

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.4446 OF 2006

PUNJAB & SIND BANK

...

APPELLANT

Vs.

M/S. C.S. COMPANY & ORS.

...

RESPONDENTS

JUDGMENT

(SMT.) RANJANA PRAKASH DESAI, J.

1. The appellant – Punjab & Sind Bank (for short, “**the plaintiff-bank**”) has challenged in this appeal, judgment and order dated 4/6/2003 passed by the Kerala High Court whereby the appeal filed by original defendants 1, 2, 4, 7 and 8 challenging the judgment and decree of the Ist Additional Sub-Judge, Ernakulam, decreeing the plaintiff-bank’s suit for realization of money was allowed.

2. The title of the proceedings underwent changes during the course of time on account of death of some of the partners and/or guarantors and also on account of orders passed by the courts. There are also certain typographical errors in the amended cause title of the appeal. It is not necessary for us to give details of various changes which were brought about in the title. Suffice it to say that respondent 1 herein is the partnership firm i.e. original defendant 1 and the other respondents are either its partners and/or heirs of the partners or guarantors and/or heirs of the guarantors. By order dated 29/1/2003, the High Court has added the Kerala State Electricity Board (for short, "**KSEB**") as respondent 6 and it is respondent 10 herein. We shall, however, for the sake of convenience refer to the parties as per their status in the trial court.

3. At the outset, we must make it clear that we have reached a conclusion that the defendants have taken a dishonest stand to evade the liability to make payment to

the plaintiff-bank. At the cost of making this judgment prolix, we need to make a detailed reference to the pleadings of the parties because our conclusion, to a large extent, is substantiated by the pleadings. The facts, as disclosed by the plaintiff-bank in the plaint, are as under:

- a) Defendant 1 is a partnership firm engaged in the business of engineering works and defendants 2, 3 and 4 are its partners, who undertook the execution of certain civil engineering works awarded to them by KSEB. As per the terms of the tender, defendants 1 to 4 had to furnish Bank Guarantees to KSEB. They approached the plaintiff-bank for issuance of Bank Guarantee for an aggregate amount of Rs.20 lakhs on their behalf in favour of KSEB. The plaintiff-bank agreed to do so on certain terms and conditions. Defendants 1 to 4 accepted the said conditions. The plaintiff-bank on 11/5/1983 executed and

offered a Bank Guarantee on behalf of defendant 1 to KSEB for Rs.1 lakh as and by way of security deposit as per the terms of the tender. Thereafter, the plaintiff-bank on 24/6/1983 further executed and offered on behalf of defendant 1 another Bank Guarantee of Rs.19 lakhs to enable defendants 1 to 4 to avail of the amount of Rs.19 lakhs as mobilization advance from KSEB for the purpose of execution of the work undertaken by defendant 1.

- b) According to the terms of the Bank Guarantee dated 11/5/1983, the amount of Bank Guarantee not exceeding Rs.1 lakh was payable to KSEB on demand at any time during its currency without any demur. In consideration of the aforementioned Bank Guarantee, defendant 1 by its partners i.e. defendants 2, 3 and 4 agreed and undertook to indemnify the plaintiff-bank by a

Deed of Indemnity and Guarantee dated 11/5/1983 together with all costs and charges which may be incurred or become payable by the plaintiff-bank in connection with the Guarantee given to KSEB. As further security, defendants 2, 3, 4, 5, 6, 7 and 8 also undertook and agreed to indemnify the plaintiff-bank from and against all claims, demands, losses, charges and expenses which the plaintiff-bank may sustain in respect of any liability incurred by it and also guaranteed to make payment of the amount together with interest, costs, commission and charges payable thereon by the plaintiff-bank. As security for the aforementioned Bank Guarantee of Rs.1 lakh, defendant 2 deposited the title deeds of his property situated in Kottayam Village on 11/5/1983. He confirmed the deposit of title deeds by memorandum of deposit of title deeds. Defendant 5 as security for the aforementioned

Bank Guarantee deposited the title deeds of her properties comprised in Survey No.10/6/2 situated in Kottayam Village with intent to create a security thereon by way of mortgage in favour of the plaintiff-bank on 11/5/1983, at the plaintiff-bank's office at M.G. Road, Ernakulam in the City of Kochin. Defendant 5 also confirmed the deposit of title deeds by Memorandum of deposit of title deeds executed on 11/5/1983. Defendant 6 through his power of attorney holder - defendant 4, deposited the title deeds of his property comprised in Survey No.983/5 of Ernakulam Village with intent to create a security by way of mortgage in favour of the plaintiff-bank on behalf of defendant 1. He executed a Memorandum confirming the said deposit of title deeds through his agent and power of attorney holder. Defendants 7 and 8 also deposited with the plaintiff-bank on 11/5/1983 at their Branch at

M.G. Road, Ernakulam the title deeds of their properties comprised in Survey No.51/9B of Vijayapuram Village in Kottayam Taluka with intent to create a security thereon by way of mortgage in favour of the plaintiff-bank. Defendants 7 and 8 also confirmed the said deposit of title deeds of their properties by executing Memoranda of deposit of title deeds. Defendant 4 charged and assigned the fixed deposit receipt for the sum of Rs.25,000/- in favour of the plaintiff-bank as per the security for the said amount of the Guarantee.

