IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO.43 OF 2021
IN
COMMERCIAL SUMMARY SUIT NO.238 OF 2020

SKS Power Generation (Chhattisgarh) Ltd. ...Plaintiff
vs.
Indian Bank ...Defendant

Mr. Venkatesh Dhond, Senior Advocate a/w. Mr. Rohaan Cama, Ms. Vinodini Srinivasan, Ms. Rashna Khan, Ms. Poorva Garg i/b. M/s. Mulla and Mulla and CBC, for the Plaintiff.

Mr. Prateek Sakseria a/w. Mr. Nishit Dhruva and Mr. Prakash Shinde, Ms. Niyati Merchant i/b. MDP and Partners, for the Defendant.

CORAM : N. J. JAMADAR, J.
DATE : NOVEMBER 22, 2021

ORAL ORDER

1. The plaintiff has taken out this Summons for Judgment.

2. The summary suit is instituted for a decree in the sum of Rs. 57,30,00,000/- along with interest thereon on the basis of bank guarantee being number 00185IG120000005 issued by the defendant bank.

3. The plaintiff is a Company registered under the Companies Act, 1956. It deals in the business of power generation. The defendant is a banking company incorporated under the provisions

of Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970.

4. The plaintiff had entered into various agreements with Cethar Constructions Limited and Cethar Limited (Cethar Ltd.) for the purpose of setting up of 4 x 300 MW Power Project at Raigargh. In connection therewith, a number of contracts were executed. On 3rd February, 2012 the defendant bank issued in favour of the plaintiff, the bank guarantee bearing number 00185G120000005, for an amount of Rs. 57,30,00,000/-. It was an unconditional and irrevocable guarantee wherein the defendant agreed to pay the plaintiff merely on written demand signed by the plaintiff stating that the amount claimed is due by way of loss or damage caused or would be caused to the plaintiff by reason of any default on the part of Cethar Ltd. in discharging any of its obligations under the contract. The said bank guarantee was renewed from time to time upto 30th October, 2017; the last renewal being on 31st July, 2017.

5. The plaintiff avers, in view of the default on the part of Cethar Ltd, an amendment agreement came to be executed on 12th November, 2013 between the plaintiff and Cethar Ltd. The plaintiff asserts that despite the amendment agreement the project was

delayed due to various defaults in discharging the obligations under the agreement and inefficiency on the part of Cethar Ltd., causing loss and damage to the plaintiff. Hence, on 5th September, 2017 the plaintiff invoked the bank guarantee and requested the defendant to remit the full amount under the said bank guarantee.

6. The defendant instituted a suit, being Suit No. 163 of 2017, in the Court of Tiruchirapalli (Mahila Court, Trichy) and sought injunction against the plaintiff from invoking the bank guarantee and obtained an ex-parte order of status quo on 8th September, 2017. Plaintiff avers that the suit was instituted despite the fact that the defendant was fully aware that only Courts at Mumbai had exclusive jurisdiction under contract of bank guarantee and that the said Court had no jurisdiction at all. Thus, plaintiff approached Madurai Bench of the Madras High Court by filing a Revision Application and by an order dated 7th November, 2019, the plaint was directed to be returned to defendant to file a fresh suit on or before 10th December, 2019 before the competent Court at Mumbai.

7. On 19th November, 2019, since there was no restraint order, the plaintiff called upon the defendant to make payment under the bank guarantee by 20th November, 2019. The defendant raised false

and untenable contentions and refused to discharge the liability under the bank guarantee. Eventually, the defendant vide letter dated 6th January, 2020 informed the plaintiff that the defendant had instituted the suit in the City Civil Court at Dindoshi. The plaintiff avers that the said exercise of instituting the suit in the City Civl Court at Dindoshi was also a part of dilatory tactics as the said Court would have no jurisdiction to entertain the suit. Hence, the suit for decree in the sum of Rs. 57,30,00,000/- along with interest thereon, under Order 37 of Code of Civil Procedure, 1908 (the Code).

