

(2012) 12 BOM CK 0126

In the Bombay High Court

Case No : Summons for Judgment No. 11 of 2012 in Summary Suit No. 3131 of 2011

Board of Control for Cricket in India

APPELLANT

Vs

Punjab National Bank

RESPONDENT

Date of Decision : 20-12-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2

Citation : (2012) 12 BOM CK 0126

Hon'ble Judges : S.J. Kathawalla, J

Bench : Single Bench

Advocate : T.N. Subramanian, Along with Ms. Akhila Kaushik, Mr. Indranil Deshmukh, Mr. Rahul Mascarnhas and Mr. Adarsh Saxena, instructed by M/s. Amarchand Mangaldas and Suresh A. Shroff and Co, for the Appellant; Ravi Kadam , in Summons for Judgment No. 11 of 2012 in Summary Suit No. 3131 of 2011, Mr. V. Dhond in Summons for Judgment No. 12 of 2012 in Summary Suit No. 3132 of 2011 and Mr. Shailesh Mendan in Summons for Judgment No. 13 of 2012 in Summary Suit No. 3133 of 2011 Along with Mr. Nishit Dhruve, Prakash Shinde and Ms. Prachi Mhatre, instructed by M/s. MDP and Partners in Summons for Judgment No. 11 of 2012 in Summary Suit No. 3131 of 2011, Summons for Judgment No. 12 of 2012 in Summary Suit No. 3132 of 2011 and Summons for Judgment No. 13 of 2012 in Summary Suit No. 3133 of 2011, for the Respondent

Judgement

S.J. Kathawalla, J.—The Plaintiff has filed the above three Summary Suits for recovery of sums of (i) Rs. 597,98,37,329/-, (ii) Rs. 406,47,26,027/- and (iii) Rs. 597,98,37,329/- with interest thereon at the rate of 10 per cent per annum from the date of filing of the suits until payment and/or realisation. In the above three Summary Suits, the Plaintiff has taken out the above three Summonses for Judgment praying that judgment be entered for the Plaintiff in the above suits against the Defendants for the sums set out hereinabove along with interest. All the above three Summonses for Judgment are taken up for hearing and disposed of by this common judgment.

2. The facts in the matter are briefly set out hereunder:

3. By a Media Rights License Agreement dated 15th October 2009 (the said Agreement), entered into between the Plaintiff-The Board of Control for Cricket in India ("BCCI") and one Nimbus Communications Limited ("Nimbus"), BCCI granted Nimbus license of certain rights in respect of cricket matches played in India, as set out in the MRLA. The said Agreement was amended from time to time. However, the amendment which is relevant for the purpose of the present proceedings is the Addendum dated 21st October 2009. The said Agreement read with the said Addendum dated 21st October 2009 shall hereinafter be referred to as "the MRLA".

4. In order to secure the obligations of Nimbus under the MRLA, each of the Defendants issued 9 unconditional and irrevocable Bank Guarantees, out of which two Bank Guarantees (in relation to each of the Defendants) were released and duly discharged with the consent of the BCCI and thus stood terminated on such release. As such, two of the nine Bank Guarantees issued by each of the Defendants have been returned by BCCI to the respective Defendants in terms of the MRLA and have therefore been terminated. The present Summary Suits are in respect of the money payable to BCCI under the other Bank Guarantees, aggregating to approximately Rs. 1602 crores.

5. Some of the clauses of the MRLA referred to by the parties in the course of their arguments are reproduced hereunder:

7. RIGHTS FEE AND FINANCIAL GUARANTEE

7.1 In consideration of Licensor's grant of the license of the Media Rights, Licensee shall pay to the Licensor in accordance with this clause 7 the Rights Fee as follows (the parties agree that the Rights Fee shall be as per the table below to each of the BCCI Events in accordance with the following table:

For each ODI, Test and 20/20 International Match. 2010-2014 Rupees 31.25 Crores (thirty one crores and twenty five lakhs) for each match (per match Value)

Licensee specifically acknowledges that Licensor is in negotiation with the ICC and the Cricket Boards of various countries to finalise the Future Tours Programme ("FTP") for all bilateral cricket tours by the Indian National Team from April 2010 onwards and changes are likely to take place in the above schedule of Matches. To the extent any series or Match/Matches is/are either increased or reduced in any year during the Rights Period, the Rights Fee payable will be pro rata increased for the extra series or Match/Matches, as the case may be, or decreased to the extent of the series or Match/Matches reduced, as the case may be, based on the Per Match Value stated above for all the series or Matches as included in the schedule below or New series scheduled by Licensor. It being understood and agreed by licensee that if Licensor decides to schedule a Tri series the amount paid per match will remain as per the Per match Value defined above.

