts without any valid reason for refusal;*
- (k). levying of charges without adequate prior notice to the customer;*
- (l). non-adherence to the instructions of Reserve Bank on ATM /Debit Card and Prepaid Card operations in India by the bank or its subsidiaries on any of the following:*
 - i. Account debited but cash not dispensed by ATMs*
 - ii. Account debited more than once for one withdrawal in ATMs or for POS transaction*
 - iii. Less/Excess amount of cash dispensed by ATMs*



iv. Debit in account without use of the card or details of the card

v. Use of stolen/cloned cards

vi. Others

(m). non-adherence by the bank or its subsidiaries to the instructions of Reserve Bank on credit card operations on any of the following:

i. Unsolicited calls for Add-on Cards, insurance for cards etc.

ii. Charging of Annual Fees on Cards issued free for life

iii. Wrong Billing/Wrong Debits

iv. Threatening calls/ inappropriate approach of recovery by recovery agents including non-observance of Reserve Bank guidelines on engagement of recovery agents

v. Wrong reporting of credit information to Credit Information Bureau

vi. Delay or failure to review and correct the credit status on account of wrongly reported credit information to Credit Information Bureau.

vii. Others

(n). non-adherence to the instructions of Reserve Bank with regard to Mobile Banking / Electronic Banking service in India by the bank on any of the following:

i. delay or failure to effect online payment/ Fund Transfer,

ii. unauthorized electronic payment/ Fund Transfer,

(o). non-disbursement or delay in disbursement of pension (to the extent the grievance can be attributed



to the action on the part of the bank concerned, but not with regard to its employees);

(p) refusal to accept or delay in accepting payment towards taxes, as t by Reserve Bank/Government:

(q) refusal to issue of delay in issuing, or failure to service or delay in servicing or redemption of Government securities:

(r) forced closure of deposit accounts without due notice or without sufficient reason:

(s) refusal to close or delay in closing the accounts;

(t) non-adherence to the fair practices code as adopted by the bank;

(u) non-adherence to the provisions of the Code of Bank's Commitments to Customers issued by Banking Codes and Standards Board of India and as adopted by the bank;

(v) non-observance of Reserve Bank guidelines on engagement of recovery agents by banks;

(w) non-adherence to Reserve Bank guidelines on para-banking activities like sale of insurance /mutual fund /other third party investment products by banks with regard to following:

i improper, unsuitable sale of third party financial products

ii. non-transparency /lack of adequate transparency in sale

iii. non-disclosure of grievance redressal mechanism available

iv. delay or refusal to facilitate after sales service by banks



(x) any other matter relating to the violation of the directives issued by the Reserve Bank in relation to banking or other services.

(2) A complaint on any one of the following grounds alleging deficiency in banking service in respect of loans and advances may be filed with the Banking Ombudsman having jurisdiction:

(a) non-observance of Reserve Bank Directives on interest rates;

(b) delays in sanction, disbursement or non-observance of prescribed time schedule for disposal of loan applications;

(c) non-acceptance of application for loans without furnishing valid reasons to the applicant; and

(d) non-adherence to the provisions of the fair practices code for lenders as adopted by the bank or Code of Bank's Commitment to Customers, as the case may be;

(e) non-observance of Reserve Bank guidelines on engagement of recovery agents by banks; and

(f) non-observance of any other direction or instruction of the Reserve Bank as may be specified by the Reserve Bank for this purpose from time to time.

(3) The Banking Ombudsman may also deal with such other matter as may be specified by the Reserve Bank from time to time in this behalf."

14.5. Sub-sub-clause (a) of Sub-Clause (1) of Clause

8, as aforesaid, deals with non-payment or inordinate delay in the payment or collection of cheques, drafts, bills, etc. It is therefore clear



that even a bank guarantee would come under this Clause, the invocation of a bank guarantee having been made for collection of payment.

14.6.Clause (t) reproduced hereinabove deals with non-adherence to the Fair Practices Code to be adopted by the Bank and Clause (u) deals with non-adherence to the provision of the Code of Bank's commitment to customers.

14.7.The above, in my considered opinion, would cover the non-payment of amounts on a bank guarantee. A bank guarantee also being a commercial service rendered by the Bank, it is required for the Bank to act in a fair manner and discharge its obligation in relation thereto in a proper manner. The Banking Ombudsman, having established with the object of enabling resolution of complaints relating to certain services rendered by Banks and to facilitate the satisfaction of settlement of such complaints,



could not have in such a lackadaisical manner indicated that the complaint of the Petitioner would not come under sub-clause (1) of Clause 8 or sub-clause (2) of Clause 8 and dismissed the same, without even providing an opportunity to the Petitioner to make known as to how the complaint of the Petitioner would come under those clauses.

14.8. Be that as it may, as I have come to a conclusion that non-payment of the amounts under bank guarantee issued by a particular Bank, where the Bank has undertaken to honour the bank guarantee, is being also a service rendered by the said Bank, which has been relied upon by the Petitioner in advancing huge amounts of money to the borrower; the borrower being the customer of Respondent No.1 - Bank, the Bank has not acted in a proper



manner but has in fact acted in a dishonest manner, as indicated above.

14.9. Thus, I answer point No.3 by holding that the order of the Banking Ombudsman suffers from various legal infirmities as aforesaid and is required to be quashed. The banking ombudsman would be well advised to implement the BOS scheme in its true letter and spirit and not dismiss any complaint filed on technical grounds so as to favour the bank against whom a complaint has been filed.

15. **Answer to Point No.4: What order?**

15.1. In view of all the above, I pass the following:

ORDER

- i) The Writ Petition is allowed.
- ii) A certiorari is issued, the order dated 21.12.2020 passed by Respondent No.3- Banking Ombudsman rejecting the complaint of



the Petitioner at Annexure-G is quashed. Consequently, the complaint filed by the Petitioner is allowed.

- iii) A mandamus is issued to Respondent No.1 directing it to make payment of the amounts covered under a Bank Guarantee bearing No.408101GL0001716 dated 20.7.2016 (BG-1) and a Bank Guarantee bearing No.408101GL0001816 dated 20.7.2016 (BG-2) within a period of seven days from the date of receipt of a copy of this order.
- iv) The Respondent No.1-Bank shall also make payment of interest at the rate of 18% on the amounts covered under BG-1 calculated from 29.3.2019 till date of payment.
- v) The Respondent No.1-Bank will also make payment of interest at the rate of 18% on BG-2, calculated from 26.4.2019 till date of payment.



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- vi) On account of the dishonest stand of the Bank, the Bank is also directed to make payment of a sum of Rs.5 lakhs as costs to the Karnataka State Legal Services Authority, which shall be so paid within 15 days from date of receipt of a copy of this order. If the said amounts are not paid by then, the KSLSA will be entitled to initiate proceedings against the Respondent No.1 - Bank for recovery of the above amounts as arrears of land revenue.

**Sd/-
(SURAJ GOVINDARAJ)
JUDGE**

PRS
List No.: 19 SI No.: 1