Union Of India & Anr vs M/S Indusind Bank Ltd.& Anr on 15 September, 2016

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Bench: C. Nagappan, Rohinton Fali Nariman

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.9087-9089 of 2016
(ARISING OUT OF SLP (CIVIL) NOS.16166-16168 OF 2011)

UNION OF INDIA & ANR. …APPELLANTS

VERSUS

M/S INDUSIND BANK LTD. & ANR. …RESPONDENTS

J U D G M E N T

R.F. Nariman, J.

1. Leave granted.

2. The present appeals by the Union of India raise an interesting question as to the applicability of the 1997 Amendment to Section 28 of the Contract Act, 1872. The facts of the three appeals are

similar inasmuch as they concern four exporters who belong to what is known as the GPB Group of Companies.

3. By a Memorandum dated 6.11.1995, issued by the Textile Commissioner under the Imports and Exports (Control) Act, 1947, terms and conditions for export of raw cotton and cotton waste for September, 1995 - August, 1996 were laid down. The shipment was permitted only against an irrevocable letter of credit. The exporters were required to furnish a bank guarantee in the prescribed form at the rate of 10% of the contract price. The bank guarantee was required to be kept valid up to 6 months with a provision for claims for an additional three months, after the last date of shipment. The allocation of quota was on the basis of the highest unit value realization.

4. The Textile Commissioner invited applications vide Press Note and Memorandum, both dated 9.1.1996, for export of 10,000 bales of extra long staple cotton. It was mentioned in the Press Note and the Memorandum that the shipment period will be 180 days from the date of registration of quota or up to 31.8.1996, whichever is earlier.

5. Pursuant to this Press Note and Memorandum, four sale contracts were executed between M/s Indocomex Fibres Pvt. Ltd., Singapore and the four exporters, all in January, 1996. On 31.1.1996, the four exporters made an application together with a bank guarantee of even date. In February, the exporters were permitted to export the total quantity of 9175 bales vide an Allocation-cum-Registration Certificate dated 6.2.1996 within a validity period of shipment up to 31.7.1996. It may be mentioned in passing that this date was extended as many as three times, the third extension being notified as upto 28.2.1997.

6. As the four exporters failed and neglected to furnish supporting documents regarding export of goods allocated to them within the stipulated period, the Textile Commissioner, by a letter dated 3.1.1997, called upon the exporters to submit the necessary documents within 15 days from the date of issue of this letter but not later than 20.1.1997, failing which the bank guarantees would be enforced. As the exporters failed and neglected to furnish these documents, the Textile Commissioner, vide letters dated 15.5.1997, invoked the bank guarantees. Vide letters of even date, the Respondent Bank refused to pay under the said guarantees, stating that the same could be invoked only within the extended period of three months i.e. up to 30.4.1997, and not later. By a letter dated 27/28.8.1997, the Textile Commissioner informed the Respondent Bank that in light of the amendment to Section 28 of the Indian Contract Act, which came into force on 8.1.1997, the Bank was not absolved of its obligation to make payment under the bank guarantee. To this, the Bank vide letter dated 19.9.1997, reiterated its earlier stand and stated that it was not liable to make payment under the bank guarantee after 30.4.1997. It may be mentioned in passing that two of the aforesaid group companies, namely GPB Fibres Ltd. and M/s Bhagwati Cotton Ltd. were amalgamated on 12.9.1997.

7. On 23.7.1998, the Textile Commissioner called upon both the exporters and the Respondent Bank to pay the sums covered by the bank guarantee. As this letter evoked no response, three summary suits - being 2959/1999, 2963/1999 and 2996/1999 - were filed on 8.4.1999 by the Union of India and the Textile Commissioner against the exporters and the Bank in the High Court of Bombay. By

order dated 4.12.2001, as amended on 22.1.2002, unconditional leave to defend the suits was granted to the Bank, and conditional leave to so defend the suits to the exporters upon depositing the amount of Rs.3,82,59,450/- in the Court within 12 weeks from the date of the said order. On 20.1.2003/27.2.2003, the Division Bench dismissed the appeal filed by the Union of India on the ground that it was not maintainable under Clause 15 of the Letters Patent of the High Court. On 14.8.2003, an SLP filed by the Union of India met with the same fate.

