

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

**SUMMONS FOR JUDGMENT NO. 2 OF 2021  
IN  
COMMERCIAL SUMMARY SUIT NO. 123 OF 2020**

Axis Bank Ltd. ...Applicant/Ori.  
Plaintiff

**In the matter between**

Axis Bank Ltd. ...Plaintiff

**Versus**

Bank of Baroda ...Defendant

Mr. Shyam Kapadia, a/w Ms. Pranvi Jain, i/b Dhurve Lilahar  
& Co., for the Applicant/Plaintiff.

Mr. Ashish Kamat, a/w Mr. Harsh Moorjani, Nishit Dhruva,  
Prakash Shinde, Ms. Niyati Merchant, Yash Dhruva and  
Harsh Sheth, i/b MDP & Partners, for the Defendant.

**CORAM: N. J. JAMADAR, J.**

**RESERVED ON: 29<sup>th</sup> NOVEMBER, 2022**

**PRONOUNCED ON: 17<sup>th</sup> FEBRUARY, 2023**

**JUDGMENT:-**

1. This commercial division summary suit is instituted for recovery of a sum of Rs.8,56,00,000/- alongwith interest at the rate of 17.40% p.a. from 26<sup>th</sup> February, 2018, the date the bank guarantees, which form the basis of the suit, were invoked.

2. The plaintiff and defendant are the banking companies. Initial transaction was between the plaintiff and Vijaya Bank,

which merged with the defendant, under an amalgamation scheme with effect from 1<sup>st</sup> April, 2019.

**3.** The material averments in the plaint can be summarised as under:

(a) On 9<sup>th</sup> November, 2016, the plaintiff had sanctioned a Gold Metal Loan to the tune of Rs.100 Crores to M/s. Nakshatra Brand Ltd. (M/s. Nakshatra) in accordance with terms and conditions incorporated therein. One of the term was that M/s. Nakshatra would secure the loan by furnishing a Bank Guarantee covering 110% margin of the limit under the loan. At the request of M/s Nakshatra on 15<sup>th</sup> May, 2017 the defendant Viajaya Bank, issued Bank Guarantee No.51011BGIS170040, for or a sum of Rs.2,83,00,000/- towards security of the gold loan sanctioned by the plaintiff equivalent to the notional international price of 10 kg. gold to M/s. Nakshatra. The issuance of the said bank guarantee was acknowledged and confirmed by the defendant vide confirmation letter 16<sup>th</sup> May, 2017 bearing No.MRO/PLANNING/BG-CONF/1702/2017. Likewise, two more bank guarantees bearing No.51011BGIS170044 dated 1<sup>st</sup> June, 2017 for a sum of Rs.2,84,00,000/- and No.51011BGIS170046 dated 27<sup>th</sup> June, 2017 for a sum of Rs.2,89,00,000/- were issued by the defendant.

(b) Under the bank guarantees the liability of the defendant Bank was irrevocable and unconditional. The defendant agreed to pay to the plaintiff merely on demand the amount covered by the bank guarantees without any contest demur or protest. It was expressly provided that a demand by the plaintiff shall be conclusive as regards the amount due and payable by the defendant under said bank guarantees.

(c) The bank guarantees were duly extended.

(d) Pursuant to the drawdown request of M/s. Nakshatra dated 8<sup>th</sup> November, 2017, 30<sup>th</sup> November, 2017 and 21<sup>st</sup> December, 2017, the plaintiff delivered 30 kg. gold metal under invoices dated 26<sup>th</sup> February, 2018. An amount of Rs.9,18,50,615/-, equivalent to the notional international price of 30 kg. gold was utilized by M/s. Nakshatra. Debit notes were raised against M/s. Nakshatra. However, M/s. Nakshatra committed default in repayment of the loan amount on due date and thus committed breach of the terms of the loan agreement.

(e) The plaintiff was thus constrained to invoke the bank guarantees. By letter dated 26<sup>th</sup> February, 2018, the plaintiff in exercise of its rights under the bank guarantees invoked the guarantees and called upon the defendant to make payment thereunder. As there was no response, the plaintiff issued a

reminder on 7<sup>th</sup> March, 2018. In response thereto, vide letter dated 12<sup>th</sup> March, 2018, the defendant wrongfully alluded to a “fraud element” and unjustifiably sought additional information and documents from the plaintiff in complete derogation of its absolute and unconditional obligation under the bank guarantees. There was an exchange of correspondence between the plaintiff and the defendant. However, the defendant failed to honour the guarantees. Hence this suit to recover the amount covered by the bank guarantees alongwith interest thereon.

