

CASE NO.:
Appeal (civil) 2662 of 2002

PETITIONER:
STATE BANK OF SAURASHTRA

Vs.

RESPONDENT:
M/S ASHIT SHIPPING SERVICES P. LTD. & ANR.

DATE OF JUDGMENT: 12/04/2002

BENCH:
Syed Shah Mohammed Quadri & S.N. Variava

JUDGMENT:

S. N. VARIAVA, J.

- 1) Leave granted.
- 2) Heard parties.

3) Briefly stated the facts are as follows:
The 1st Respondent is working as an agent for one M/s Palm Oil Transportation Pvt. Ltd., C/o M/s Samta Shipping Agency P. Ltd., Singapore for their vessel MV Hec Ann which arrived at Kandla port on 20th June, 1995. The said ship was carrying logs of timber consigned to various parties under the following documents:
"a) Bills of lading No. HA/9504/47 to 49 dated 30.5.95.

b) Invoice Nos VB 95003 dated 30.5.95 for US\$ 10,566.43
-do- Nos. VB 95003/Int of -do- for US \$ 312.65
-do- Nos. VB 95002 of -do- for US \$ 5,029.23
-do- Nos. VB 95002/Int of -do- for US \$ 148.81
-do- Nos. VB 95001 of -do- for US \$ 44,539.65
-do- Nos. VB 95001/Int of -do- for US \$ 1,317.89
\$ 61,914.66"

It appears that the 2nd Respondent sent to the 1st Respondent a Bond which, inter alia, provided as follows:

"The above goods were shipped on the above vessel by M/s. Matsui and company (Hong Kong) Limited Hong Kong 59 pieces (and consign to the order) but relevant bills of lading has not yet arrived.

We hereby request you to deliver such goods to M/s. (Vasani Bros) Bhavnagar in accordance with our request.

1. To indemnify you and held harmless in respect of any liability loss or damage or whatsoever nature which you may sustain by reason of delivering the goods of M/s. Vasani Brothers, Bhavnagar in accordance with our request.
2. To pay you on demand the amount of any loss on which the Master / agent of the vessel or any other of your

services or agents whatsoever may incur as a result of delivering the goods aforesaid.

XXX
XXX

XXX
XXX

XXX
XXX

6. To produce and deliver to you the Bills of lading for the above goods duly endorsed as such as documents shall have arrived.

XXX
XXX

XXX
XXX

XXX
XXX"

On the said Bond the following notation appears with the stamp of the Appellant Bank and the signature of their Manager:

"We the undersigned hereby join in the above indemnity and jointly and severally guarantee due performance of the above contract and accept all the formalities expressed therein.

Sd/-

Stamp and Signature of Bank."

4. The 1st Respondent claim that on the basis of this Bond they issued a Delivery Memo dated 14th June, 1995 to the 2nd Respondent. 2nd Respondent thereafter took delivery of the cargo. It further appears that the 2nd Respondent never delivered to the 1st Respondent the duly discharged bills of lading.

5. The 1st Respondent therefore wrote a letter dated 31st August, 1995 to the Appellants, terming the document as an indemnify guarantee. The 1st Respondent stated, in the latter, that if the bills of lading were not delivered they would invoke the guarantee. The Appellant replied to the said letter by the letter dated 16th September, 1995 and asked for copy of the Bond and delivery Orders. Further correspondence thereafter took place between the parties. The 1st Respondent then filed a summary Suit under Order 37 of the Code of Civil Procedure. They claimed a sum of Rs. 21,08,813.32 with interest of Rs. 1,62,450.02 upto filing of the suit and further interest from date of Suit till payment.

6. The Appellants and the 2nd Respondent filed applications for leave to defend. The 2nd Respondent has not come up in Appeal to this Court. We are thus only concerned with the application for leave to defend filed by the Appellants.