8. All four exporters remained ex parte, as a result of which the suits came to be decreed ex parte against the said exporters on 29.11.2004.

9. On contest with the Bank, a learned Single Judge of the Bombay High Court on 22.2.2008, was of the view that as the bank guarantees in question were in force on 8.1.1997, when the amendment to Section 28 of the Contract Act took place, the amended Section 28 would apply to the facts of these cases. This being the case, the clause in the bank guarantees extinguishing rights and discharging the liability of the Bank if a claim were not to be made within three months of the date of expiry of the bank guarantee, was held to be void. Consequently, it was held that the invocation of the aforesaid bank guarantees, being without the aforesaid time constraint, was valid, and the said suits were, therefore, decreed in favour of the Union of India and against the bank.

10. In an appeal against this judgment, by the impugned judgment dated 20.4.2011, a Division Bench of the Bombay High Court, while holding that the amended Section 28 would apply to the facts of these cases, came to the opposite conclusion by following certain judgments of this Court, and therefore, reversed the learned Single Judge, holding that since the bank guarantees were not invoked within the time prescribed, the suits would have to be dismissed. The Union of India has filed the present appeals before us.

11. Shri A.K. Panda, learned senior advocate appearing on behalf of the Union of India, has stated that the Single Judge was correct in applying Section 28(b) as amended in 1997, and that the condition contained in the bank guarantee which restricted the period within which it could be invoked is, therefore, void. To buttress his submission, he cited (1995) 2 SCC 630, R. Rajagopal Reddy v. Padmini Chandrasekharan. According to learned counsel, the Division Bench, having reiterated that the amended Section 28(b) would apply, was not correct in its conclusion that such clause in the bank guarantees would not be void. According to learned counsel, the Supreme Court judgments relied upon were all pre-amendment, and could not therefore be relied upon to arrive at the opposite result from the learned Single Judge.

12. On the other hand, Dr. A.M. Singhvi, learned senior advocate, and Shri Krishnan Venugopal learned senior advocate, contended that both the Single Judge and the Division Bench were not correct in applying the amendment to Section 28. According to both the learned counsel, the bank guarantees themselves being dated 31.1.1996, would not be affected by an amendment made one year later i.e. on 8.1.1997. The relevant date and the relevant law applicable would be as on 31.1.1996, which would be the unamended Section 28. This being the case, according to them, a catena of judgments has held that if a clause in a contract does not restrict the limitation period within which one can approach a Court, then it is perfectly valid and not hit by Section 28

(unamended). For this purpose, they cited several judgments before us. An alternative plea was also raised by them that, on the assumption that the amended Section 28 would apply, even then, regard being had to the limited object sought to be achieved by the amendment, which followed a Law Commission Report, it would be clear that even on application of Section 28(b), the aforesaid clause in the bank guarantees would not be hit. In particular, they argued that the revised Section 28 suggested by the Law Commission was not in fact enacted verbatim in Section 28(b), and that the crucial words "or on failure to make a claim" are missing in the amended Section 28. They also referred to a subsequent amendment of Section 28 in 2012, specifically dealing with bank guarantees, in the course of their arguments.

13. The primary contention with which we are faced is whether Section 28 applies in its original form or whether it applies after amendment in 1997. In order to answer this question, it is first necessary to set out Section 28 in its original form and Section 28 after amendment. The Section reads as under:-

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

Amendment w.e.f. 08.01.1997

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

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

14. In order to answer this primary question, we have first to see whether the change made in Section 28 could be said to be clarificatory or declaratory of the law, and hence retrospective. It is common ground that the statute has not made the aforesaid amendment retrospective as it is to come into force only with effect from 8.1.1997.