- c) In the trial court the plaintiff bank produced the Deed of Indemnity and Guarantee executed by defendants 2, 3 and 4 with a copy of the Bank Guarantee for Rs.1 lakh, the Deed of Indemnity and Guarantee executed by defendants 2, 3, 4, 5, 6, 7 and 8 as further security, title deeds

deposited by defendant 2 as security by way of equitable mortgage in favour of the plaintiff-bank in respect of Bank Guarantee of Rs.1 lakh, Memorandum dated 11/5/1983 executed by defendant 2 confirming the deposit of the said title deeds, title deeds deposited by defendant 5, the Memorandum dated 11/5/1983 executed by defendant 5 confirming deposit of title deeds and Memoranda of deposit of title deeds executed by defendant 6 through his Power of Attorney holder defendant 4 and by defendants 7 & 8 confirming the deposit of title deeds of their properties.

- d) Defendant 1 wanted to avail of a mobilization advance of Rs.19 lakhs from KSEB. KSEB, as security for such payment of mobilization advance, required defendant 1 to furnish Bank Guarantee for the amount of Rs.19 lakhs. Defendant 1 requested the plaintiff-bank to

furnish the Bank Guarantee in favour of KSEB for the amount of Rs.19 lakhs. The plaintiff-bank agreed to furnish the said Bank Guarantee on certain conditions which defendant 1 accepted. Accordingly, the plaintiff-bank executed and offered the Bank Guarantee on behalf of defendant 1 to KSEB for the sum of Rs.19 lakhs. According to the said Bank Guarantee, the sum of Rs.19 lakhs was payable to KSEB on demand by the Chief Engineer (Civil) General at any time, during the currency including the period covered by its extension without any demur and on a mere demand. The Guarantor had agreed that such demand made on the plaintiff-bank shall be conclusive as regards the amounts due and payable under the Bank Guarantee and the Guarantor had to make the payment without any demur. As consideration for giving the said Bank Guarantee, defendant 1 by its partners viz.

defendants 2, 3 and 4 undertook to indemnify the plaintiff-bank by a Deed of Indemnity and Guarantee from all claims, amounts, charges, damages and expenses which may be caused or sustained by the plaintiff-bank or for which it may become liable by reason of having given the said Bank Guarantee. It was also specifically agreed that in connection with the said Guarantee, the plaintiff-bank without going into the question whether the terms of the agreement or any obligations with the Chief Engineer (Civil) General or KSEB had been fulfilled or not on notice of demand from the beneficiary of the Guarantee, was entitled in its own absolute discretion to make payment of the whole or part of the amount of the Guarantee as may be called upon to do so by KSEB without any reference to the defendants and that the defendants shall not have any right to question in any way whatsoever the making of

such payment by the plaintiff-bank. As further security, defendants 2 to 8 also undertook to indemnify the plaintiff-bank from and against all claims, demands, loss, charges and expenses which the plaintiff-bank may sustain or incur in respect of any liability incurred or might be incurred and guaranteed to make payment on demand of the amount of the Guarantee together with interest, commission, costs and charges payable thereon by the plaintiff-bank. As further security for the aforementioned Bank Guarantee of Rs.19 lakhs, defendants 2, 5, 6, 7 and 8 extended and created the mortgage by deposit of title deeds of their respective properties which were already charged and mortgaged in favour of the plaintiff-bank to cover and apply to the pecuniary liability in respect of the amount of Rs.19 lakhs together with costs, charges, interests, etc. to the plaintiff-bank. The said defendants further declared at

their personal visit to the plaintiff-bank's branch on 24/6/1983 that the mortgage by deposit of title deeds already created on their respective properties on 11/5/1983 shall also apply and stand extended to and cover the further Bank Guarantee of Rs.19 lakhs also. The said defendants confirmed by Memoranda dated 24/6/1983 the deposit of the title deeds creating the mortgage of their respective properties in favour of the plaintiff-bank and, thereafter, applying and extending the security by way of mortgage of deposit of title deeds for the Guarantee of Rs.19 lakhs. Defendant 1 charged and assigned the fixed deposits for the sum of Rs.4,75,000/- which amount was deposited with the plaintiff-bank as security for the aforementioned facility or liability incurred by the plaintiff-bank.