8. The defendant entered appearance in response to writ of summons. The defendant filed an affidavit seeking an unconditional leave to defend the suit.

9. At the outset, it was contended that the suit in the present form is beyond the purview of the provisions contained in Order 37 of the Code. It was not based on a written contract. The suit involved determination of disputed questions of fact, which warranted evidence for adjudication. Thus, very tenability of the summary suit was called in question. It was also contended that the dispute between the plaintiff and the defendant does not fall within

the ambit of the commercial dispute envisaged by section 2(C) of the Commercial Courts Act, 2015.

10. On the merits, the defendant contended that invocation of the bank guarantee is tainted with egregious fraud. Cethar Ltd., at whose instance the bank guarantee was issued, owes a sum of Rs. 532.50 crores to the defendant, in addition to the debts owed to a consortium of Banks, of which the defendant is the leader. The total outstanding liability of the Cethar Ltd. is 1344.96 crores. On account of default in repayment of the loan as well as non-service of interest the accounts of Cethar Ltd. were classified NPA in the year 2012. Proceedings have been initiated under the provisions of SARFAESI Act, 2002. Yet, the bank guarantee issued by the defendant in favour of the plaintiff for the sum of Rs. 57.30 crores has been periodically renewed from time to time. Cethar Ltd. has got one of its operational creditors M/s. Loyal Insurance Limited to institute a proceeding under section 9 of the Insolvency and Bankruptcy Code, 2016 and an Insolvency Resolution Professional came to be appointed. The institution of the said petition and appointment of IRP with the consent of Cethar Ltd. was a clear case of fraud over the defendants and the other members of the consortium of lenders.

11. The defendant further contends that invocation of the bank guarantee by the plaintiff was in clear breach of clause 5 thereof, under which the beneficiary was required to undertake the reduction in the guarantee amount, periodically. Thus, the invocation of the entire amount under the bank guarantee is vitiated with fraud and collusion between the plaintiff and Cethar Ltd.

12. By way of an additional affidavit, the defendant has further contended that by an order dated 16th June, 2017 a Company Petition against Cethar Ltd. had been admitted under Corporate Insolvency Resolution Process or CIRP and there was moratorium under section 14. In suppression of the said fact the bank guarantee was got extended on 31st July, 2017. According to the defendant the admission of the Company Petition against Cethar Ltd. on 16th June, 2017, the extension of the bank guarantee on 31st July, 2017 and the colourable invocation of the bank guarantee on 5th September, 2017 clearly set out a collusion between the plaintiff and Cethar Ltd. In any event, as Cethar Ltd is under liquidation, the defendant will not be in a position to recover the amount, if payments are made under the bank guarantee. Resultantly, the defendant would suffer irretrievable injustice.

13. The plaintiff has filed an affidavit in rejoinder followed by an additional affidavit in rejoinder. The claim of the defendant that the transaction has been vitiated by fraud was seriously contested. It was asserted that the defendant has suppressed the order passed by the NCLT on 31st December, 2019 whereby the prayer of the liquidator of Cethar Ltd. to pass restraint order against the plaintiff from enforcing the bank guarantee came to be rejected. The plaintiff asserts that the said order was confirmed in Appeal by the NCLAT, New Delhi in Company Appeal (AT) (Insolvency) No. 561 of 2020 dated 13th July, 2020 opining, inter alia, that moratorium order passed under sub-section (1) to sec. 14 of the I & B Code does not apply to the surety in a contract of guarantee to a Corporate Debtor.

14. In the backdrop of the aforesaid pleadings, I have heard Mr. Venkatesh Dhond, learned senior advocate for the plaintiff and Mr. Prateek Sakseria, learned counsel for the defendant, at length.