15. The original Section is of 1872 vintage. It remained in this incarnation for over 100 years and was the subject matter of two Law Commission Reports. The 13th Report of the Law Commission of India, September, 1958 examined the Section and ultimately decided that it was not necessary to amend it, given the fact that there is a well-known distinction between agreements providing for relinquishment of rights as well as remedies as against agreements for relinquishing remedies only. This was reflected in para 57 of the Report as follows:-

> "57. Decided cases reveal a divergence of opinion in relation to certain clauses of insurance policies with reference to the applicability of this Section. On examination, it would appear that these cases do not really turn on the interpretation of the Section, but hinge on the construction of the insurance policies in question. The principle itself is well recognized that an agreement providing for the relinquishment of rights and remedies is valid, but an agreement for relinquishment of remedies only falls within the mischief of Section 28. Thus, in our opinion, no change is called for by reason of the aforesaid conflict of judicial authority."

16. Several decades passed, until the Law Commission in its 97th Report of March, 1984 suo motu decided that the Section required amendment. An introduction to the Report stated the point for consideration thus:-

> "1.2 Under Section 28 of the Indian Contract Act, 1872 – to state the point in brief – an agreement which limits the time within which a party to an agreement may enforce his rights under any contract by proceedings in a court of law is void to that extent. But the Section does not invalidate an agreement in the nature of prescription, that is to say, an agreement which provides that, at the end of a specified period. If the rights thereunder are not enforced, the rights shall cease to exist. As will be explained in greater detail in later Chapters of this Report, this position creates serious anomalies and hardship, apart from leading to unnecessary litigation. Prima facie, it appeared to the Commission that the Section stood in need of reform on this point. The arguments for and against amendment of the section will be set out later. For the present, it is sufficient to state that the problem is one of considerable practical importance as such stipulations are frequently found in agreements entered into in the course of business."

17. After going through the existing case law and finding that the existing case law resulted in economic injustice because of unequal bargaining power, the Law Commission decided to recommend a change in the Section. This was done as follows:-

> "5.1 We now come to the changes that are needed in the present law. In our opinion, the present legal position as to prescriptive clauses in contracts cannot be defended as a matter of justice, logic, commonsense or convenience. When accepting such clauses, consumers either do not realize the possible adverse impact of such clauses, or are forced to agree because big corporations are not prepared to enter into contracts except on these onerous terms. "Take it or leave it all", is their general attitude, and because of their superior bargaining power, they naturally have the upper hand. We are not, at present, dealing with the much wider field of "standard form contracts" or "standard" terms. But confining ourselves to the narrow issue under discussion, it would appear that the present legal position is open to serious objection from the common man's point of view. Further, such clauses introduce an element of uncertainty in transactions which are entered into daily by hundreds of persons.

> 5.2 It is hardly necessary to repeat all that we have said in the preceding Chapters about the demerits of the present law. Briefly, one can say that the present law, which regards prescriptive clauses as valid while invalidating time limit clauses which merely bar the remedy, suffers from the following principal defects:
>
> It causes serious hardship to those who are economically disadvantaged and is violative of economic justice.
>
> In particular, it harms the interests of the consumer, dealing with big corporations.
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> It is illogical, being based on a distinction which treats the more severe flaw as valid, while invalidating a lesser one.
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> It rests on a distinction too subtle and refined to admit of easy application in practice. It thus, throws a cloud on the rights of parties, who do not know with certainty where they stand, ultimately leading to avoidable litigation.
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> 5.3 On a consideration of all aspects of the matter, we recommend that Section 28 of the Indian Contract Act, 1872 should be suitably amended so as to amend to render invalid contractual clauses which purport to extinguish, on the expiry of a specified term, right accruing from the contract. Here is a suggestion for re-drafting the main paragraph of Section 28.

Revised Section 28, main paragraph, Contract Act as recommended

28. Every agreement – by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, or which extinguishes the rights of any party thereto under or in respect of any contract on the expiry of a specified period (or on failure to make a claim) or to institute a suit or other legal proceeding within a specified period, or which discharges any party thereto from any liability under or in respect of any contract in the circumstances specified in clause (c), is void to that extent."