The current schedule for Matches is as listed below:

....

Payment Schedule

7.2 The Rights Fee shall be paid by Licensee to Licensor in the instalments and by the due dates for payment of each instalment set out in the Payment Schedule (annexed hereto). Interest shall be payable by Licensee to Licensor on any late payments of any amount including any instalment of the Rights Fee at a rate of twelve per cent (12%) per annum. Any delay of payment will constitute a Material Breach by the Licensee.

Schedule-1

Payment Schedule

3. The Licensee shall pay the Rights Fee for each during the Rights Period in accordance with the payment schedule below:

1.1 The Rights Fee payable shall be determined on the basis of the per match value as set out in Clause 7.1 to each BCCI Event as set out in Schedule-3 hereto during each year of the Rights Period.

(a) In respect of the Rights Fee period 1st April 2010 to 31st March 2014,

50 per cent of the Fee shall be payable not later than 30 days before the commencement of the each of the Series and the balance 50 per cent shall be payable within 60 days after the Scheduled date of the last match of the series.

The Licensor shall notify Licensee of the scheduled commencement date and the scheduled last match of each of the respective series at least 60 days in advance.

Withholding and deductions

7.3

Bank Guarantee

7.4 For the purpose of securing Licensee's obligation to pay the Rights Fee in accordance with the foregoing provisions of this Clause 7, Licensee shall deliver to Licensor an irrevocable and unconditional Bank Guarantee in accordance with the provisions of this Agreement.

7.5 Licensee shall deliver to Licensor, a Bank Guarantee to guarantee the entire Rights Fee within seven (7) days of execution of this Agreement, which Bank Guarantee shall be valid and subsisting for the entire Rights Period. It is agreed by Licensee that it will provide a Bank Guarantee for 2000 crores(two thousand crores) within 7 days of signature of this agreement. The Bank Guarantee shall only be invoked if there is a failure by Licensee to make payment of the Rights Fee as per Clause 7.2 and after licensor issues a notice as per the procedure set out in Clause 10.3 and any amount already paid by Licensee which is still

covered by the Bank Guarantee will be refunded to the Licensee.

7.6 (a)

(b) Mitigation Clause: Licensee acknowledges and agrees that in the event of Licensor terminating the Agreement in accordance with the provisions contained in the agreement, BCCI shall be entitled to offer the Media Rights for retender to third parties. In respect of Bank Guarantee in BCCI's possession at the time of such retender, BCCI shall encash the Bank Guarantee and shall appropriate the amounts due in pursuance to this contract. BCCI acknowledges that the fees agreed pursuant to a re-tender will mitigate any loss occasioned by Licensee's default and agrees to refund the Licensee the balance amounts after deducting the amounts owed by the Licensee. However, in case, even after retender and encashing the Bank Guarantee, the amount of liability of the Licensee is not satisfied, then the "Licensee shall pay the outstanding dues/amount under this contract to the Licensor within a period of one month.

TERMINATION

10.1 (a) Either party may at any time (without prejudice to any other rights it may then have against the other party) by giving written notice to the other party (the "Defaulting Party") terminate this Agreement if the Defaulting Party commits a "material breach" (as defined below) or material breaches of this Agreement, such material breach or material breaches to have been committed fraudulently, maliciously, recklessly, negligently or willfully and such material breach is not remedied within 21 days of receipt of such written notice requiring it to do so (it being agreed that if such written notice is not received within 60 days of such breach, then, notwithstanding Clause 18 of the Agreement, the right to serve such written notice shall immediately expire in respect of the relevant material breach), provided that the parties must follow the procedure set out below prior to such termination taking effect if the Defaulting Party disputes the entitlement of the other party to terminate, including without limitation a dispute as to whether there has been a material breach or whether such material breach was fraudulent, malicious, reckless, negligent or willful, or if there is any dispute as to what steps should be taken to remedy such material breach.