15. Mr. Dhond, learned senior counsel for the plaintiff would urge that the defendant bank has resorted to litigative stratagem to defeat the legitimate claim of the plaintiff. In view of the clear and explicit irrevocable and unconditional contract of guarantee, the defendant bank cannot wriggle out of the situation by resorting to

various defence and letigative strategies, urged Mr. Dhond. Attention of the Court was invited to the efforts made by the defendant in putting hindrances in the enforcement of the bank guarantee. Firstly, by instituting the suit before a Court which had no jurisdiction at all and, secondly, making an effort to join the Corporate entity at whose instance the bank guarantee was issued as a party to this proceeding. Reference was made to the Interim Application taken out by the liquidator of Cethar Ltd. to implead him as a party defendant to the suit and, after its rejection, a third party notice taken out by the defendant to implead Cethar Ltd. Mr. Dhond further urged that in view of the well recognized position in law that the enforcement of the bank guarantee cannot be injuncted, save and except in the case of egregious fraud and irretrievable injustice, the endevour on the part of defendant, in the instant case, to seek leave to defend by asserting that there was a fraud, without spelling out contours thereof, does not deserve countenance.

16. Mr. Dhond, took the Court through the clauses of bank guarantee which cast an unconditional and irrevocable obligation on the defendant to pay the moment a claim is lodged by the plaintiff. In the circumstances, according to Mr. Dhond, there is no

defence at all to the claim of the plaintiff and, therefore, the Summons for Judgment is required to be made absolute.

17. In opposition to this, Mr. Prateek Sakseria, the learned counsel for the defendant laid emphasis on the fact that NCLT passed order on 16th June, 2017 admitting the Company Petition against Cethar Ltd.. Yet, the bank guarantee was renewed on 31st July, 2017 without disclosing the said fact. The defendant was kept in dark about the said order passed by NCLT. This constitutes a clear fraud. Elaborating the submission, Mr. Sakseria, would urge that Cethar Limited has indulged in fraudulent activities resulting in siphoning off huge amount of Rs. 450 crores. Mr. Sakseria, further urged that the defendant may not eventually succeed in establishing the fraud, however, at this stage, it cannot be said that the defence is moonshine. Since the bank guarantee was got renewed after the order dated 16th July, 2017, passed by NCLT, in the Company Petition, triable issues arise.

18. Mr. Sakseria further urged that the invocation of the bank guarantee for the entire amount is in teeth of clause 5 of the contract of bank guarantee as the beneficiary was enjoined to reduce the amount of guarantee on quarterly basis. In the

circumstances, the defendant, which is a public sector bank, would suffer serious prejudice if leave to defend is not granted unconditionally, though a clear case of fraud and irretrievable injustice is made out, submitted Mr. Sakseria.

19. To begin with, it may be apposite to extract the relevant clauses of the contract of bank guarantee executed on 3rd February, 2012. Clause Nos. 1, 2, 6 and 8 are material, and hence extracted below:

> *1] We hereby undertakes and bind ourselves irrevocably and unconditionally to pay to you within five clear working days from the date of receipt of first written demand the sum in aggregate not exceeding Rs. 57,30,00,000/- as aforesaid, merely on a written demand signed by your duly authorised representative stating that the amount claimed is due by way of loss or damage caused to or would be caused to you by reason or any default or defaults on the part of the supplier in discharging any of its obligations under the contract.*
>
> *2] Notwithstanding anything to the contrary, your decision as to whether the supplier has made any such default or defaults under the aforesaid contract and the amount to which you are entitled by reason thereof, will be binding on us and we shall not be entitled to ask you to establish or prove your claim or claims under this guarantee but will pay the sum promptly on first written demand without any protest or demur or any objection, cavil or argument.*
>
> *6] We hereby agree that this guarantee will not be invalidated or cancelled by the reason of purchaser giving time to the supplier to perform its obligations or not enforcing their rights in respect of any one obligation and that this guarantee shall continue to bind us irrespective of changes in your constitution or management or your merger with another company or corporation or your agreeing to varying the contract or the obligations of the supplier.*