18. A period of 13 years passed after which this Report was implemented. The Statement of Objects and Reasons of the Amendment reads as follows:-

> "The Law Commission of India has recommended in its 97th report that Section 28 of the Indian Contract Act, 1872 may be amended so that the anomalous situation created by the existing Section may be rectified. It has been held by the courts that the said Section 28 shall invalidate only a clause in any agreement which restricts any party thereto from enforcing his rights absolutely or which limits the time within which he may enforce his rights. The courts have, however, held that this Section shall not come into operation when the contractual term spells out an extinction of the right of a party to sue or spells out the discharge of a party from all liability in

> respect of the claim. What is thus hit by Section 28 is an agreement relinquishing the remedy only i.e. where the time-limit specified in the agreement is shorter than the period of limitation provided by law. A distinction is assumed to exist between remedy and right and this distinction is the basis of the present position under which a clause barring a remedy is void, but a clause extinguishing the rights is valid. This approach may be sound in theory but, in practice, it causes serious hardship and might even be abused.
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> 2. It is felt that Section 28 of the Indian Contract Act, 1872 should be amended as it harms the interests of the consumer dealing with big corporations and causes serious hardship to those who are economically disadvantaged.
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> 3. The Bill seeks to achieve the above objects.

19. What emerges on a reading of the Law Commission Report together with the Statement of Objects and Reasons for the Amendment is that the Amendment does not purport to be either declaratory or clarificatory. It seeks to bring about a substantive change in the law by stating, for the first time, that even where an agreement extinguishes the rights or discharges the liability of any party to an agreement, so as to restrict such party from enforcing his rights on the expiry of a specified period, such agreement would become void to that extent. The Amendment therefore seeks to set aside the distinction made in the case law up to date between agreements which limit the time within which remedies can be availed and agreements which do away with the right altogether in so limiting the time. These are obviously substantive changes in the law which are remedial in nature and cannot have retrospective effect.

20. In Sukhram v. Harbheji, [1969] 3 S.C.R. 752, this Court held:-

> "Now a law is undoubtedly retrospective if the law says so expressly but it is not always necessary to say so expressly to make the law retrospective. There are occasions when a law may be held to be retrospective in operation. Retrospection is not to be presumed for the presumption is the other way but many statutes have been regarded as retrospective without a declaration. Thus it is that remedial statutes are always regarded as prospective but declaratory statutes are considered retrospective. Similarly sometimes statutes have a retrospective effect when the declared intention is clearly and unequivocally manifest from the language employed in the particular law or in the context of connected provisions. It is always a question whether the legislature has sufficiently expressed itself. To find this one must look at the general scope and purview of the Act and the remedy the legislature intends to apply in the former state of the law and then determine what the legislature intended to do. This line of investigation is, of course, only open if it is necessary. In the words of Lord Selborne in Main v. Stark [1890] 15 A.C. 384 at 388, there might be something in the context of an Act or collected from its language, which might give to words prima facie prospective a large operation. More retrospectivity is not to be given than what can be gathered from expressed or clearly implied intention of the legislature." (pp.

758-759)

21. Considering that the subject matter of Section 28 is "agreements", the unamended Section 28 would be the law applicable as on 31.1.1996, which is the date of the agreement of bank guarantee. It now remains for us to deal with the case law cited by both sides.