4. Upon service of writ of summons, the defendant entered appearance. Thereupon, the plaintiff took out the summons for judgment. An affidavit-in-reply is filed by the defendant seeking an unconditional leave to defend the suit.

5. The defendant contends that it is entitled to an unconditional leave to defend the suit as substantial and triable issues arise in the context of an egregious fraud which vitiated the entire transaction. An endeavour was made to demonstrate that the present case is of exceptional and extraordinary nature in as much as M/s. Nakshatra and its promoters/directors are investigated by several law enforcement agencies for having committed a systematic fraud. The Union of India, having regard to the nature and magnitude of the fraud, was constrained to

approach the National Company Law Tribunal ("NCLT") in Company Petition No.277 of 2018 and seek interim reliefs. M/s. Nakshatra is arrayed as third respondent in the said petition. The NCLT, Mumbai, by an order 23<sup>rd</sup> February, 2018 restrained the respondents, other companies and the individual entities associated with them from removal, transfer or disposal of their funds, assets and properties. Since the entire transaction, according to the defendant, is vitiated by fraud, the plaintiff was not justified in invoking and encashing the bank guarantees.

6. The defendant contends that the plaintiff has never provided the particulars of the delivery of the gold physically to M/s. Nakshatra. In the backdrop of the fraud involving M/s. Nakshatra the defendant had repetitively called upon the plaintiff to furnish relevant information/documents evidencing the underlying transaction of delivery of the gold to M/s. Nakshatra by the plaintiff. However, the plaintiff has refused to furnish the requisite information.

7. In the aforesaid circumstances, according to the defendant, it cannot be said that the defendant has not succeeded in raising a substantial defence and/or triable issues. Hence, the defendant deserves an unconditional leave to defend the suit.

8. A affidavit-in-rejoinder is filed on behalf of the plaintiff controverting the contentions in the affidavit-in-reply. The allegations of fraud are stated to be bald and vague. Secondly, the entire premise of fraud is unsustainable as there is no allegation of fraud regarding the issue of the bank guarantees. In the face of unconditional, irrevocable and absolute bank guarantees, according to the plaintiff, there is no defence much less a substantial one. Hence, the Summons for Judgment deserves to be decreed.

9. In the wake of the aforesaid pleadings, I have heard Mr. Kapadia, the learned Counsel for the applicant – plaintiff and Mr. Kamat, the learned Counsel for the defendant, at length. I have also perused the averments in the plaint, affidavit in support of Summons for Judgment, reply and rejoinder thereto and the documents annexed to the plaint and filed alongwith the affidavits.

10. Before adverting to note the submissions canvassed on behalf of the parties, it may be apposite to note few uncontroverted facts so as to narrow down the controversy. It is not much in contest that the bank guarantees were furnished at the instance of M/s. Nakshatra in accordance with the term of the Gold Metal Loan sanctioned by the plaintiff to M/s.

Nakshatra under the sanction letter dated 9<sup>th</sup> February, 2016. There is no dispute over the fact that the subject bank guarantees were issued by the defendant and they were valid and subsisting on the date of invocation by the plaintiff. By and large, there is not much controversy over the fact that the bank guarantees were irrevocable and unconditional. The defendant agreed to pay the amount under the bank guarantees upon demand notwithstanding any dispute raised by the borrower. It was further agreed by the defendant that demand made by the bank shall be conclusive as regards the amount due and payable by the defendant thereunder.

11. The controversy between the parties essentially revolves around the question as to whether the invocation of the bank guarantees was justifiable and the defendant is able to demonstrate that there are circumstances which render the enforcement of the bank guarantees unjust and inequitable.

12. Mr. Kapadia strenuously submitted that in view of the well recognized position in law that there can be no restraint on the enforcement of the bank guarantees once the guarantees are invoked in accordance with the terms of the contract, the defences sought to be raised are wholly sham and vexatious. Mr. Kapadia submitted that in the face of irrevocable, unconditional

and absolute obligation under the bank guarantees, it was not open for the defendant to seek documents and information from the plaintiff in support of the underlying consideration. The action of defendant in seeking proof of the delivery of the gold runs against the very nature of the jural relationship established by the bank guarantee. The plaintiff, according to Mr. Kapadia, was therefore justified in banking upon the clauses of the bank guarantee and calling upon the defendant to make the payment instead of seeking information and documents.