....

EFFECT OF TERMINATION OR EXPIRY

11.1 Upon expiration or termination of this Agreement for any reason whatsoever:

(a) All rights, licenses and benefits (including, without limitation the Media Rights) shall forthwith revert to Licensor;

(b) Licensee shall immediately cease to exercise or exploit the Media Rights and Licensor shall immediately thereafter be entitled to grant all or any of the Media

Rights to any other person, and shall not thereafter use or exploit its previous connection with Licensor or any of the Matches, whether directly or indirectly;

(c) Licensee shall not at any time thereafter:

(i) Disclose or use any confidential information relating to Licensor acquired by Licensee during or as a result of this Agreement;

(ii) Make any use of the Licensor Marks or any trade marks, trade names, and/or logos which are similar to any of the foregoing;

(iii) Purport to be associated with Licensor.

(d) Licensor and Licensee shall promptly return to the other all property of the other within its possession, save that each will be permitted to retain such property as it demonstrates (to the other party's reasonable satisfaction) to be required by law to be maintained for records;

(e) Licensee shall execute any documents required by Licensor to effect the termination and/or assignment of any rights in connection with the Media Rights;

(f) Such termination shall be without prejudice to any other rights or remedies to which a party may be entitled under this Agreement or at Law as a result of or in relation to any breach or other event which gives rise to such termination, and shall not affect any other accrued rights or liabilities of either party as at the date of termination; and

(g) Within fourteen (14) days after the expiry of the Rights Period or after any earlier termination of this Agreement, Licensee shall upon and in accordance with the reasonable written instructions of Licensor either (at the Licensor's election):

(a) deliver to (delivery costs being for the account of Licensee where such instructions follow a termination of this Agreement pursuant to Clause 10.2, but otherwise being for the account of Licensor) or make available for collection by Licensor; or (b) procure destruction of, all or any recordings of Footage made pursuant to this Agreement and such other tapes and videos delivered to Licensee by or on behalf of such Licensor pursuant to this Agreement. Any such delivery shall be to the address notified to Licensee by Licensor in writing or otherwise in accordance with the written instructions of Licensor.

11.2 It is acknowledged and agreed that the terms of Clauses 3.5, 5.7, 8.17, 8.18, 9.3, 9.4, 11.1, 14, 15, 17, 18, 21, 22, 24, 25 and 28 shall survive termination of this Agreement.

6. In terms of the MRLA, on 7th October 2011, Nimbus was required to pay a sum of Rs. 137,87,50,000/- being the first instalment of the Rights Fees payable in relation to the 2011 West Indies Series. Nimbus made part payment of Rs. 50,00,00,000 (Rupees Fifty crores) on 15th November 2011. The Plaintiff through its Advocate's letter dated 16th November 2011 called upon Nimbus to make payment of Rs. 87,87,50,000/- (Rupees Eighty seven crores eighty seven lakhs fifty thousand) within a period of five days. Nimbus made part payment of

Rs. 24,08,75,000/- and failed to pay the balance of Rs. 63,78, 75,000/-. The Plaintiff through its Advocate's letter dated 12th December 2011 terminated the MRLA and invoked the Bank Guarantees on 13th December 2011.

7. On 14th December 2011, Nimbus filed Arbitration Petition (L) No. 1425 of 2011 u/s 9 of the Arbitration and Conciliation Act, 1996, inter alia seeking an interim injunction restraining the Plaintiff from receiving any amounts under the said Bank Guarantees and restraining the Defendants from paying any amounts under the said Bank Guarantees.