22. In R. Rajagopal Reddy v. Padmini Chandrasekharan, (1995) 2 SCC 630, this Court was called upon to interpret the Benami Transactions (Prohibition) Act, 1988. A 3-Judge Bench of this Court overruled Mithilesh Kumari v. Prem Behari Khare, (1989) 2 SCC 95, in arriving at the conclusion that the 1988 Act was prospective and not retrospective. In so overruling the Division Bench judgment, this Court held that the Act is not expressly retrospective, so that an enquiry would lie as to whether it could be said to be clarificatory or declaratory. The language of Section 4(1) of the statute made it clear that it would apply to suits filed only after the 1988 Act came into force Further, the Bench went on to quote Maxwell on Interpretation as follows:

> "Perhaps no rule of construction is more firmly established than this — that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.' The rule has, in fact, two aspects, for it, 'involves another and subordinate rule, to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary." [para 14] It then went on to hold as follows:
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> "As regards, reason 3, we are of the considered view that the Act cannot be treated to be declaratory in nature. Declaratory enactment declares and clarifies the real intention of the legislature in connection with an earlier existing transaction or enactment, it does not create new rights or obligations. On the express language of Section 3, the Act cannot be said to be declaratory but in substance it is prohibitory in nature and seeks to destroy the rights of the real owner qua properties held benami and in this connection it has taken away the right of the real owner both for filing a suit or for taking such a defence in a suit by benamidar. Such an Act which prohibits benami transactions and destroys rights flowing from such transactions as existing earlier is really not a declaratory enactment. With respect, we disagree with the line of reasoning which commanded to the Division Bench. In this connection, we may refer to the following observations in Principles of Statutory Interpretation, 5th Edn., 1992, by Shri G.P. Singh, at page 315 under the caption 'Declaratory statutes': "The presumption against retrospective operation is not applicable to declaratory statutes. As stated in Craies and approved by the Supreme Court:
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> 'For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to

set aside what Parliament deems to have been a judicial error whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a preamble, and also the word "declared" as well as the word enacted.' But the use of the words 'it is declared' is not conclusive that the Act is declaratory for these words may, at times be used to introduce new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is to explain an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language 'shall be deemed always to have meant' is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre- amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law when the Constitution came into force the amending Act also will be part of the existing law.

In Mithilesh Kumari v. Prem Behari Khare [(1989) 2 SCC 95 : (1989) 1 SCR 621] Section 4 of the Benami Transactions (Prohibition) Act, 1988 was, it is submitted, wrongly held to be an Act declaratory in nature for it was not passed to clear any doubt existing as to the common law or the meaning or effect of any statute. The conclusion however, that Section 4 applied also to past benami transactions may be supportable on the language used in the section." [para 17]

23. Similarly, in Purbanchal Cables & Conductors (P) Ltd. v. Assam SEB, (2012) 7 SCC 462, this Court had to decide whether the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 could be said to be retrospective. After a review of various judgments of this Court, this Court held:-

"There is no doubt about the fact that the Act is a substantive law as vested rights of entitlement to a higher rate of interest in case of delayed payment accrues in favour of the supplier and a corresponding liability is imposed on the buyer. This Court, time and again, has observed that any substantive law shall operate prospectively unless retrospective operation is clearly made out in the language of the statute. Only a procedural or declaratory law operates retrospectively as there is no vested right in procedure.

In the absence of any express legislative intendment of the retrospective application of the Act, and by virtue of the fact that the Act creates a new liability of a high rate of interest against the buyer, the Act cannot be construed to have retrospective effect.

> Since the Act envisages that the supplier has an accrued right to claim a higher rate of interest in terms of the Act, the same can only be said to accrue for sale agreements after the date of commencement of the Act i.e. 23-9-1992 and not any time prior." [paras 51 and 52]

24. Similarly, in CIT v. Vatika Township (P) Ltd., (2015) 1 SCC 1, this Court held that the proviso to Section 113 of the Indian Income Tax Act, 1961 was prospective and not retrospective. In so holding, the Constitution Bench adverted to certain general principles as under:-

> "Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lex prospicit non respicit: law looks forward not backward. As was observed in Phillips v. Eyre [(1870) LR 6 QB 1], a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.
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> The obvious basis of the principle against retrospectivity is the principle of "fairness", which must be the basis of every legal rule as was observed in L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd. [(1994) 1 AC 486 : (1994) 2 WLR 39 : (1994) 1 All ER 20 (HL)] Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later." [paras 28 and 29]

25. On a conspectus of the aforesaid decisions, it becomes clear that Section 28, being substantive law, operates prospectively as retrospectivity is not clearly made out by its language. Being remedial in nature, and not clarificatory or declaratory of the law, by making certain agreements covered by Section 28(b) void for the first time, it is clear that rights and liabilities that have already accrued as a result of agreements entered into between parties are sought to be taken away. This being the case, we are of the view that both the Single Judge and Division Bench were in error in holding that the amended Section 28 would apply.

