

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION**

**LD-VC-APPEAL (LODGING) NO. 50 OF 2020
IN
NOTICE OF MOTION NO. 1490 OF 2018
IN
COMMERCIAL SUIT NO. 948 OF 2018
WITH
INTERIM APPLICATION NO. 1 OF 2020**

Kryshnajay Developers Pvt.Ltd. ...Appellant/Original Plaintiff
vs
Kapil M. Mahtani & Ors. ...Respondents

Dr.Milind Sathe, Senior Advocate with Mr.Mustafa Doctor, Senior Advocate, with M/s.Atul Daga, Kishore Vussonji and Phiroze Merchant i/b. M/s.Kanga & Co. for Appellant/Applicant.
Mr.Darius Khambata, Senior Advocate with M/s.Ali Antulay and Shehzad, A.K. Najam-es-sani i/b. Maneksha & Sethna for Respondent Nos.1 and 2.

CORAM : S.C.GUPTA & ABHAY AHUJA, JJ.

DATED : 12 AUGUST 2020

ORAL JUDGMENT (Per S.C. Gupta, J.) :

This appeal challenges a judgment and order passed by a learned Single Judge of this court on a notice of motion. The motion was for a temporary injunction against Respondent Nos.1 to 3 restraining them from invoking a bank guarantee and receiving or making any payment thereunder. The learned Single Judge has, by his impugned order, dismissed the motion.

2 Respondent No.4 (original Defendant No.4) – Pali Hill Navroze

Co-operative Society Ltd. (“society”) owns an immovable property consisting of (i) a building called Navroze Apartments constructed on land bearing Nos.CTS No.C/1342, C/1343 and C/1344, Plot No.66, in Revenue Village Danda, Taluka Andheri in Registration District of Mumbai Suburban and (ii) a building designated as Building No.II constructed to the west of Navroze Apartments and having two floors containing four residential flats. The portion of the land, on which Building No.II is situate, together with the ownership of Building No.II, was leased by the society in favour of Respondent Nos.1 and 2 (original Defendant Nos.1 and 2) – Kapil Mahtani and Vikas Mahtani (“Mahtanis”) by a lease deed dated 27 September 1994 for a period of 99 years. The Appellant herein (original Plaintiff) - Kryshnajay Developers Pvt.Ltd. (“Kryshnajay”) entered into a development agreement with the society and Mahtanis for construction of ownership flats free of costs in consideration of utilisation of available FSI of the plot together with TDR, etc. In pursuance of this development agreement, Kryshnajay separately entered into permanent alternative accommodation agreement with Mahtanis. With a view to secure the performance of its obligations under the development agreement as also under the alternative accommodation agreement, Kryshnajay furnished two bank guarantees, one dated July 2012 in favour of the society for a sum of Rs.5.25 crores and the other, a separate guarantee in favour of Mahtanis for a sum of Rs.10 crores (“suit bank guarantee”). In pursuance of the development agreement, on 26 December 2014, Kryshnajay received possession of Building No.II from Mahtanis to begin the redevelopment work. Since the guarantees referred to above enjoined completion of the redevelopment project within 36 months, the bank guarantees were amended on 29 December 2014 with a view to reflect the commencement date. It is the

case of Kryshnajay that by a Special General Body Resolution, the society agreed to extend the timeline of the project and based on this resolution, a supplementary agreement dated 9 December 2016 was executed between the society and Kryshnajay. By this supplementary agreement, the timeline for completion of the project was *inter alia* extended by a period of one year. There are disputes between the parties, namely, Kryshnajay, on the one hand, and Mahtanis, on the other, as to whether the timeline for development could have been extended by Kryshnajay and the society without the consent of Mahtanis and in particular, whether the extension granted by the society to Kryshnajay for completion of the project was binding on Mahtanis. A lot of correspondence appears to have been exchanged between the parties in that behalf. Finally, on 4 January 2018, Mahtanis invoked the suit bank guarantee. Kryshnajay assailed this invocation as being bad in law in the suit herein and sought a temporary injunction in the present notice of motion against any payment under the guarantee. The learned Single Judge, after hearing the parties and taking into account the case law cited by both parties, was of the view that there was no case for restraining the bank from making any payment under the suit bank guarantee. The learned Judge, in particular, was of the view that that invocation of the suit bank guarantee was in accordance with the terms thereof and that there was no case of either fraud or irretrievable injustice to enable Kryshnajay to seek a restraint order against the bank. The order of the learned Single Judge is impugned in the present appeal.