8. On the same day, the Plaintiff received a letter dated 14th December 2011 from the Defendants categorically refusing to make payment under the said Bank Guarantees. On 15th December 2011, when the Petition filed by Nimbus was taken up for hearing, the Plaintiff filed an Affidavit-in-reply inter alia disputing the facts stated therein, as well as the entitlement of Nimbus to seek ad-interim reliefs as prayed for in the Petition filed by Nimbus. The Senior Advocate appearing for the Defendants made a statement that the Defendants do not intend to make payment pursuant to the Plaintiff's invocation of the said Bank Guarantees and that the Defendants contend that they are not liable to make payment under the said Bank Guarantees. The said statement came to be recorded in the order dated 15th December 2011 passed by this Court in the Petition filed by Nimbus. On 16th December 2011, the Plaintiff filed an Arbitration Petition (L) No. 1439 of 2011 inter alia against the Defendant for the reliefs prayed for therein after obtaining leave from this Court under Order II Rule 2 of the Code of Civil Procedure, 1908. Thereafter correspondence was exchanged between the Plaintiff and the Defendants wherein the Plaintiff insisted that the Defendants were bound and liable to pay the amounts guaranteed under the aforesaid Bank Guarantees to the Plaintiff. The Defendants repeated and reiterated their stand that the Plaintiff is not entitled to receive any amounts under the Bank Guarantees. The Plaintiff therefore filed the above Summary Suits and have taken out the above three Summonses for Judgment therein.

9. Mr. Subramanian, the learned Senior Advocate appearing for the Plaintiff, has submitted that the Bank Guarantees which are the subject matter of the above three suits are unconditional, irrevocable and independent contracts between the Plaintiff and the Defendants and consequently the Defendants obligation to pay thereunder is not dependent in any manner on the dispute and/or quantum of claim and/or the details of default under the underlying contract viz. the MRLA. It is submitted that the said Bank Guarantees are payable on demand upon a claim being made by the Plaintiff in terms of the said Bank Guarantees. The claim made by the Plaintiff vide its letters of invocation dated 13th December 2011 read with its Advocate's letter dated 13th December 2011 is strictly in accordance with the terms of the Bank Guarantees and the same does not suffer from any infirmity or illegality whatsoever. It is submitted that after receipt of the said valid claim by the Defendants, the obligation of the Defendants to pay under the said Bank Guarantees became absolute and the Defendants are required to

make payment of the full amount due thereunder. It is submitted that all contentions raised by the Defendants in their letter dated 14th December 2011 are baseless, untenable, mala fide and without any merit whatsoever and on a true and proper construction of the said Bank Guarantees, the same clearly and unequivocally continue to be operative even after termination of the MRLA. It is submitted that the present suit deals with the liquidated demand due under the seven Bank Guarantees (Exhibits B-1 to B-7 to Summary Suit No. 3131 of 2011) which are unconditional, and irrevocable Bank Guarantees. The Defendants' obligations under the said Bank Guarantees are sacrosanct and the Defendants cannot be allowed to renege on its unconditional obligations thereunder. It is therefore submitted that the above three Summonses for Judgment be made absolute and the Summary Suits be decreed as prayed.

10. The first main defence raised by the Defendants is that in view of clause 5 of the Bank Guarantee, the Plaintiff cannot invoke the Bank Guarantee after having terminated the MRLA. It is submitted that the Plaintiff vide its letter dated 12th December 2011 terminated the MRLA with Nimbus. The Plaintiff invoked the Bank Guarantees on 13th December 2011 vide its letter to the Defendants. Thus the MRLA between the Plaintiff and Nimbus had come to an end prior to invocation of the Bank Guarantees.

11. The Learned Senior Advocates appearing for the Defendants have taken the Court through clause 5 of the Bank Guarantee Agreement which reads as follows:

5. The guarantee herein contained shall not be determined or affected by the liquidation or winding up or dissolution or change(s) in constitution of Nimbus, but shall for all purposes be binding and operative until payment of all money due to BCCI in respect of the said contract are paid or till its expiry or termination, whichever is earlier.

The Learned Senior Advocates appearing for the Defendants have thereafter submitted that on both a literal reading and informed construction of the language of clause 5 of the Bank Guarantee, it is evident that clause 5 itself clearly spells out that: (i) the Bank Guarantee was not terminable, "the guarantee herein contained shall not be determined..... ", (ii) the Bank Guarantee was not to be "affected by the liquidation or winding up or dissolution or change(s) in the constitution of Nimbus". With this in mind, the concluding words of clause 5 namely "binding and operative until payment of all money due to BCCI in respect of the said contract are paid or till its expiry or termination whichever is earlier", admit of one and only one meaning that the Bank Guarantees were to be binding and operative, inter alia till the termination of the MRLA. It is submitted that in other words, the termination of the MRLA was a recognized and stipulated mode for discharge of the Bank Guarantees and/or release from the obligations thereunder. It is further submitted by the learned Senior Advocates appearing for the Defendants that the words "expiry or termination" are immediately preceded by the word "its". The expression "its" makes it absolutely clear that what is being referred/alluded to is what is