26. Considering that the un-amended Section 28 is to apply, it is important to advert to the said Section and see what are its essential ingredients. First, a party should be restricted absolutely from enforcing his rights under or in respect of any contract. Secondly, such absolute restriction should be to approach, by way of a usual legal proceeding, the ordinary Tribunals set up by the State. Thirdly, such absolute restriction may also relate to the limiting of time within which the party may thus enforce its rights.

27. At this point, it is necessary to set out the exact clause in the bank guarantees in the facts of the present cases. One such clause reads as under:

> "…. Unless a demand or claim under this guarantee is made against us within three months from the above date (i.e. On or before 30.4.97), all your rights under the said guarantee shall be forfeited and we shall be relieved and discharged from all liabilities hereunder."

28. A similar clause contained in another bank guarantee reads thus:-

> "….Provided however, unless a demand or claim under this guarantee is made on us in writing within 3 months from the date of expiry of this guarantee in respect of export of 416.500 M.T. 2450 Bales OF Raw Cotton, we shall be discharged from all liability under this guarantee thereafter."

29. A reading of the aforesaid clauses makes it clear that neither clause purports to limit the time within which rights are to be enforced. In other words, neither clause purports to curtail the period of limitation within which a suit may be brought to enforce the bank guarantee. This being the case, it is clear that this Court's judgment in Food Corpn. of India v. New India Assurance Co. Ltd., (1994) 3 SCC 324, would apply on all fours to the facts of the present case.

30. The judgment of Venkatachala,J. and Bharucha,J. set out the relevant clause in a fidelity insurance guarantee as follows:-

> "…however, that the Corporation shall have no rights under this bond after the expiry of (period) six months from the date of termination of the contract."

31. On the facts in that case, the High Court had allowed the appeals of the Insurance Companies stating that the said clause did not entitle the Corporation to file suits against Insurance companies after the expiry of the six months period from the date of termination of the respective contracts entered into. In setting aside the High Court judgment, this Court held that none of the clauses in the bond required that a suit should be instituted by the Corporation for enforcing its rights under the bond within a period of six months from the date of termination of the contract. The restriction adverted to in the clauses of the bond envisaged the need for the Corporation to lodge a claim based on the bond, and that if this was done, a suit to invoke rights under the bond could be filed within the limitation period set out in the Limitation Act.

32. In a separate concurring judgment R.M. Sahai, J. after going into the case law in paragraph 3 of his judgment, made an extremely perceptive observation. He stated that where the filing of the suit within limitation is made dependent on any condition precedent, then such condition precedent not curtailing the limitation period within which a suit could be filed, would be valid and not hit by Section 28. In paragraph 8 of the judgment, the learned Judge put it thus:-

> "It does not directly or indirectly curtail the period of limitation nor does it anywhere provide that the Corporation shall be precluded from filing suit after expiry of six months. It can utmost be construed as a condition precedent for filing of the suit that the appellant should have exercised the right within the period agreed to between the parties. The right was enforced under the agreement when notice was issued and the company was required to pay the amount. Assertion of right is one thing than enforcing it in a court of law. The agreement does not anywhere deal with enforcement of right in a court of law. It only deals with assertion of right. The assertion of right, therefore, was governed by the agreement and it is imperative as well that the party concerned must put the other side on notice by asserting the right within a particular time as provided in the agreement to enable the other side not only to comply with the demand but also to put on guard that in case it is not complied it may have to face proceedings in the court of law. Since admittedly the Corporation did issue notice prior to expiry of six months from the termination of contract, it was in accordance with the Fidelity Insurance clause and, therefore, the suit filed by the appellant was within time." [para 8]