7. In the application for leave to defend the Appellant, inter alia, contended that the suit was for recovery of the price of the goods and the interest on the said amount. They contended that the Court at Gandhidham had no jurisdiction. They also contended that the document was an indemnity bond and the 1st Respondent should thus prove that they had suffered a loss. They pointed out that in the Plaint the 1st Respondent had not averred that they had suffered any loss or damage. It was, inter alia, averred as follows:
"In this connection it is submitted that the so called and alleged bond is not Bank Guarantee or Guarantee Bond and it is only Indemnity Bond. The said Bond purported to have been signed by the defendant No. 2 in favour of the plaintiff and countersigned by the Manager of the defendant No. 1 of Bhavnagar Station Branch which is in flagrant violation of the Bank's Procedure as it was never entered in the Bank's record nor Controller's permission or sanction was obtained. It is submitted that the Branch

Manager has exceeded his powers and alleged indemnity bond is not binding on the defendant No. 1. It therefore leads to the suspicion that the same is fraudulently obtained by the plaintiff in collusion with the defendant No. 2 and also with assistance of the then Branch Manager of the said Branch.

XXX	XXX	XXX
XXX	XXX	XXX

Without prejudice to the averments made hereinbefore and hereinafter and making no admission of what so ever nature it is submitted that the Bhavnagar (main) Branch had received an inquiry from the negotiating Bank about certain discrepancies noticed in the Bank documents submitted by the beneficiary M/s. Mstui & Co., and therefore, they sought the confirmation of the said Branch whether the bill with those discrepancies could be negotiated. As this defendant/opener of the I/C was not accepting the discrepancies, the said negotiating Bank was advised not to negotiate the bills under the L/C. Though the L/C was established by the defendant No. 1 the negotiating Bank was advised not to negotiate the documents. Therefore, there is no liability arises of this defendant of whatsoever nature."

Thus it is to be seen that the Appellant had, amongst other contentions, averred that a fraud had been made on them by the 1st Respondent in collusion with the 2nd Respondent and their Manager. They also averred that they had refused to negotiate L/C as there were discrepancies. No rejoinder was filed by the 1st Respondent. Thus there was no denial of these averments.

8. The trial Court by an Order dated 30th October, 1996 refused leave to defend. The trial Court held that the Appellant had not raised any triable issue. It, inter alia, held as follows: "that facts clearly show that bank has categorically given a guarantee and so no triable issue is arising, and therefore, provisions of Order 37 of CPC specifically applies to the suit of the plaintiff and these facts are supported by the decision reported in AIR 1990 Patna Page-221. Further, it is not the say of the Defendant that the plaintiff has committed fraud and for that reason it cannot also stop the payment under the Bank Guarantee and that this fact has also been denied by Defendant No. 2 and has stated that the plaintiff has not colluded with Defendant No. 2 and as only on the imaginary facts, it cannot be said that the fraud has been committed."

9. Both the Appellants and the 2nd Respondent then filed Revisions before the High Court of Gujarat at Ahmedabad. Both those Revisions came to be dismissed by the impugned Order dated 18th April, 2002. The High Court also held that no triable issue had been raised. The High Court held that the defence sought to be raised was "nothing but a sham".

10. The law on the subject is well settled. In the case of Mechalec Engineers & Manufacturers v. Basis Equipment Corporation reported in AIR (1977) SC 577, it has been held that the question of granting leave to defence has to be considered in the light of following principles:

a) If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is

entitled to unconditional leave to defend.

b) If the defendant raised a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shows such a state of facts as leads to the inference that at the trial of the action he 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.

d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence.

11. In the case of *Raj Duggal v. Ramesh Kumar Bansal* reported in AIR (1990) SC page 2218, it has been held that leave to defend must be declined where the Court is of the opinion that grant of leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defences. It has been held that the test is to see whether the defence raises a real issue and not a sham one. It has been held that when there is a plausible defence leave to defend must be granted. It has been held that if there is a dispute as to the meaning of a document or uncertainty as to the amount actually due or the facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witness leave should not be denied.

12. In this case, as already set out hereinabove, there is a dispute as to whether the document is a guarantee or merely an Indemnity. The 1st Respondent termed the document to be an indemnity/guarantee. The Appellants denied that the document was a Guarantee. On the face of it the document appears to be an Indemnity and not a Guarantee. The Court was therefore required to consider the nature and meaning of the document. This by itself necessitated granting of leave to defend.