- e) The plaintiff-bank produced in the trial court the Deed of Indemnity and Guarantee executed by defendants 2, 3 and 4 together with a copy of Bank Guarantee of Rs.19 Lakhs, the Deed of Indemnity and Guarantee executed by defendants 2, 3, 4, 5, 6, 7 & 8 as further security and the Memoranda dated 24/6/1983 of deposit of title deeds of various properties executed by the defendants confirming deposit of title deeds of their properties. Defendant 1 availed of Rs.19 lakhs as mobilization advance from the KSEB on the strength of the second Guarantee mentioned hereinabove.
- f) KSEB by its letter dated 19/6/1984 called upon the plaintiff-bank under Clause 5 of Deed of Guarantee to pay a sum of Rs.19 lakhs being the full amount of the said Guarantee to KSEB. The plaintiff-bank informed defendant 1 by telephone,

telegram and by letter about the invoking of the Bank Guarantee by KSEB and called upon defendant 1 to remit Rs.19 lakhs with interest at 18.5% per annum immediately in terms of counter Guarantee executed by them to enable the plaintiff-bank to make payment to KSEB. KSEB insisted upon compliance with its demand in accordance with Clause 5 of the Bank Guarantee. The plaintiff-bank was bound to pay the sum of Rs.19 lakhs being the amount of the second Bank Guarantee and accordingly the plaintiff-bank paid the said amount by way of Demand Draft dated 23/6/1984 to KSEB.

- g) The plaintiff-bank called upon the defendants to pay the amount of the Bank Guarantee of Rs.19 lakhs. The defendants gave assurances that the amount would be paid but did not make any payment. The plaintiff-bank, therefore,

appropriated a sum of Rs.4,56,962.80 being the balance amount of the fixed deposit after adjusting the over paid interest on the fixed deposit. After appropriating and adjusting the said amount, a sum of Rs.14,43,037.92 together with interest at 20% per annum remained due and payable by the defendants in respect of the second Bank Guarantee as on 24/5/1986 being the date on which the suit was filed by the plaintiff-bank.

- h) Defendant 1 requested the plaintiff-bank to extend the Bank Guarantee in favour of KSEB for Rs.1 lakh executed on 11/5/1983 for a further period of one year from 11/5/1984 till 11/5/1985. The plaintiff-bank, accordingly, extended the said Bank Guarantee upto 11/5/1985. It appears that the KSEB terminated the contract given to defendant 1 on account of breach of the terms and

conditions of the contract. KSEB by its letter dated 15/10/1984 called upon the plaintiff-bank to pay a sum of Rs.1 lakh being the amount of the first Bank Guarantee executed by the plaintiff-bank on behalf of defendant 1 to KSEB. The plaintiff-bank, in turn, intimated to defendant 1 and called upon them to remit the said amount. However, the defendants did not make the payment. The plaintiff-bank had to pay to KSEB a sum of Rs.1 lakh on 5/8/1985 by Demand Draft as per the terms of the Bank Guarantee. Thus, in all, the plaintiff-bank had to pay Rs.20 lakhs in aggregate under two Bank Guarantees furnished on behalf of defendant 1 to KSEB. Since despite letters, notices and repeated requests, the defendants did not pay the balance amount, the plaintiff-bank filed a suit in the Court of 1st Additional Sub-Judge at Ernakulam for an amount of Rs.21,54,464.20 with future interest from

1/5/1986 at 20% per annum.

4. In their joint written statement, defendants 1, 2 and 4 did not deny the issuance of Bank Guarantees by the plaintiff-bank, but denied the dates thereof. They put the plaintiff-bank to proof regarding the dates of the said Guarantees as, according to them, the dates were within the knowledge of the plaintiff-bank only. They admitted that for the purpose of Guarantees furnished by the plaintiff-bank on behalf of defendant 1-firm, defendant 1-firm deposited 25% of the amount in cash with the plaintiff-bank. They, however, denied that any mortgage was created in favour of the plaintiff-bank by any one of the defendants. They denied the execution of documents referred to in the plaint. They did not admit the Deed of Indemnity and Guarantee dated 11/5/1983 but stated that the Managing Partner of defendant 1 had given a power of attorney in favour of the plaintiff-bank authorizing the plaintiff-bank to adjust 5% of the bill amount due to defendant 1 from KSEB through the