13. Mr. Kapadia further urged that in view of the extremely limited nature of interference permissible in the matter of enforcement of the bank guarantees, bald and unsubstantiated allegations of fraud are of no avail. Neither there is an egregious fraud nor the defendant succeeded in making out a case of irretrievable injustice. Therefore, a decree must follow.

14. To lend support to the aforesaid submissions, Mr. Kapadia placed reliance on a judgment of the Supreme Court in the case of *Andhra Pradesh Pollution Control Board vs. CCL Products (India) Limited*<sup>1</sup>, a Division Bench Judgment of this Court in the case of *M/s. CIPL vs. Indian Oil Corporation Limited and others*<sup>2</sup> and a judgment of a learned Single Judge of this Court in the

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<sup>1</sup>(2019) 20 Scc 669.

<sup>2</sup>Writ Petition (L) No.5594/2020 dated 5/11/2020.

case of ***SKS Power Generation (Chattisgarh) Ltd. vs. Canara Bank***<sup>3</sup>.

15. Per contra, Mr. Kamat stoutly submitted that there is no quarrel with the propositions as to the scope of interference, in the matter of the enforcement of the bank guarantee, by the Courts. Taking the Court though the judgments of the Supreme Court in the cases of ***U.P. State Sugar Corporation vs. Sumac International Limited***<sup>4</sup>, ***Dwarikesh Sugar Industries Ltd. vs. Prem Heavy Engineering Works (P) Ltd. and another***<sup>5</sup>, Mr. Kamat would urge that the present case is of such exceptional and extraordinary nature where the mere invocation of the bank guarantee by the plaintiff would not justify passing of a decree, especially when the defendant has succeeded in demonstrating that both elements of egregious fraud and irretrievable injustice are made out.

16. Mr. Kamant invited the attention of the Court to the order passed by NCLT Mumbai Bench on 23<sup>rd</sup> April, 2018, in the petition preferred by the Union of India, in general public interest, upon unearthing of the fraud of a huge magnitude involving M/s. Nakshatra as well. It was further submitted that

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**3**2021 SCC Online Bom. 1835.

**4**(1997) 1 SCC 568.

**5**(1997) 6 Supreme Court Cases 450.

the plaintiff was not only aware of the fraud but also a privy to the decision in a meeting of the lenders held on 8<sup>th</sup> February, 2018, wherein it was informed that credit limit sanctioned in favour of those entities, including M/s. Nakshatra, have been recalled. The Punjab National Bank had reported the matter as a “suspected fraud” to RBI and a complaint had already been lodged with CBI. All member – Banks agreed to recall the limits given to those entities subject to approval of their higher authorities.

17. Mr. Kamat would urge that after the said order of NCLT dated 23<sup>rd</sup> February, 2018, the alacrity with which the plaintiff invoked the bank guarantee, preceded by issue of the invoice and debit note against M/s. Nakshatra on the very day i.e. 26<sup>th</sup> February, 2018, speaks volumes. Inviting the attention of the Court to the averments in paragraph 4(g) of the plaint to the effect that the invoices and debit notes were issued on the very day, Mr. Kamat submitted that the requisition by the defendant to furnish the documents is required to be appreciated in this context.

18. Taking the Court through the terms and conditions of the loan agreement under which M/s. Nakshatra was obligated to furnish periodical information about the stock position, quarterly

sales position, deposit of sales proceeds even to the bank issuing bank guarantee, Mr. Kamat would urge that serious triable issues as to whether transaction was genuine or fraudulent and whether there was any physical delivery of gold by the plaintiff to M/s. Nakshatra arise for adjudication. In the circumstances, according to Mr. Kamat, the defendant deserves an unconditional leave to defend the suit.

**18 A-** The legal position as regards the nature of obligation under a bank guarantee is well settled. In the case of **Hindustan Steelworks Construction Ltd. vs. Tarapore and Co. and Anr.**<sup>6</sup> 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

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**6**(1996) 5 Supreme Court Cases 34.

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)

19. In the case of **U.P.State Sugar Corporation vs. Sumac International Ltd.**<sup>7</sup> 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 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

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**7**(1997) 1 Supreme Court Cases 568.

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.](#) (1988 [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 supplier 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] On 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). 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 realisation of the bank guarantee/Letters of credit would cause irreparable harm to the plaintiff. This contention was upheld. To 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.