referred to earlier (before the word "its"), namely the "said contract". On a plain grammatical construction/reading therefore, the expiry or termination specified is that of the MRLA. Clause 5, read in its entirety prescribes the three contingencies when it would cease to be binding or operative. The said clause cannot be construed to mean that the Bank Guarantees would remain in force till the expiry or termination of the Bank Guarantees, particularly since the Bank Guarantees are irrevocable in nature. Moreover, the said clause itself states that "the Guarantee herein contained shall not be determined". Thus the same clause negated termination of the Bank Guarantee. It would therefore be absurd to suggest that the opening words and closing words of Clause 5 were at cross-purposes, in contradiction and were self destructive of each other. Consequently the word "its" appearing in the said clause refers to only the contract between Nimbus and the Plaintiff viz. The MRLA and not the Bank Guarantee.

12. The learned Advocates appearing for the Defendants have further submitted that it is pertinent to note that clause 11 of the MRLA i.e. effect of termination or expiry, also uses identical terms/words as in Clause 5 of the Bank Guarantees. Thus, it is clear that the terms "till its expiry or termination" refers to the MRLA only and not the Bank Guarantees. This is more particularly because the Bank Guarantees were being issued pursuant to the MRLA (Clause 7.4) and even the format thereof was prescribed in Schedule 2. Hence the same words in the same document namely Schedule 2 and clause 11 had to be given the same meaning. It is submitted that what puts the matter beyond any doubt is clause 11.2 of the MRLA, which specifies the provisions of the Agreement which survive termination. Significantly, clause 7 is absent therein which is yet another pointer to the fact that the termination of the MRLA would also invalidate the Bank Guarantees.

13. The learned Senior Advocates appearing for the Defendants also submitted that the construction/interpretation put forth by the Defendants is consistent with basic rules of grammar for constructing the true purport of the pronominal "its" appearing in clause 5 of the Bank Guarantees, the referent shall be construed as "contract" and not the "guarantee" as it is an established rule of grammar that a "pronominal" refers to the nearest "antecedent" noun. In clause 5, the nearest antecedent noun is "contract" and hence the pronoun "its" in clause 5 shall be construed to refer to the noun "contract". It is therefore submitted on behalf of the Defendants that upon termination of the MRLA, the Bank Guarantees also came to an end and the Defendants liability therein stood discharged. Thus the Bank Guarantees cannot be invoked and no amount thereunder can be recovered from the Defendants.

14. The learned Senior Advocates appearing for the Defendants have therefore submitted that the issue as to whether the Plaintiff in view of Clause 5 of the Bank Guarantees is entitled to invoke the Bank Guarantees after termination of the MRLA is a triable issue and the Defendants would be establishing their case by leading evidence at the trial of the Suit.

15. The learned Senior Advocate appearing for the Plaintiff submitted that clause 5 of each of the Bank Guarantees has to be read in the context of the four events set out therein and the scope of the said clause cannot be extended to situations not contemplated by the said clause. It is submitted that the words "for all purposes" in clause (5) merely indicates that each of the Bank Guarantees shall continue to be binding and operative for all the purposes for which the Guarantees were issued and does not indicate that the four events set out therein are illustrative, as contended by the Defendants. This clause cannot in any event dilute clause (3) read with clause (7) which is a non-obstante clause. The learned Senior Advocate appearing for the Plaintiff has further submitted that even in respect of the four eventualities specified in clause 5, the word "or" provides for three conditions in case of any of those four events occurring for the guarantee to be operative viz. (i) until payment of all moneys due, or (ii) till expiry of the guarantee; or (iii) till termination of the guarantee, whichever is earlier. The word "its" after the word "or" in clause 5 is relatable/referable only to the Bank Guarantees and not to the contract as sought to be contended by the Defendant Banks. Any other interpretation would render the earlier portion of clause 5 which provides for the Guarantee being alive until payment is made, otiose and nugatory, as is apparent from the words "whichever is earlier" at the end of that clause. What emerges therefore is that the Guarantees shall be alive until all payments have been made or until the termination or expiry of the same.