plaintiff-bank and, the amount so withheld was allowed to be held as security by defendant 1 in case KSEB invoked the Bank Guarantee. They denied that defendants 2 to 8 went to the plaintiff-bank on 11/5/1983 to deposit the title deeds of their properties. It was, however, admitted that defendant 4 had by his letter dated 4/4/1983 forwarded to the plaintiff-bank title deeds of the properties described in the Schedule for the purpose of scrutiny. They admitted that on the insistence of KSEB to furnish the Bank Guarantee, the plaintiff-bank was requested to furnish Bank Guarantee of Rs.19 lakhs in favour of KSEB. They put the plaintiff-bank to proof regarding the terms and conditions of the said Bank Guarantee. Securities and Deed of Indemnities were not admitted. They denied that any of the defendants went to the plaintiff-bank on 24/6/1983 to make any declaration. They admitted the assignment of fixed deposit of a sum of Rs.4,75,000/-. They admitted that mobilization advance of Rs.19 lakhs was availed of by defendant 1. They, however, stated that it was not availed

of on the strength of Bank Guarantee but the basis thereof was supplementary agreement executed between KSEB and defendant 1 in which, there was no stipulation to furnish any Bank Guarantee. They put the plaintiff-bank to proof regarding the amounts which are said to have been paid by it to KSEB. They denied their liability to pay the amount to KSEB since, according to them, the invocation of Bank Guarantee and the alleged payment made by the plaintiff-bank was not done in terms of the Guarantee and also because according to them KSEB had illegally terminated the contract. They contended that the appropriation of Rs.4,56,962.80 is illegal and the plaintiff-bank had no right to reduce the rate of interest to 5% on the amount deposited by defendant 1. They denied that the plaintiff-bank had extended the Bank Guarantee of Rs.1 lakh for a further period of one year in favour of KSEB. They contended that defendant 1 had already filed a suit for recovery of an amount of Rs.19 lakhs and interest thereon against the plaintiff-bank for illegal reversal / cancellation of

entry of the amount which was already credited in the account of defendant 1. According to these defendants, the story regarding countermanding of the cheque was created for the purpose of escaping the liability to pay the amount to defendant 1.

5. Defendants 6 to 8 filed joint written statement contending that they are not partners of defendant 1-firm and they are not concerned with the Bank Guarantees. They denied that they had created equitable mortgage in respect of their properties in favour of the plaintiff-bank. They denied the execution of Deed of Indemnity and Guarantee dated 11/5/1983 and their alleged visit to the plaintiff-bank on 11/5/1983. They contended that defendant 4 had forwarded the title deeds of their properties to the plaintiff-bank only for scrutiny. They contended that the plaintiff-bank had taken blank signed papers from them on or about 11/5/1983 when the first Bank Guarantee for Rs.1 lakh was issued in favour of KSEB and these signed blank

papers were utilized for creating equitable mortgage, indemnity, guarantee and other documents. According to these defendants, the said documents are not genuine but are fabricated subsequently on the blank signed papers obtained from them.

6. Though initially, defendants 1, 2 and 4 did not allege that the plaintiff-bank had fabricated any documents they subsequently amended their written statement and contended that the plaintiff-bank had taken blank signed papers from them on 11/5/1983 when the first Bank Guarantee for a sum of Rs.1 lakh was issued in favour of KSEB. These papers were used for the purposes of creating documents in favour of the plaintiff-bank. They contended that all the documents like counter guarantees, confirmation of deposit of title deeds, etc. more particularly described in paragraph 2 of the plaint were fabricated by the plaintiff-bank by utilizing some of the said signed blank papers and, therefore, they are not binding on the defendants.

7. By judgment and order dated 1/1/1991, the trial court decreed the suit. It directed the defendants to pay Rs.19,00,000/- with interest at the rate of 18.5% per annum from 23/6/1984 till date of the suit with future interest on Rs.14,43,037.20 (Rs.19,00,000/- minus Rs.4,56,962.80 adjusted by the plaintiff-bank) at the rate of 18.5% per annum from the date of suit till realization. The trial court further directed the defendants to pay to the plaintiff-bank Rs.1,00,000/- with interest at the rate of 18.5% per annum from 15/10/1984 till realization. The trial court held that the plaintiff-bank is entitled to realize the above amounts and costs by sale of the properties shown in the Schedule to the plaint and directed that, in case, the plaintiff-bank is unable to realize the full amounts due to it by sale of the hypothecated properties, the plaintiff-bank will have the right to proceed against defendants 2 to 4 personally and against the assets of defendants 1 to 4 to realize the balance amounts due to it.

8. Being aggrieved by the said decree, defendants 1, 2, 4, 7 and 8 preferred an appeal in the High Court. By the impugned order, the High Court allowed the appeal. The High Court, *inter alia*, held that since the originals of the Bank Guarantees were not produced by the plaintiff-bank, the plaintiff-bank cannot successfully lay its claim on the said two Bank Guarantees. The plaintiff-bank has challenged the said judgment and order in this appeal.