(emphasis supplied)

20. 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.**<sup>8</sup>. 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 the Court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary, by way of restitution.”

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**8**(1997) 6 Supreme Court Cases 450.

**21.** In the case of *Andhra Pradesh Pollution Board* (supra) the Supreme Court after adverting to previous pronouncements, exposited that the settled legal position which has emerged from the precedents of the Supreme Court is that, absent a case of fraud, irretrievable injustice and special equities, the Court should not interfere with the invocation or encashment of a bank guarantee so long as the invocation was in terms of the bank guarantee.

**22.** In the light of the aforesaid exposition of law as regards the circumstances in which the Court would be justified in interfering with enforcement of an unconditional and irretrievable bank guarantee, the quality of the defence sought to be put-forth by the defendant is required to be appraised.

**23.** First and foremost, the context in which the defence is raised deserves to be noted. The defendant's contention that M/s. Nakshatra, at whose instance the bank guarantees were issued, was allegedly involved in a fraud is borne out by an order passed by the NCLT dated 23<sup>rd</sup> February, 2018. It would be contextually relevant to note that the fact that the lenders, including the plaintiff, had an inkling of the fraud becomes evident from the minutes of the joint lenders meeting held on 8<sup>th</sup> February, 2018, a fortnight before the aforesaid order. The

minutes of the said meeting throw light on the context. They read as under:

“Shri. Vimlesh Kumar, GM, PNB chaired the meeting and welcomed the participants.

GM, PNB informed the consortium that they have found certain unauthorized LOUs issued on behalf of Gitanjali Germs Ltd and Gili India Ltd utilizing PNB SWIFT system unauthorisedly.

In view of this criminal conspiracy, debit operations in the accounts have been freezed in all the accounts of Gitanjali Group I.e Gitanjali Gems Ltd, Gili India Ltd, Nakshatra Brands Ltd and Asmi Jewellery India Ltd and credit limits sanctioned in their favour have been recalled.

Further, the Bank has reported the matter as suspected fraud to RBI and a complaint has also been submitted to CBI in the matter.

The matter was discussed amongst the lenders and decided not to permit operations in the account and recall the limits sanctioned to these companies. All member banks agreed to recall the limits subject to approval of their higher authorities.

After much deliberations on further course of action, it was decided that future course of action including possession of stocks/securities may be discussed in next meeting. Once mandate for recalling limits is available with member banks.”

24. Secondly, the fact that the plaintiff invoked the bank guarantee after a couple of days of the order of NCLT, Bench Mumbai, cannot be said to be wholly inconsequential and immaterial Whether the order passed by the NCLT on 23<sup>rd</sup> February, 2018, was a driving force behind the invocation of the bank guarantee or it was in the normal course of banking operations may also bear upon the issue at hand.

**25.** To this end, a reference to the documents, especially the drawdown requests made by M/s. Nakshatra and the demand to the borrower and the consequent default becomes apposite. The drawdown requests were made by M/s. Nakshatra on 18<sup>th</sup> November, 2017, 30<sup>th</sup> November, 2017 and 21<sup>st</sup> December, 2017, for 19 kg., 10 kg. and 1 kg. gold, respectively. The repayment was due under each of the drawdown requests on 4<sup>th</sup> May, 2018, 25<sup>th</sup> May, 2018 and 4<sup>th</sup> May, 2018, respectively. It is the claim of the plaintiff that in terms of these drawdown requests the plaintiff had delivered the specified quantity of the gold indicated therein.

**26.** This claim is sought to be substantiated by banking upon the debit note, tax invoice and the letter of invocation. The debit notes were raised against M/s. Nakshatra on 26<sup>th</sup> February, 2018, on the day the bank guarantee was invoked. Undoubtedly, in view of the unconditional and irrevocable nature of the bank guarantees, the defendant had agreed to pay the amount under bank guarantee on mere demand. However, the context and the entire setting of the matter cannot be lost sight of.

**27.** The issue of the debit notes on the very day the bank guarantees were invoked cannot be brushed aside as a mere coincidence. The copies of the debit notes, annexed to the plaint,

refer to the invoice which was drawn on the dates of the drawdown requests. The invoices do not bear the acknowledgments of the recipient. Even the invoices and debit notes do not bear the signatures of the authorised signatory.