> *8] We acknowledge that our obligations herein are absolute and unconditional, irrespective of the value, genuineness, validity, regularity or enforceability of the contract or the insolvency, bankruptcy, re-organisation, dissolution or liquidation of the supplier or any change in ownership of the supplier or any purported assignment by the supplier or any other circumstance whatsoever which might otherwise constitute a discharge or defence of a guarantor or surety.*

20. From a conjoint reading of aforesaid clauses an inference become inescapable that the defendant undertook to unconditionally pay the plaintiff the sum of Rs. 57,30,00,000/- on demand, without insisting for the proof of the claim and without protest or demur. It was acknowledged, in clear terms, that the obligation of the defendant was absolute and unconditional irrespective of the value, genuineness, validity, regularity or enforceability of the contract or insolvency, bankruptcy, re-organisation, dissolution or liquidation of the supplier. It would be suffice to note that the bank guarantee was couched in most unconditional and unqualified terms and the demand on the part of the plaintiff was the sole determinant for enforcement of the said bank guarantee.

21. There is not much controversy over the fact that the bank guarantee was renewed on 31st July, 2017 and was to remain valid till 31st October, 2017, on the same terms and conditions.

22. In the backdrop of the aforesaid nature of the contract of guarantee, the nature of obligation thereunder becomes critical. In the case of **Hindustan Steelworks Construction Ltd. vs. Tarapore and Co. and Anr.**[1] expounding the law as regards the unconditional bank guarantee, it was enunciated that:

> *"In case of an unconditional bank guarantee the nature of obligation of the bank is absolute and not dependent upon any dispute or proceeding between the party at whose instance the bank guarantee is given and the beneficiary. The High Court thus failed to appreciate the real object and nature of a bank guarantee. The distinction which the High Court has drawn between a guarantee for due performance of a works contract and a guarantee given towards security deposit for that contract is also unwarranted. The said distinction appears to be the result of the same fallacy committed by the High Court of not appreciating the distinction between the primary contract between the parties and a bank guarantee and also the real object of a bank guarantee and the nature of bank's obligation thereunder. Whether the bank guarantee is towards security deposit or mobilisation advance or working funds or for due performance of the contract if the same is unconditional and if there is a stipulation in the bank guarantee that the bank should pay on demand without a demur and that the beneficiary shall be the sole judge not only on the question of breach of contract but also with respect to the amount of loss or damages, the obligation of the bank would remain the same and that obligation has to be discharged in the manner provided in the bank guarantee."*
>
> *(emphasis supplied)*

23. In the case of **U.P.State Sugar Corporation vs. Sumac International Ltd.**[2] the Supreme Court further expounded the law as regards the invocation of bank guarantee and the two exceptions in which the Court would be justified in restraining the invocation of the bank guarantee. The observations in paragraphs No. 12 and 14

1 (1996) 5 Supreme Court Cases 34.
2 (1997) 1 Supreme Court Cases 568.

are instructive and, hence, extracted below:

> *12] The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may co-exist in some cases. In the case of U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd. (988 [1] SCC 174), which was the case of works contract where the performance guarantee given under the contract was sought to be invoked, this Court, after referring extensively to English and Indian cases on the subject, said that the guarantee must be honoured in accordance with its terms. The bank which gives the guarantee is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the suppler has performed his contractual obligation or not, nor with the question whether the supplier is in default or not. The bank must pay according to the tenor of its guarantee on demand without proof or condition. There are only two exceptions to this rule. The first exception is a case when there is a clear fraud of which the bank has notice. The fraud must be of an egregious nature such as to vitiate the entire underlying transaction.*
>
> > *The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent.*

> *But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it charged".*

This Court set aside an injunction granted by the High Court to restrain the realization of the bank guarantee.