9. We have heard learned counsel for the parties, at some length. We have also carefully perused the written submissions filed by them. Counsel for the plaintiff-bank submitted that the High Court wrongly reversed the decree passed by the trial court because the originals of the Bank Guarantees were not produced. The High Court overlooked several material documents produced by the plaintiff-bank and the evidence of PW-2 and PW-3, the officials of KSEB, who have deposed about the Bank Guarantees and their

invocation. Pertinently, there is no denial of the evidence given by these witnesses. Counter Guarantees executed by the defendants and the Confirmation of deposit of title deeds by the defendants are a pointer to the genuineness of the case of the plaintiff-bank. The story that the plaintiff-bank fabricated documents on blank papers signed by the defendants is totally unpalatable. Counsel submitted that the High Court has misconstrued the provisions of the Evidence Act. Counsel submitted that in the circumstances, the impugned judgment and order needs to be set aside and the decree of the trial court needs to be restored.

10. Counsel for the defendants have reiterated the stand taken by their respective clients in their written statements, which we have extensively quoted hereinabove. They have banked on the fact that the originals of the Bank Guarantees are not produced. Relying on **J. Yashoda v. K. Shobha Rani**¹ and **Roman Catholic Mission v. State of**

¹ 2007 (5) SCC 730

Madras², it is contended that if the original of a document is not available, then secondary evidence must be led by laying down foundation for leading secondary evidence in terms of Section 65 of the Evidence Act which the plaintiff-bank has not done in this case. Counsel contended that in any case, even the photocopy of Bank Guarantee dated 11/5/1983 (Ex-A19) and Bank Guarantee dated 24/6/1983 appended to the Counter-Guarantee of the same date (Ex-A16) are incomplete and, therefore, they cannot be considered as secondary evidence. Drawing our attention to Section 91 of the Evidence Act, counsel submitted that in the circumstances, no other evidence including the statement of witnesses can be used by the plaintiff-bank to prove the execution of the Bank Guarantees. Counsel submitted that it is not stated in the plaint in whose possession the original documents were and, hence, there is violation of the procedure prescribed under Order VII Rule 14 of the Code of Civil Procedure. Relying on **Hindustan Construction Co.**

² AIR 1966 SC 1457

Ltd. v. State of Bihar & Ors.³, counsel submitted that invocation of Bank Guarantees is illegal because the Bank Guarantees can be invoked only by the person named therein. In this case, according to the defendants, the Bank Guarantees are invoked by the Secretary, KSEB when, in fact, they should have been invoked by the Chief Engineer (Civil), General, who is named in the Bank Guarantees. Counsel submitted that whereas in the plaint, it is submitted that the Bank Guarantees were invoked by Secretary, KSEB, reliance is placed on Ex-A82 and Ex-A3 which are letters dated 14/11/1983 and 9/5/1984 respectively written by the Chief Engineer allegedly invoking the Bank Guarantees. Counsel submitted that since these letters are not referred to in the plaint, they cannot be relied upon. Relying on **State of Maharashtra v. Dr. M.N. Kaul**⁴, counsel submitted that Bank Guarantee (Ex-A19) dated 11/5/1983 was not enforceable as it was invoked after it had expired. Counsel relied on **Delhi Development Authority v.**

³ 1999 (8) SCC 436

⁴ AIR 1967 SC 1634

Skipper Construction Co. (P) Ltd. & Anr.⁵, where in the context of issuance of Bank Guarantees, this court directed inquiry to ascertain loss suffered by the public sector banks on account of malfeasance and misfeasance of their officials.

11. Counsel submitted that the Counter Guarantees, Indemnity Bonds, Confirmation Letters and Memorandum of deposit of title deeds on which reliance is placed are of no use to the plaintiff-bank because they are not complete documents. Therefore, they do not prove creation of equitable mortgage by deposit of title deeds. Counsel submitted that it is alleged that defendant 9 had, through power of attorney holder - defendant 6, created equitable mortgage of his property. This is, however, incorrect inasmuch as the power of attorney dated 21/4/1983 clearly shows that it was given for availing housing loan and not for depositing the title deeds in support of the Bank Guarantee. Relying on **Syed Abdul Khader v. Rami Reddy⁶**, it was

⁵ 2003 (1) SCC 547

⁶ 1979 (2) SCC 601

submitted that the power of attorney has to be given strict interpretation. In short, counsel contended that no interference is necessary with the impugned order.