**28.** In this backdrop, the first response of the defendant dated 12<sup>th</sup> March, 2018 to the notice invoking the bank guarantees assumes significance. The relevant part of the said letter reads as under:

“In view of the exceptional and extraordinary circumstances and the fraud element involved, the Competent Authority has sought the following additional information:

1. Kindly furnish a copy of Account Statement in respect of the GML availed against the invoked BGs.
2. Kindly Clarify whether the GML against the above referred BGs were for Domestic/Export Sales.
3. Kindly confirm that the Gold Metal Loan proceeds have been utilized for Working Capital purpose and submit a copy of the borrowers self certificate for each drawal.
4. Kindly submit documentary evidence to the effect that the borrower has defaulted in terms of the GML agreement executed between Axis Bank Ltd and Nakshatra Brands Ltd.

We request you to submit the above information at the earliest to enable our Competent Authority to take a view on your request.”

**29.** Can the defendant draw any support and sustenance from the underlying contract between the plaintiff and M/s. Nakshatra, to arm the defendant with the right to seek the

information and/or documents. Clauses 10 and 12 of the terms and conditions of Gold Metal Loan Agreement read as under:

|     |                                                               |                                                                                                                                                                                                                                                      |
|-----|---------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 10. | Information sharing with company and with other member banks. | The company to submit monthly stock position and quarterly sales position, deposit of sales proceeds etc., at stipulated intervals and there should be proper sharing of the above information between GML providing bank and SB LC/BG issuing bank. |
| 12. | Other Covenants                                               | i. ....<br>ii. Borrower shall submit data on quarterly sales, stock position at month end and this data shall be shared with SBLC/BG issuing bank.<br>iii. ....                                                                                      |

30. At this juncture, it would be necessary to note the pleadings in paragraph 4(g) of the plaint:

“4(g) That as per Clause 7 of the gold loan agreement dated 9<sup>th</sup> January, 2017 executed by the Nakshatra, the disbursement of the loan amount was required to be made by way of physical delivery of the gold metal. Accordingly, at the drawdown requests dated 8<sup>th</sup> November 2017, 30<sup>th</sup> November 2017 and 21<sup>st</sup> December 2017 received from the Nakshatra, the Plaintiff delivered the 30 kg of gold metal. Details whereof are as under;

| Sr. No. | Debit Note Reference | Invoice Date | Gold (in kgs) | Final Sale Value (as on 26.02.2018) | Differential Tax Amount | Principal Amount |
|---------|----------------------|--------------|---------------|-------------------------------------|-------------------------|------------------|
| 1       | ID17GLG47            | 26.02. 2018  | 19            | 5,80,39,954/-                       | 67,292/-                | 5,81,07,246/-    |
| 2       | ID17GGN,38           | 26.02. 2018  | 10            | 3,06,40,914/-                       | 34,104/-                | 3,06,75,018/-    |
| 3       | ID17GGBM 45          | 26.02. 2018  | 1             | 30,62,941/-                         | 5,410/-                 | 30,68,351/-      |
| TOTAL   |                      |              |               | 9,17,43,809/-                       | 1,06,806/-              | 9,18,50,615/-    |

Hereto annexed and marked as **Exhibit “L”, “M-1”, “M-2 ” and “M-3”** are copies of the drawdown request dated 8<sup>th</sup> November, 2017, along with the corresponding invoice, debit note and tax invoice all dated 26<sup>th</sup> February, 2018. ....”

31. Two circumstances assume critical salience. First, in the plaint the plaintiff did not assert that the invoices evidencing the delivery of the gold were raised on the respective dates of drawdown request. It was claimed that the invoices were issued on 26<sup>th</sup> February, 2018. Second, the plaintiff does not assert that in accordance with the terms of the loan agreement, extracted above, the borrower had shared the information on monthly stock position, quarterly sales position and deposit of sale proceeds, or for that matter, the defendant was also apprised of the same and had been informed about the stock position by the borrower. These twin factors, if considered in the light of the concomitant circumstances of a fraud of huge magnitude allegedly perpetrated by, *inter alia*, M/s. Nakshatra, and the plaintiff being a privy to the information revealing a suspected fraud, render the defence sought to be raised by the defendant a fair and reasonable defence. When the defendant bank has adverted to the aforesaid circumstances, in my view, the plaintiff cannot simply bank upon unconditional and irrevocable nature of the bank guarantees.