14] O<u>n the question of irretrievable injury which is the second exception to the rule against granting of injunctions when unconditional bank guarantees are sought to be realized the court said in the above case that the irretrievable injury must be of the kind which was the subject-matter of the decision in the Itek Corporation case (supra).</u> In that case an exporter in the U.S.A. entered into an agreement with the Imperial Government of Iran and sought an order terminating its liability on stand by letters of credit issued by an American bank in favour of an Iranian Bank as part of the contract. The relief was sought on account of the situation created after the Iranian revolution when the American Government cancelled the export licences in relation to Iran and the Iranian Government had forcibly taken 52 American citizens as hostages. The U.S. Government had blocked all Iranian assets under the jurisdiction of United States and had cancelled the export contract. The court upheld the contention of the exporter that any claim for damages against the purchaser if decreed by the American Courts would not be executable in Iran under these circumstances and relisation of the bank guarantee/Letters of credit would cause irreparable harm to the plaintiff. This contention was upheld. T<u>o avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if the ultimately succeeds, will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. In the Itek case (supra) there was a certainty on this issue. Secondly, there was good reason, in that case for the court to be prima facie satisfied that the guarantors i.e. the bank and its customer would be found entitled to receive the amount paid under the guarantee.</u>

(emphasis supplied)

24. To the same effect is the pronouncement of a three judge bench of the Supreme Court in the case of **Dwarikesh Sugar**

Industries Ltd. vs. Prem Heavy Engineering Works (P) Ltd. And Anr.[3]. In this case the nature of the second exception to the rule of granting injunction i.e. irretrievable injustice, was further expounded. The observations in paragraph 22 are material and, thus, extracted below:

> *22] The second exception to the rule of granting injunction, i.e., the resulting of irretrievable injury, has to be such a circumstance which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds. This will have to be decisively established and it must be proved to the satisfaction of due Court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary, by way of restitution.*

25. With the aforesaid clarity, as regards the circumstances in which the liability under an unconditional and irretrievable bank guarantee can be sought to be avoided, the nature of the defence sought to be put forth in the case at hand, is required to be appreciated. On the first count of fraud, it is imperative to note that the defendant does not claim that there was a fraud at the inception of the contract and at the time of issue of bank guarantee by the defendant. Indisputably, the bank guarantee was renewed from time to time and the last renewal was on 31st July, 2017. The only element which may bear on the allegations of fraud is the fact that when bank guarantee came to be lastly renewed on 31st July, 2017, a Company Petition was admitted against the Cethar Ltd on 16th June,

3 (1997) 6 Supreme Court Cases 450.

2017. It is the claim of the defendant that it was not apprised of the said development while seeking renewal of the bank guarantee.

26. Two factors assume significance in this context. Firstly, the bank guarantee was issued at the instance of M/s. Cethar Limited in the year 2012. The underlying consideration for the bank guarantee must have been secured by the defendant bank, as a prudent banker would do, in the year 2012 itself. Secondly, it is pertinent to note that the efforts made by the liquidator to restrain the invocation of the bank guarantee were repelled by the NCLT and NCLAT. In this view of the matter, the claim of the defendant that renewal of the bank guarantee was tainted with fraud does not constitute a strong defence.

27. The claim of the defendant based on the invocation of the bank guarantee, allegedly in breach of clause 5 of the bank guarantee, even if taken at par, falls short of fraud. Clause 5 reads as under:

> *5] The amount of the guarantee shall be reduced on quarterly basis in proportion to value of advance adjusted by the supplier under its invoice/s to purchaser provided, we receive a letter of acceptance of such adjustment which explicitly provide purchaser's authorization to reduce our obligation under this agreement.*

28. On a first blush, it appears that the parties had agreed that

the amount of guarantee shall be reduced on quarterly basis in proportion to the value of advance adjusted by the supplier under its invoice to purchaser. However, the rider is the letter of acceptance of such adjustment which explicitly contains purchaser's authorization to reduce the obligation under the said contract of guarantee. It implies that the beneficiary under the bank guarantee was required to communicate the acceptance of the adjustment. Coupled with the said fact, the fact that the bank guarantee was renewed on the same terms and conditions for the sum of Rs. 57,30,00,000/- a couple of months prior to invocation thereof, cannot be lost sight of. In any event, in the absence of material to demonstrate that, the liability of the corporate entity at whose instance the bank guarantee was issued was reduced in the intervening period, the mere invocation of the bank guarantee for the entire amount would not render it fraudulent.