12. The High Court has non-suited the plaintiff-bank primarily on the ground that the plaintiff-bank has not produced originals of the Bank Guarantees and it has not adduced any secondary evidence after giving explanation as to the non-production of the originals (**Roman Catholic Mission**). The High Court has observed that the Bank Guarantees produced by the plaintiff-bank are not complete and, therefore, the terms and conditions thereof and rights and liabilities of the parties arising therefrom cannot be ascertained. The High Court has also held that as per the copies of the Bank Guarantees produced on record, they could be invoked only by the Chief Engineer (Civil) General, however in this case, they were invoked by the Secretary, KSEB. Therefore, the invocation is illegal (**Hindustan Construction Co. Ltd.** and **Dr. M.N. Kaul**). The High

Court has not accepted the case of the plaintiff-bank that the Bank Guarantees were invoked vide plaintiff-bank's letters (Ex-A4 and Ex-A82). It is observed that these documents create suspicion about the manner in which the Bank Guarantees are executed. The High Court has observed that the Counter Guarantees produced by the plaintiff-bank are incomplete. The High Court was impressed by the case of the defendants that the title deeds were forwarded to the plaintiff-bank for scrutiny and it virtually come to the conclusion that there was no deposit of title deeds as security for the Bank Guarantees. It was impressed by the defendants' case that the plaintiff-bank had concocted the documents.

13. We need to ascertain how far the defendants' case is truthful. They admit the plaintiff-bank's basic case, but try to evade their liability to pay through their inconsistent, contradictory and evasive stand. From the narration of the written statements of the defendants, it is clear that so far

as defendants 1, 2, 3 and 4 are concerned, they have clearly admitted issuance of the Bank Guarantees. They have admitted that for the purpose of Bank Guarantees furnished by the plaintiff-bank on behalf of defendant 1-firm, defendant 1-firm has deposited 25% of the amount in cash with the plaintiff-bank. Instead of coming out with the correct facts surprisingly, they have put the plaintiff-bank to the proof regarding the dates and terms and conditions of the Bank Guarantees contending that the dates were within the knowledge of the plaintiff-bank only. They have also put the plaintiff-bank to the proof regarding the amounts which have been paid to KSEB. Their version about the execution of bank guarantees is hard to digest. They have denied that any mortgage was created in favour of the plaintiff-bank and they contended that they do not admit the Deed of Indemnity and Counter Guarantee dated 11/5/1983 but stated that the Managing Partner of defendant 1 had given a power of attorney in favour of the plaintiff-bank authorizing the plaintiff-bank to adjust 5% of the bill amount

due to defendant 1 from KSEB through the plaintiff-bank and the amount so withheld was allowed to be held as security by defendant 1 in case KSEB invoked the Bank Guarantee. It is pertinent to note that though they have denied that defendants 2 to 8 went to the plaintiff-bank on 11/5/1983 to deposit the title deeds of their properties, they have admitted that defendant 4 had by his letter dated 4/4/1983 forwarded the title deeds of his properties to the plaintiff-bank. Their case, however, is that the title deeds were sent for scrutiny. It is not understood for what purpose the scrutiny of the title deeds was necessary and done. They admitted the assignment of Fixed Deposit Receipts in the sum of Rs.4,75,000/- and availment of mobilization advance of Rs.19 lakhs by defendant 1, but stated that it was not availed of on the strength of Bank Guarantees but the basis thereof was supplementary agreement executed between KSEB and defendant 1 in which, there was no stipulation to furnish any Bank Guarantee. This case is not substantiated by them. Though

they initially did not come out with a case that the plaintiff-bank fabricated any document, they subsequently amended the written statements and contended that the plaintiff-bank had taken blank signed papers from them on 11/5/1983 when the first Bank Guarantee was issued in favour of KSEB and these papers were used for fabricating the documents in favour of the plaintiff-bank. They contended that all the documents were fabricated by the plaintiff-bank by utilizing the signed blank papers taken from them by the plaintiff-bank. Thus, they denied that any equitable mortgage was created as security for the Bank Guarantees. Similarly, defendants 6 to 8 denied that any equitable mortgage was created. They came out with the case that the Deeds of Indemnity, Counter Guarantees, Memoranda of deposit of title deeds and Confirmation Letters were fabricated by the plaintiff-bank by using the blank signed papers taken from them on or about 11/5/1983 when the first Bank Guarantee for Rs.1 lakh was issued in favour of KSEB.

14. The defendants' case regarding blank signed papers is not substantiated by any evidence except their say so. The trial court has rightly rejected this story and we concur with the trial court. Apart from the fact that there is nothing on record to establish the case of the defendants that the plaintiff-bank was party to such a fraud of creating fabricated documents after obtaining blank signed papers from the defendants, it also does not stand to reason that the defendants and its partners and other defendants are so gullible as to hand over to the plaintiff-bank several signed blank papers. Falsity of their case is seen from the documents on record.