33. In National Insurance Co. Ltd. v. Sujir Ganesh Nayak & Co., (1997) 4 SCC 366, this Court had to decide whether condition 19 of an insurance policy was hit by the unamended Section 28. Condition 19 reads as follows:-

> "Condition 19.—In no case whatever shall the company be liable for any loss or damage after the expiration of 12 months from the happening of loss or the damage unless the claim is the subject of pending action or arbitration."

34. After referring to the relevant case law and a detailed reference to the Food Corporation judgment, this Court held:-

> "Clause 19 in terms said that in no case would the insurer be liable for any loss or damage after the expiration of twelve months from the happening of loss or damage unless the claim is subject of any pending action or arbitration. Here the claim was not subject to any action or arbitration proceedings. The clause says that if the claim is not pressed within twelve months from the happening of any loss or damage, the Insurance Company shall cease to be liable. There is no dispute that no claim was made nor was any arbitration proceeding pending during the said period of twelve months. The clause therefore has the effect of extinguishing the right itself and consequently the liability also. Notice the facts of the present case. The Insurance Company was informed about the strike by the letter of 28-4-1977 and by letter dated

> 10-5-1977. The insured was informed that under the policy it had no liability. This was reiterated by letter dated 22-9-1977. Even so more than twelve months thereafter on 25-10-1978 the notice of demand was issued and the suit was filed on 2-6-1980. It is precisely to avoid such delays and to discourage such belated claims that such insurance policies contain a clause like clause 19. That is for the reason that if the claims are preferred with promptitude they can be easily verified and settled but if it is the other way round, we do not think it would be possible for the insurer to verify the same since evidence may not be fully and completely available and memories may have faded. The forfeiture clause 12 also provides that if the claim is made but rejected, an action or suit must be commenced within three months after such rejection; failing which all benefits under the policy would stand forfeited. So, looked at from any point of view, the suit appears to be filed after the right stood extinguished. That is the reason why in Vulcan Insurance case [(1976) 1 SCC 943] while interpreting a clause couched in similar terms this Court said: (SCC p. 952, para 23) "It has been repeatedly held that such a clause is not hit by Section 28 of the Contract Act." Even if the observations made are in the nature of obiter dicta we think they proceed on a correct reading of the clause." [para 21]

35. In H.P. State Forest Co. Ltd. v. United India Insurance Co. Ltd., (2009) 2 SCC 252, this Court had to decide whether clause 6(ii) of an insurance policy was hit by the unamended Section 28. This clause reads as follows:-

> "6(ii) In no case whatsoever shall the Company be liable for any loss or damage after the expiration of 12 months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration: it being expressly agreed and declared that if the Company shall declaim liability for any claim hereunder and such claim shall not within 12 calendar months from the date of the disclaimer have been made the subject- matter of a suit in a court of law then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder." After a copious reference to Food Corporation and S.G. Nayak's case, this Court held that such clauses would not be hit by Section 28.

36. Considering that the respondents' first argument has been accepted by us, we do not think it necessary to go into the finer details of the second argument and as to whether the aforesaid clauses in the bank guarantee would be hit by Section 28(b) after the 1997 amendment. It may only be noticed, in passing, that Parliament has to a large extent redressed any grievance that may arise qua bank guarantees in particular, by adding an exception (iii) by an amendment made to Section 28 in 2012 with effect from 18.1.2013. Since we are not directly concerned with this amendment, suffice it to say that stipulations like the present would pass muster after 2013 if the specified period is not less than one year from the date of occurring or non-occurring of a specified event for extinguishment or discharge of a party from liability. The appeals are, therefore, dismissed with no order as to costs.

……J.

(C. Nagappan)

……J.

New Delhi; (R.F. Nariman)

September 15, 2016