3 Dr.Sathe, learned Senior Counsel appearing for the Appellant, restricts his case to the invocation being contrary to the terms of the bank guarantee. Learned Counsel does not dispute that there was no case of

fraud or irretrievable injustice in the present matter. It is the submission of Dr.Sathe that the language of the bank guarantee makes it clear that it was a conditional and contingent contract. Learned Counsel has taken us through the various clauses of the suit bank guarantee, including Recitals 7 and 8 and Clauses 1, 6, 7 and 12 thereof in support of his case. Learned Counsel submits that the recitals make it very clear that the object and purpose behind issuance of the suit bank guarantee was primarily to secure due and timely performance of the development agreement as also the agreement for permanent alternative accommodation. Learned Counsel submits that mere use of the words “unconditional” or “irrevocable” does not make the particular clause, or the guarantee as a whole, unconditional. Learned Counsel submits that Mahtanis could have invoked the suit bank guarantee only in the case of a breach of the development agreement or of the agreement of permanent alternative accommodation on the part of Kryshnajay. Learned Counsel submits that the development agreement is between the society and Kryshnajay, and the time-line for completion of the project thereunder has been duly extended by the supplementary agreement executed by them in pursuance of a duly passed Special General Body Resolution of the society. Learned Counsel submits that invocation of the suit bank guarantee, being clearly in the face of this extended period of completion under the supplementary agreement, is *ex facie* wrongful and illegal.

4 A contract of guarantee, which is sometimes described as “collateral” to another contract described, in turn, as an “underlying contract”, is a contract to perform a promise or discharge a liability of a third party under such underlying contract. In this sense, it is the default of

the third party, which brings about the obligation of the guarantor. The bank guarantee, however, though a *specie* of such contingent contract, is a special contract. By its very nature, it is a commercial instrument executed by a banker, just like a letter of credit, which imposes upon the bank an obligation to pay in accordance with its own terms, and irrespective of any dispute which might arise between the two contracting parties under the underlying contract. It is an independent and distinct contract between the bank and the beneficiary; it is not qualified by the underlying transaction or the primary contract between the person at whose instance the bank guarantee is given and the beneficiary. (See, **Hindustan Steelworks Construction Ltd. vs. Tarapore & Co.**¹) Just as the purpose of a letter of credit is to facilitate commercial trading on the solemn assurance of a bank to pay for the goods sold and delivered or services rendered, the object and purpose of a bank guarantee is to facilitate a commercial transaction by giving comfort to the promisee towards due performance of the underlying contract by the promisor. The promisee agreeing to enter into a bargain with the promisor is essentially bargaining on the strength of such bank guarantee. He enters into the bargain on an assurance on the part of the bank that it would honour the bank guarantee according to its own terms and would not be concerned with whether either of the parties to the contract, which underlay the guarantee, was in default. It is on this principle that a bank guarantee is given to, and invoked by, its beneficiary. It is upon this principle that trade and commerce are conducted.

5 In that sense, an unconditional bank guarantee is distinguishable from an ordinary guarantee defined in Section 126 of the

1(1996) 5 SCC 34

Contract Act. As the learned authors in **Pollock & Mulla on Indian Contract and Specific Relief Acts**² put it, “under a guarantee, the surety’s liability is co-extensive with that of the party for whose performance the guarantee is given, and the surety is liable only when the principal debtor is liable, and to the same extent.”; on the other hand, the liability to pay under an unconditional bank guarantee arises “even when such latter person has not been in default” or when “his actual liability under that transaction would be much less than the amount paid under the unconditional guarantee”.

6 Thus, in an ordinary case, it may be a good defence for the guarantor, or even for that matter for the principal debtor or obligor, that the contingency for performing the promise of the guarantee has not arisen, but not so in the case of an unconditional bank guarantee. In fact, the argument that whatever may be the position as regards the bank itself *vis-a-vis* a bank guarantee, an injunction may well be sought against the beneficiary who has wrongfully invoked the bank guarantee was considered by the Supreme Court in the well known case of **U.P Cooperative Federation Ltd. vs. Singh Consultants and Engineers (P) Ltd.**³. The court was of the view that the net effect of any such injunction would nevertheless be to restrain the bank from performing the bank guarantee and that cannot be done. One cannot do indirectly what one is not free to do directly. After all, the court went on to observe, the party wronged in such circumstances, that is to say, by wrongful invocation of the bank guarantee, is not remediless; he can recover the entire amount of bank guarantee together with interest and, we may add, if there are special damages resulting from such invocation, even such special damages. It is

2 15th Edition, Volume 2, Page 1285

3 1987(2)ARBLR279(SC)

only when the bank guarantee is vitiated by an egregious fraud or there are exceptional circumstances implying an irremediable hardship to the party arranging for the bank guarantee that the invocation thereof or any payment thereunder can be enjoined by a court.