15. The title deeds are at Ex-A39 to Ex-A43, Ex-A45 to Ex-A48, Ex-A53, Ex-A54 and Ex-A63. The tax and revenue receipts relating to the properties are at Ex-A57 to Ex-A62, Ex-A65 and Ex-A67. Encumbrances certificates upto April, 1983 are at Ex-A44, Ex-A49, Ex-A50, Ex-A51, Ex-A55, Ex-A56, Ex-A64 and Ex-A66. Confirmation letters regarding

deposit of title deeds are at Ex-A24, Ex-A30, Ex-A34 and Ex-A72. We have carefully perused these letters. It is impossible to come to a conclusion that the plaintiff-bank has fabricated these letters on the blank signed papers allegedly given to it by the defendants. There is no manner of doubt that they are genuine documents. There are Memoranda of deposit of title deeds duly signed by the defendants giving details of the properties. They are at Ex-A9 to Ex-A15, Ex-A22, Ex-A23, Ex-A25, Ex-A26, Ex-A28, Ex-A29, Ex-A32 and Ex-A33. We have seen these exhibits also. We are convinced that they are genuine documents. The defendants have not been able to give any valid acceptable explanation as to how so many original title deeds came in the custody of the plaintiff-bank. Pertinently, the trial court has noted that defendant 1 has filed O.P. No.62 of 1986 in the Sub-Court at Ernakulam against the plaintiff-bank for recovery of Rs.18,99,900/-. In the schedule of properties under the heading "assets of the partners", it is clearly stated that these properties are mortgaged to the Bank as

security for Bank Guarantee of Rs.20 lakhs. The trial court has further noted that when DW-1 was confronted with this fact, he had no reply. At the cost of repetition, it needs to be stated that it is the case of defendants 6 to 8 in their written statement that they are not partners of defendant 1; they have no connection with the Bank Guarantee and, hence, there is no question of there being any equitable mortgage; that the original title deeds were only given for scrutiny and that the plaintiff-bank had taken blank signed papers from them when the first Bank Guarantee for Rs.1 lakh dated 11/5/1983 was taken. This explanation itself falsifies the case of defendants 6 to 8. They have admitted that the first Bank Guarantee of Rs.1 lakh dated 11/5/1983 was executed. Even assuming without admitting that some blank papers with their signatures were taken by the plaintiff-bank from them, unless they were concerned with the Bank Guarantee, such documents would not be demanded from them nor would they have given such documents to the plaintiff-bank. Their efforts to disassociate

themselves from defendant 1-firm and the Bank Guarantees cannot, therefore, be countenanced. It is equally impossible to accept that these documents were taken for scrutiny by the plaintiff-bank. None of the defendants have successfully explained why and for what purpose, the scrutiny of their documents was necessary. We concur with the trial court that all these documents cut at the very root of the defence regarding the non-existence of the equitable mortgage. The case of the defendants that there was no equitable mortgage will have to be, therefore, rejected.

16. The defendants' contention that the plaintiff-bank illegally encashed the Fixed Deposit Receipts in the sum of Rs.4,75,000/- must also be rejected. It is the plaintiff-bank's case that this amount was deposited as security for the Bank Guarantee of Rs.19 lakhs availed of by the plaintiff-bank and the liability incurred by it. The defendants contend that the said Fixed Deposit Receipts were given to the plaintiff-bank for safe custody. Against the background

of the aforementioned facts, the story that the Fixed Deposit Receipts were deposited with the plaintiff-bank for the purposes of safe custody, does not stand to reason. Except for oral evidence, there is nothing on record to substantiate this case. In the facts of this case, we have no hesitation in rejecting this case of the defendants. In our opinion, the said Fixed Deposit Receipts have rightly been encashed by the plaintiff-bank.

17. So far as invocation of Bank Guarantees is concerned, in our opinion, there is no infirmity in the case of plaintiff-bank. It is true that in the plaint, there is a reference to Ex-A4 and Ex-A7, which indicates that the invocation is done by the Secretary of KSEB but when an objection was raised by the defendants that the invocation was not proper, the plaintiff-bank has produced Ex-A82 and Ex-A3 which show that the invocation was done by the Chief Engineer (Civil) General as per the terms of the Bank Guarantees. It is significant to note that Ex-A4 is subsequent to Ex-A82 and

relates to Bank Guarantee of Rs.19 lakhs and Ex-A7 is subsequent to Ex-A3 and relates to Bank Guarantee of Rs.1 lakh. The trial court has rightly held them to be genuine documents. The invocation of Bank Guarantees was also done when they were in force, in view of their extension.

