

Fenner (India) Ltd

Vs

Punjab & Sind Bank

(K. Ramaswamy, D.P.Wadhwa JJ)

07.07.1997

ORDER

1. Leave granted . We have heard counsel for both sides.
2. This appeal by special leave is arises from the Judgment of the Kerala High Court, made on November 14,1996 in A.S No. 394 OF 1996.
3. The admitted facts are that the appellant laid a suit to enforce the Bank Guarantee against the respondent pursuant to the Agreement dated April 23, 1991 entered into between ,M/s.Fenner(India)Ltd.,3 Madurai Melakkal Road, Madurai and M/s Vijay Exports, 23/393, Panampally Nagar, Kochi under which the appellant had agreed thus:"In order to finance purchase of raw nuts and processing for exports, the Processor requires financial support and the Exporter has agreed to advance up to Rs. 30,00,000/- (Rupees thirty lakhs only) as purchase advance to be secured by a "Bank Guarantee". The Bank Guarantee executed on April 24,1991 by the respondent PUNJAB AND Sind Bank,the Guarantor in favour M/s Fenner(India), the purchaser ,covenanted that the purchaser shall apply the amount advanced and in case of default ,apart from invoking the arbitration clause ,the Bank would be entitled to enforce the Bank Guarantee for recovery thereof. It is not disputed that the Purchaser had advanced upto a sum of Rs. 20,00,000/-(Rupees twenty lakhs only) under the aforesaid agreement .Since M/s. Vijay exports ,Kochi committed breach in payment thereof ,the appellant invoked the Bank Guarantee against the respondent Bank for a sum of Rs,39,28,408/-inclusive of all items mentioned in suit. The trial Court decreed the suit and in appeal the High Court reversed it holding that since the appellant had failed to advance the agreed amount of Rs. 30,00,000/- for utilisation of procuring processing cashew nuts, it was entitled to invoke the Bank Guarantee.
4. The question ,therefore,is :whether the appellant is entitled to invoke the Bank Guarantee for the amount agreed to be identified by M/s Vijay Exports. The Bank Guarantee reads as under :

And whereas it has been agreed under terms and conditions of the aforesaid agreement that the purchaser shall make an advance to the Seller of Rs.30,00,000/- (Rupees thirty lakhs only)for utilising it for procuring/processing cashew nuts to be supplied under the said agreement from a Bank acceptable to the purchaser. And whereas the Guarantor has as per terms and conditions of the aforesaid agreement to stand guarantee for the amount of advance payment in favour of the seller , now this deed witness that in pursuance of the terms and condition of aforesaid agreement and in consideration of the advance payment agreed to be made to the seller by the Purchaser ,the Guarantor do hereby agree and undertake to indemnify the purchaser

to keep the Purchaser to indemnified to the extent of a sum not exceeding the said sum of Rs.30,00,000/-(Rupees thirty lakhs only) against any damage or loss that may be suffered by the purchaser by reason of non-fulfilment of any of the terms and conditions of the agreement ,by the seller and the guarantor hereby undertake to pay on demand and without any demur or delay to the purchaser any sum unconditionally irrevocable not exceeding the sum of Rs .30,00,000/-(Rupees thirty lakhs only) as may be ascertained by the purchaser as the damage or loss that the purchaser may have suffered , provided that the Guarantee comes into force when the advance payment has been made to the account to the seller and the guarantor hereby convents with the purchaser as follows."

5. A reading of it would clearly indicate that the appellant had agreed to advance a sum of Rs, 30,00,000/- (rupees thirty lakhs only) to the seller,M/s Vijay Exporter for utilising it for procuring cashew nuts to be supplied under the said agreement on their furnishing the Bank Guarantee , in terms of the agreement between the Purchaser and Exporter referred to herein .In other words ,the undertaking given by the appellant was to advance a sum of upto Rs.30,00,000/- to the purchaser and in case of breach of payment thereof by the seller or purchaser ,as the case may be ,under the agreement the appellant is entitled to invoke the Bank Guarantee. Shri Vishwanatha Iyer the learned senior counsel for respondent contends that since the appellant did not advance a sum of Rs.30,00,000/- being the amount agreed to be paid ,the appellant is not entitled to invoke the Bank Guarantee.We find no force in the contention . In view of the expression"upto thirty lakhs",whatever amount is advanced and if it is not repaid ,on committing breach thereof ,the appellant is entitled to avail of and enforce the Bank Guarantee to the extent of amount advanced. Thereby ,a sum of Rs.20,00,000/- (rupees twenty lakhs only),admittedly ,was advanced .The appellant is entitled to recover the same by invoking the Bank Guarantee with interest from the date of the suit. Shri Vishwanatha Iyer further contends that the seller was not made a party to the suit and therefore the suit is bad for non-joinder of seller as he is a necessary and proper party . We find no force in the contention . Admittedly issue of non-joinder was tried a preliminary issue and was negatived. On revision ,the High Court has confirmed the same .Section 11 of the CPC envisaging the principle of resjudicata stands in the way of the respondent.

8. The appeal is accordingly allowed. No costs.