32. In any event, delivery of 30 kg. of gold must be evidenced by documents to vouch for the same. Reluctance of the plaintiff to disclose those basic documents renders the defence that there

was no actual physical delivery of the gold to M/s. Nakshtra, a tribale issue.

**33.** On the aspect of irretrievable injustice, Mr. Kapadia submitted that mere inability to recover the amount by the bank from the borrower cannot be construed as an irretrievable injustice. Attention of the Court was invited to the observations of the learned Single Judge in the case of ***SKS Power*** (supra) wherein after adverting to the previous pronouncements, the learned Single Judge held that in order to invoke special equities, that is to say, that the person against whom invocation is made would never be able to recover the amount under the bank guarantee, it must be shown decisively to the satisfaction of the Court that there is no possibility\_\_\_i.e. not the slightest possibility at all\_\_\_of restitution in the said amount. Merely showing that a person at whose instance the bank guarantee is issued is in a precarious financial condition or that it is in liquidation is insufficient for this purpose. What must be demonstrated must be something far more clear than a mere apprehension.

**34.** In the case at hand, in the order dated 10<sup>th</sup> November, 2021 passed by NCLT, Mumbai Bench, it is recorded that the Committee of Creditors of M/s. Nakshatra decided that since

M/s. Nakshatra did not have running business and all assets of the corporate debtor were seized/attached by the various Government agencies, the possibility of getting a Resolution Plan was remote and, therefore, it was decided by the Committee of Creditors to obtain approval of the appropriate authority for liquidation of M/s Nakshatra. Thereupon, the NCLT appointed a Liquidator under Section 34 of the Insolvency and Bankruptcy Code, 2016.

**35.** It is true that the mere fact that the liquidation proceedings are initiated against M/s. Nakshtra, by itself, would not furnish a justification for an inference of an irretrievable in justice. However, in the totality of the circumstances, this factor assumes significance. The assets of M/s. Nakshtra stand attached. M/s. Nakshatra is allegedly involved in a huge corporate fraud. Key managerial persons have allegedly made themselves scarce. In such a situation, where the factum of underlying consideration of delivery of the physical gold is put in the arena of controversy, if the bank guarantee issuing bank is called upon to discharge its obligation under the bank guarantees, in my view, it would cause irretrievable injustice.

**36.** Lastly the test which is required to be applied in granting or refusing to grant leave to defend in a summary suit deserves to

be noted. In a recent pronouncement in the case of *B.L. Kashyap and Sons Limited vs. JMS Steels and Power Corporation and Another*<sup>9</sup>, the Supreme Court, after considering the previous judgments including *IDBI Trusteeship Services Ltd V. Hubtown Ltd.*,<sup>10</sup> culled out the test as under:

“33.3 Therefore, while dealing with an application seeking leave to defend, it would not be a correct approach to proceed as if denying the leave is the rule or that the leave to defend is to be granted only in exceptional cases or only in cases where the defence would appear to be a meritorious one. Even in the case of raising of triable issues, with the defendant indicating his having a fair or reasonable defence, he is ordinarily entitled to unconditional leave to defend unless there be any strong reason to deny the leave. It gets perforce reiterated that even if there remains a reasonable doubt about the probability of defence, sterner or higher conditions as stated above could be imposed while granting leave but, denying the leave would be ordinarily countenanced only in such cases where the defendant fails to show any genuine triable issue and the Court finds the defence to be frivolous or vexatious.”

37. A profitable reference can also be made to the Judgment of the Supreme Court in the case of **State Bank of Hyderabad Vs. Rabo Bank**<sup>11</sup>. In the said case in the backdrop of the allegations of the 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:-

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**9** (2022) 3 SCC 294.

**10** (2017) 1 SCC 568

**11** (2015) 10 SCC 521

“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 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.”

**38.** Applying the aforesaid principles to the facts of the case, in my view, the defendant is entitled to leave to defend the suit without making any deposit. However, it would be expedient to put the parties to terms as to the period of trial.

**39.** Hence, the following order:

**: O R D E R :**

(i) The defendant is granted an unconditional leave to defend the suit.

(ii) The defendant shall file written statement within a period of 30 days from today.

(iii) The pre-trial formalities be completed within two months thereafter.

(iv) The hearing of the Suit stands expedited.

Summons for Judgment stands dismissed.

In view of the the dismissal of the Summons for Judgment, pending application(s), if any, stand(s) disposed.

**[N. J. JAMADAR, J.]**