18. Perhaps the most significant piece of evidence which has not been noticed by the trial court and though referred to by the High Court but not appreciated by it, is the letter dated 7/7/1984 (Ex-A6) in which the Managing Partner of defendant 1 has admitted execution of Bank Guarantees and expressed willingness to pay the amount. This is a letter written by defendant 1 to the plaintiff-bank in response to the demand notice dated 23/6/1984 issued to defendant 1. DW-1 in his evidence has admitted that the said letter (Ex-A6) was written by defendant 1. We deem it appropriate to quote the said letter entirely.

*"In response to the demand notice dated
23-6-1984 issued to me and after prolong*

discussion with the officials concerned, we give you this reply placing certain conditions and suggestions for a smooth banking transaction between us.

A bank guarantee for a sum of Rs. 19,00,000/- was arranged by you for a contract work which we have entered into with the K.S.E.Board (Kakkad Hydro Electric Tunnel Project, costing Rs. 6.5 Crores). The work is going on in a full swing and for the continuation of the work we have invested a huge amount for the purchase of machineries and other things. It is relevant to state here that the contract is for a sum of Rs.6.5 crores. Unfortunately, allegations were levelled against the concerned Minister regarding this contract and this matter as referred for a finding before Justice Janaky Amma Commission. The Commission came to the conclusion that all the charges levelled against the Minister were false. Not satisfied with this finding, the opposition parties of the Kerala Legislative Assembly have now raised certain questions regarding this matter in the Assembly. All allegations levelled against the Minister was regarding allowing a sum of Rs.19,00,000/- as mobilization advance. As per the agreement, we have entered into with the K.S.E.Board, we are entitled to get a sum of Rs.20 lakhs. To be immune from the allegations the Board has withdrawn the amount advanced to us without even issuing a notice either to us or to the Bank.

We could have approached before a civil court and obtained a stay, but we avoided it

only to maintain a good relationship with KSEB for a smooth execution of the contract.

Now you have issued a notice asking us to remit the outstanding amount of Rs. 14,43,037.92. Since we have invested a huge amount and since we want to proceed with the work and since we have not so far as received any amount from the department for the work we have done till the date, we are now not in a position to remit the entire amount. As per the conclusion of the discussion with the bank officials on 6-7-1984, we hereby undertake to remit 10% of the amount of every bill from our coming running part payments.

To face the financial situation, we have reconstituted our partnership by including new partners who are substantially rich and well experienced in the field of contract work and by way of increasing the capital.

Now we are approaching you for an clean over-draft for a sum of Rs. 20,00,000/- (Rupees Twenty Lakhs only) and for sanctioning it we are prepared to give sufficient additional securities the bank requires. Being an outstanding contract, without this much of amount we cannot proceed with the work and only to face this circumstance we make this request and it is just from the part of the bank to sanction our request.

We hereby make a suggestion that we would make arrangements from some sources to deposit a substantial amount to

the bank. We make this arrangement to face the financial condition, if any, of the bank.

Hence, it is prayed that in the circumstances mentioned above, your goodself may be pleased to make immediate arrangements to sanction the request we have made above."

19. In this letter defendant 1 has accepted the case of the plaintiff-bank and undertaken to remit 10% of the amount of every bill from the running part payments receivable by it. Once defendant 1 admits execution of the Bank Guarantees and expresses its desire to repay the amount and when Counter Guarantees, number of title deeds, encumbrance certificates and confirmation letters are on record, in the facts of this case, decree must follow. In our opinion, the conduct of the defendants needs to be deprecated. After having taken the benefit of the Bank Guarantees, the defendants have tried to persuade the court to absolve them of the liability to repay the amount by taking up untenable and false contentions. In O.P. No.62 of

1986 in the schedule of properties under the heading "assets of partners", defendant 1 has categorically stated that the said properties are mortgaged to the Bank as security for Bank Guarantee of Rs.20 lakhs. It is surprising that to evade their liability to make payments, defendant took a contrary stand in this case and tried to mislead the court. The trial court was, therefore, right in decreeing the suit. In the circumstances, the plaintiff-bank must succeed. We must, however, express our extreme displeasure about the conduct of the officers of the plaintiff-bank. The plaintiff-bank is a nationalized bank. It is surprising how the originals of the Bank Guarantees could not be produced by it in the trial court. Such conduct is not expected from the officers of the plaintiff-bank who deal with public money. They have dealt with this matter with extreme casualness.

20. In view of the above, we set aside the impugned order dated 4/6/2003. We restore the judgment and decree of the trial court dated 1/1/1991. We direct the Registry to

forward a copy of this judgment to the Chairman of the Punjab and Sind Bank for information.

21. The appeal is disposed of in the aforestated terms.

.....J.
(SWATANTER KUMAR)

.....J.
(RANJANA PRAKASH DESAI)

NEW DELHI,
JANUARY 13, 2012.