7 In case the beneficiary (promisee) wrongfully invokes the bank guarantee, the party furnishing such bank guarantee (promisor) may recover the amount paid under the guarantee in its claim of damages against the promisee. Such claim for damages arises under the underlying contract (not under the contract of bank guarantee), the promisee demanding to be compensated for the promisor having wrongfully invoked the bank guarantee given in pursuance of that contract, that is to say, without the occasion for invoking it having arisen, having regard to the terms of the underlying contract. The court then has regard to the contractual disputes between the promisor and the promisee and decides whether or not the guarantee was rightly invoked. There is no question of the court, however, restraining the bank from performing its promise under the bank guarantee, which is not, in any way, dependent on the contractual disputes between the promisor and promisee.

8 Coming now to invocation of the suit bank guarantee in the present case, let us see if it is in accordance with the terms of the guarantee. The relevant clauses of the suit bank guarantee insofar as terms of invocation are concerned, are contained in Clause 12 of the guarantee. Under Clause 12, the bank has irrevocably guaranteed to honour any written demand or claim made to the bank by the beneficiary provided :

(i) Such written demand/claim is received by the bank at its bank guarantee issuing office on or before the expiry of 38 months from 12 November 2014, that is to say, upto 12 January 2018, which is the last date for lodgment of any claim; and

(ii) Such claim/demand comprises submission of the following original documents:

(a) A Certificate from an independent architect certifying that the new flat has not been constructed in the manner and within the time prescribed therefor in the agreement for permanent alternate accommodation and is not ready for occupation;

(b) Mahtanis' letter to the Bank, signed by both brothers, specifying therein the date on which they had handed over vacant possession of the existing flats/areas/premises in Building No.II, specifying expiry of the period of 38 months from that date, and accompanied with a letter issued by the Developer (Kryshnajay) in their favour at the time of taking possession of the existing premises, confirming having received possession of the same; and

(c) Original bank guarantee alongwith all original amendments, if any, duly discharged by Mahtanis against the Bank's cheque for the guarantee amount in their favour."

The clause, which follows these conditions of invocation, is very important. It is in the following terms :

"13. The Bank shall accept the submission of the aforesaid documents as tendered by the Member and without any onus as to their veracity / legality. The payment of the claimed amount shall not exceed the guaranteed amount. In case if any of the aforesaid documents are not tendered with the claim, then in that event such

claim shall be deemed to be invalid and the Bank shall process the claim and shall not make any payment to the Members.”

Other clauses, which have a material bearing on the present controversy, are clauses 7 and 15, which are in the following terms :

“7. The guarantee contained in this deed is absolute, irrevocable, unconditional and unqualified and a continuing one and shall remain in force until the terms and conditions of the aforesaid Agreements for Permanent Alternate Accommodation are performed in full and if any default is committed the said Bank shall be liable to pay the guaranteed sum of Rs.10,00,00,000/- (Rupees Ten Crores Only) in full to the Members without any demur and irrespective of any instructions or demand to the contrary made/raised by the Developers to the said Bank to withhold payment thereof on any ground whatsoever. Provided the Bank received from the Members a written demand/claim in conformity with clause 11 of this Bank Guarantee.

15. The Bank further undertakes to honour the claim/demand so received without delay or demur. The Bank is hereby bound to honour such claim/demand notwithstanding any dispute/difference between the Members and the Developers and notwithstanding any protest, contestation, proceedings pending before any court, tribunal or administrator/regulator.”

8 What these clauses unequivocally command is that it is, in the first place, for Mahtanis, as beneficiaries of the guarantee, to choose to make a claim or demand thereunder; they are the sole judge of the propriety of such claim or demand. So far as submission of documents referred to in Clause 12 is concerned, the same is bound to be accepted by the bank without any onus as to the veracity or legality of the documents. In other words, Mahtanis, as beneficiaries invoking the bank guarantee, are to be the sole judge, for the purposes of its invocation, of the truthfulness

or legality of their claim or demand as also the documents submitted in support of it. Thus, whether or not the promise of construction of their new flat was fulfilled by Kryshnajay by constructing it in the manner and within the time provided in the agreement for permanent alternative accommodation and whether or not the same was ready for occupation, which are the subject matter of the certificate referred to above, are matters for Mahtanis to allege and their architect to certify. It is no concern of the bank whether or not such allegation or certification is correct or in accordance with the underlying contract between the parties. Once the documents referred to in Clause 12 are submitted and the claim along with such submission is made within the time stipulated under Clause 12, it is imperative for the bank to honour the invocation; it cannot be forbidden from paying under the guarantee on the ground that the statement contained in the demand or in the accompanying documents is either incorrect or illegal.