29. This propels me to the question of irretrievable injustice in the event of invocation of bank guarantee. As indicated above, in the case of **Dwarikesh Sugar** (supra) the Supreme Court has expounded the nature of irretrievable injustice. It is not the mere difficulty in recovering the amount or the impossibility of recovery. What is to be shown is that it was absolutely impossible to recover

the amount from the person at whose instance bank guarantee was issued.

30. In the case at hand, the defendant bank carries an onerous burden. Usually, it is the person, at whose instance the bank guarantee is furnished, who approaches the Court against the invocation of the bank guarantee alleging fraud against the beneficiary or irretrievable injustice to him. In the case at hand, the defendant bank alleges that there is a fraud in invocation of the bank guarantee. In view of the unconditional nature of the contract of bank guarantee, a heavy onus lay on the defendant to make out a case of egregious fraud or irretrievable injustice. The mere fact that the entity at whose instance bank guarantee was furnished owes huge amount of money to the defendant bank and other banks, who are members of the consortium of lenders, does not ipso facto lead to an inference that the contract of guarantee, which is an independent contract between the plaintiff and the defendant, is vitiated by fraud. Conversely, the defendant bank is expected to have secured its position in obtaining adequate consideration, while issuing the bank guarantee itself. The claim of irretrievable injustice thus cannot be pressed into service with equal measure, as the person at whose instance the bank guarantee is furnished can

allege on the basis of the credible apprehension of failure of consideration.

31. The upshot of aforesaid consideration is that the defence of egregious fraud or irretrievable injustice does not seem to have been adequately made out. Mr. Sakseria, learned counsel for the defendant attempted to salvage the position by canvassing a submission that, at this stage, the defendant has to only show that triable issues are raised. In view of the fact that the defendant bank has alleged fraud, and there is, prima facie, material to support the same, according to Mr. Sakseria, grant of leave is warranted.

32. To bolster up this submission, Mr. Sakseria banked upon the pronouncement of the Supreme Court in the case of **State Bank of Hyderabad vs. Rabo Bank**[4]**.** In the said case in the backdrop of allegations of fraud by the officers of the bank, who had accepted the bill of exchange, the Supreme Court had granted unconditional leave to defend the suit observing, *inter alia,* as under:

> *19] Although the affidavit does not positively and immediately make it clear that he had a defence, yet, it shows such a state of facts leading to the inference that at the trial of the action, the defendant may be able to establish a defence to the plaintiff`s claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to*

4 (2015) 10 SCC 521.

payment into Court or furnishing security [See : T. Sukhender Reddy Vs. M.Surender Reddy, 1998(3)ALD 659].

20] We are in total agreement with the view taken by this Court in Raj Duggal Vs. Ramesh Kumar Bansal, 1991 Suppl. (1) SCC 191 that leave to defend the Summons for Judgment shall always be granted to the defendant when there is a triable issue as to the meaning or correctness of the documents on which the claim is based or the alleged facts are of such nature which entitle the defendant to interrogate or cross-examine the plaintiff or his witnesses.

21] In the case on hand, we have perused the material on record including the FIR dated 9th August, 1999 registered by the CBI at the instance of Chief Vigilance Officer, SBH and also the Charge Sheet filed by the CBI. The charge sheet indicated the involvement of Mr. Sudhir Behra, Chief Manager of the appellant Bank at Burra Bazar Branch, Calcutta. Acting at the requests of representatives from the Indian clients of the respondent's constituent, the Chief Manager had induced some officers of the appellant Bank who were In-charge of Foreign Exchange Department to issue tested telex messages of co-acceptance. The charge sheet further alleges that these officers were not authorized to issue such co-acceptances and the motive behind their illegal and unauthorized action was to enable the constituent of the respondent to get their bills discounted by jeopardizing the interests of the appellant Bank. It is also on record that the trial of the said case was at the stage of evidence as on 13th November, 2014.