13. Further this is a document given by the 2nd Respondent to the 1st Respondent. On this document, contrary to the normal practice, the Manager of the Appellant Bank has merely affixed the stamp of the Appellants and signed under a paragraph which states that they had joined in the indemnity. The Appellants had also set out in their application for leave to defend that the documents submitted to the negotiating Bank were not negotiated as there were discrepancies in those documents. To this averment there was no reply or denial by the 1st Respondent. The Appellants have made serious allegations of

fraud and collusion. They had stated that such a document did not exist in their records. This was not a defence which could be characterised, at this stage, as sham or illusory or practically moonshine. These triable issues should not have been summarily rejected by the trial Court and/or the High Court.

14. As stated above, prima facie, the document appears to be an Indemnity Bond. In cases of Indemnities the question of making good the loss arises only when there is proof that loss is suffered. In this behalf the wording of Order 37 are relevant. Rule 1 of Order 37 reads as follows:

"1. Courts and classes of suits to which the Order is to apply.- (1) This order shall apply to the following Courts, namely:-

- (a) High Courts, City Civil Courts and Courts of Small Causes; and
- (b) Other Courts:

Provided that in respect of the Courts referred to in clause (b), the High Court may, by notification in the Official Gazette restrict the operation of this Order only to such categories of suits as it deems proper, and may also, from time to time, as the circumstances of the case may require, by subsequent notification in the Official Gazette, further restrict, enlarge or vary, the categories of suits to be brought under the operation of this Order as it deems proper.

(2) Subject to the provisions of sub-rule (1), the Order applies to the following classes of suits, namely:-

- (a) suits upon bill of exchange, hundies and promissory notes;
- (b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising,-
 - (i) on a written contract; or
 - (ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than an penalty; or
 - (iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only."

It is to be seen that under sub-rule (2)(iii) of Rule (1) of Order 37 a claim could be made on the basis of a guarantee. Significantly Order 37 CPC does not provide for a claim based on an Indemnity Bond. The reason is obvious. In cases of claims on Indemnity Bonds the loss would first have to be proved. Thus a summary procedure cannot be adopted in such cases.

15. Mr. Chidambaram relied upon the case of Oil & Natural Gas Corpn. Ltd. v. SBI, Overseas Branch reported in (2000) 6 SCC 385. In this case the question was whether leave to defend could have been granted in a summary suit based on an unconditional bank guarantee. This Court held that such bank guarantees must be honoured unless

fraud had been played. This Court held that in the absence of any fraud leave to defend should not be granted in cases of unconditional bank guarantees. There can be no dispute with the above proposition. However, this decision is based on the law regarding unconditional bank guarantees. Courts have consistently held that unconditional bank guarantees must be honoured by the banks. In the present case, it is not clear whether the document is an indemnity or a guarantee. In any event, there is no unconditional bank guarantee. Even if the document is held to be a guarantee it is only on proof of loss. Also in this case fraud has been alleged. Thus the authority is of no assistance to the 1st Respondent.

16. In our view, for the aforesaid reasons, leave to defend could not have been refused to the Appellants. We therefore set aside the impugned Judgment dated 18th April, 2001 and the trial Court Order dated 30th October, 1996 and grant the Appellants leave to defend the suit. They shall file their written statement within a period of 8 weeks from today. The parties are at liberty to disclose documents within 4 weeks thereafter. The parties are at liberty to apply to the trial Court for expeditious hearing of the suit.

17. Mr. Chidambaram also relied upon the authority in the case of Kamlesh Kohli v. Escortrac Finance & Investment Ltd. reported in (2000) 1 SCC 324. In this case it has been held that leave to defend could be granted to one of the defendants and not the others. It was held that the Court was not obliged to grant leave to defend to other defendants merely because leave to defend is granted to one of the defendants. We clarify that the leave to defend has been granted only to the Appellants. The 2nd Respondent is not before this Court. We have not considered the case of the 2nd Respondent. Merely because leave to defend is granted to the Appellant does not necessarily mean that the 2nd Respondent is also to be entitled as of right to leave to defend. We also clarify that all observations made herein are prima facie and that they shall not be taken into account at the final hearing of the Suit.

18. The Appeal stands disposed of accordingly. There shall be no order as to costs.

....J.
(SYED SHAH MOHAMMED QUADRI)

J.
(S. N. VARIAVA)

April 12, 2002