9 Were Mahtanis required to be parties, in their personal capacity, to the supplementary agreement, or whether the supplementary agreement entered into by the society with Kryshnajay in pursuance of its Special General Body Resolution was binding on Mahtanis, or whether the original time for construction of the suit flat had stood duly extended, are all contractual disputes arising under the underlying contract, namely, the development agreement between the society, Mahtanis and Kryshnajay, and the separate permanent alternative accommodation agreement entered into by Kryshnajay with Mahtanis. They are of no concern to the bank, whilst being called upon to pay under the suit bank guarantee.

10 Dr.Sathe relies on the judgment of the Supreme Court in the case of **Hindustan Construction Company Ltd. vs. State of Bihar**⁴. In **Hindustan Construction Company's** case, the bank guarantee, as noted by the learned Single Judge in the impugned order, did not make the beneficiary's demand conclusive, final or binding, unlike in our case (clauses 6, 7, 13 and 15 of the suit bank guarantee). The bank guarantee in **Hindustan Construction Company's** case was given for securing an advance mobilisation loan, and the relevant clause of the bank guarantee, required the bank to pay under the guarantee "*in the event that the obligations expressed in the said clause of the abovementioned contract have not been fulfilled by the contractor giving right of claim to the employer for recovery of the whole or part of the Advance Mobilisation Loan from the contractor under the contract.*" In our case, the guarantee is said to be "*absolute, irrevocable, unconditional and unqualified*" and the bank's liability to pay "*without any demur and irrespective of any instructions or demand made/raised by the developers to the said bank to withhold payment thereof on any ground whatsoever*" (clause 7), and "*notwithstanding any dispute/difference between the members (i.e. Mahtanis) and the Developers (i.e. Kryshnajay) and notwithstanding any protest, contestation*" (clause 15). Similar clauses did not find place in the bank guarantee in **Hindustan Construction Company's** case. A Division Bench of this court, in the case of **Felguera Gruas India Pvt.Ltd. vs. Tuticorin Coal Terminal Pvt.Ltd.**⁵, has also explained the position by observing that in the peculiar facts and circumstances in the case of **Hindustan Construction Company** and having regard to the particular language of the bank guarantee therein, the Supreme Court had come to a

4 (1999) 8 SCC 436

5 2018(3)ABR 609

conclusion that the guarantee in that case was conditional. A Special Leave Petition from the order of the Division Bench has been dismissed by the Supreme Court.

11 Anyway, as the Supreme Court itself has later explained in the case of **Mahatma Gandhi Sahakra Sakkare Karkhane vs. National Heavy Engg.Coop.Ltd.**⁶, what is material in this respect are the express terms of the bank guarantee. If the guarantee represents an independent contract between the bank and the beneficiary, both parties would be bound by its terms. If the guarantee is in unequivocal terms, unconditional and recites that the amount would be paid thereunder without demur or objection and irrespective of any dispute that might have arisen between the beneficiary and the person on whose behalf the guarantee is furnished, it amounts to an unconditional promise on the part of the bank to pay. So long as the invocation itself is in accordance with the terms of the bank guarantee, there is nothing for the bank to be forbidden from making payment.

12 As we have observed above, in our case, the guarantee is wholly unconditional, containing an independent obligation to pay irrespective of any dispute between the parties under the underlying contract, the beneficiary of the bank guarantee being the sole judge of fulfillment of conditions for its invocation. The guarantee is invoked within time and is accompanied by documents set out in Clause 12, the veracity of which the bank is not in any way concerned with. In other words, there is *prima facie* no case whatsoever for restraining Mahtanis from invoking the bank guarantee or restraining the bank from making any payment

6 (2007) 6 SCC 470

thereunder.

13 There is, accordingly, no merit in the commercial appeal. The appeal is dismissed with costs. In view of the disposal of the appeal, the interim application does not survive and is disposed of.

14 Mr.Doctor, for the Appellant, applies for stay of this order. Two courts having concurrently held against granting of any injunction and there being not even a statable point on which any restraint can be sought by the Appellant against payment of the bank guarantee, we are not inclined to grant any stay. Mr.Khambata, learned Senior Counsel appearing for Respondent Nos.1 and 2, states that his clients shall not approach Respondent No.3 Bank for payment under the guarantee for a period of one week from today. The statement is noted and accepted.

(ABHAY AHUJA, J.)

(S.C. GUPTE, J.)

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