33. Reliance was also placed on the judgment of the Supreme Court in the case of **IDBI Trusteeship Services Ltd. vs. Hubtown Ltd.**[5] wherein the Supreme Court after elaborately considering the provisions of Order 37 and the previous judgments of the Supreme Court in the cases of **Mechelec Engineers & Manufactures vs. Basic Equipment Corporation**[6] and **Milkhiram (India) (P) Ltd. vs. Chamanlal Bros.**[7] expounded the law as under:

5 (2017)1 SCC 568.
6 (1976) 4 SCC 687.
7 AIR 1965 SC 1698.

> *17] Accordingly, the principles stated in paragraph 8 of Mechelec's case will now stand superseded, given the amendment of O.XXXVII R.3, and the binding decision of four judges in Milkhiram's case, as follows:*
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> *17.1] If the defendant satisfies the Court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit.*
>
> *17.2] If the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend.*
>
> *17.3] Even if the defendant raises triable issues, if a doubt is left with the trial judge about the defendant's good faith, or the genuineness of the triable issues, the trial judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security.*
>
> *17.4] If the Defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.*
>
> *17.5] If the Defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith.*
>
> *17.6] If any part of the amount claimed by the plaintiff is admitted by defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.*

Mr. Sakseria would thus urge that the case of the defendant would fall within the ambit of proposition 17.2, if not 17.1.

34. I find it rather difficult to accede to the aforesaid submission for reasons more than one. First and foremost, the underlying nature of contract between the plaintiff and the defendant. The defendant undertook an unequivocal and unconditional obligation to pay the amount of bank guarantee upon a mere demand by the plaintiff. Secondly, the said contract is independent of the contract between the plaintiff and the party at whose instance the bank guarantee was issued. Thirdly, as indicated above, the elements of fraud and irretrievable injustice have not been sufficiently made out. Fourthly, the conduct of defendant assumes critical salience. The defendant made endevour to put hindrances in the invocation of the bank guarantee by approaching the Courts, which ex facie had no jurisdiction. Lastly, it is of some relevance that, by an order dated 22nd September, 2021 in Interim Application (L) No. 19496 of 2021 in Suit (L) No. 18496 of 2021 this Court refused to grant ad-interim relief against the invocation of the bank guarantee.

35. In that view of the matter, even if the defence of the defendant is construed rather generously and allowance is given to the fact that the defendant is a public sector bank and thus deserves an opportunity to put forth its defence of fraud, the defendant does not deserve an unconditional leave to defend the

suit. At best the case of the defendant would fall within the ambit of clause 17.4 of proposition in the case of **IDBI Trusteeship** (supra).

36. The conspectus of the aforesaid consideration is that the leave to defend is required to be granted to the defendant subject to payment of entire amount of bank guarantee along with interest thereon @ 9% p.a. from 19th November, 2019. Hence, the following order.

ORDER

i] Leave to defend is granted to the Defendant subject to deposit of a sum of Rs.57,30,00,000/- along with interest @ 9% p.a. from 19th November, 2019 till the date of deposit in the Court, within a period of five weeks from today.

ii] If the aforesaid deposit is made within the stipulated period, this suit shall be transferred to the list of Commercial Causes and the defendant shall file written statement within a period of four weeks from the date of deposit;

iii] If this conditional order of deposit is not complied with within the aforesaid stipulated period, the plaintiff shall be entitled to apply for an *ex-parte* decree against the defendants after obtaining a non-deposit certificate from the Prothonotary and Senior Master of this Court.

iv] Summons for Judgment stands disposed of accordingly.

(N. J. JAMADAR, J.)