16. It is further submitted on behalf of the Plaintiff that if the interpretation sought to be given by the Banks is to be accepted that the word "its" relates to the contract, it would lead to absurdity, inasmuch as it would be possible for even a defaulting party to wrongfully and illegally terminate the contract and deprive the beneficiary of the guarantee of the security of payment given by a Nationalised Bank, on the basis of which the contracts are entered into in commercial terms. Relying on the decision of the Madras High Court in the case of Kishan Gopal Jhaver Vs. Ramnarayan Bhattad and Others, , it is submitted that a document must be given full commercial meaning based on the purpose for which the guarantee is given. Also a clause in any contract ought not to be read in isolation but must be read as a whole to give meaning and effect to the same, keeping the purport and intent in mind. Again, relying on the decision of the Hon"ble Supreme Court in The Union of India (UOI) Vs. D.N. Revri and Co. and Others, and in Citibank, N.A. Vs. TLC Marketing PLC and Another, , it is submitted that it is a settled canon of interpretation that a Court ought to adopt an interpretation which gives effect to the purport and intent of the document, and interpretation which gives full and complete effect to the commercial efficacy of the document and not render any portion of that document otiose or void ought to be accepted. It is submitted that this Court in the case of Dr. Arun Subrao Prabhu Vs. Rizvi Builders, M.M. Gulabani and Mrs. Pushpa M. Gulabani, has inter alia followed the decision of the Hon"ble Supreme Court in the case of Ramkishore Lal Vs. Kamal Narain, and held that a commercial document has to be interpreted in a manner that no provision of the document is rendered

nugatory.

17. The learned Senior Advocate appearing for the Plaintiff has further submitted that the aforesaid construction is further re-emphasised by the non-obstante clause contained in clause (7) of the Guarantee which provides that notwithstanding anything contained in the foregoing clauses [which will include clause (5)] the Guarantee will remain in force upto and including 31st May 2014 and the only time the Guarantee will stand automatically forfeited or the Bank could be relieved and discharged would be if a demand or claim is not served in writing before 31st May, 2014. It is submitted that the non-obstante clause in clause (7) would be rendered nugatory if the interpretation of the Banks is accepted. The learned Senior Advocate appearing for the Plaintiff has also drawn my attention to clause 7.6 (b) of the MRLA wherein Nimbus has agreed that in the event of BCCI terminating the MRLA in accordance with the provisions contained therein, BCCI shall be entitled to offer the Media Rights for retender to third parties and at the time of such retender BCCI shall encash the Bank Guarantees and shall appropriate the amounts due, in pursuance of the MRLA. It is submitted that this clause itself is clear and assists the Plaintiff in the interpretation being given by it to the terms of clause 5 of the Bank Guarantees and militates against the construction sought to be placed by the Defendants on clause 5. It is therefore submitted on behalf of the Plaintiff that the interpretation given by the Defendants to clause 5 of the Bank Guarantees is incorrect and the Defendants are bound to pay the amounts due under the Bank Guarantee to the Plaintiff, pursuant to the letter of invocation issued to the Defendants by the Plaintiff. Relying on the decision of the Hon"ble Supreme Court in the case of Sir Chunilal V. Mehta and Sons, Ltd. Vs. The Century Spinning and Manufacturing Co., Ltd., , it is submitted that it is well settled that interpretation of a document which forms the foundation of the rights of parties is a question of law. Given that, the only issue raised in the present case is one relating to interpretation or clause (5) of the Bank Guarantees, the same cannot be said to be a triable issue warranting grant of leave to defend.

18. I have considered the above submissions advanced on behalf of the parties qua the interpretation of clause 5 of the Bank Guarantee document. Clauses 2 to 7 of the Bank Guarantee are relevant and reproduced hereunder.

2. Nimbus has approached us for issuing the said guarantee and at their request and on receipt of sufficient consideration by us, PUNJAB NATIONAL BANK (constituted and established under the Banking Companies (Acquisition & Transfer of Undertakings Act 1970) having its Head Office at 7, Bhikaji, Cama Place, New Delhi-110 066 and one of its branch office at Maker Tower "E", Ground Floor, Cuffe Parade, Mumbai-400 005, Phone No. 2218 0752 Fax 22180 403/8451 (hereinafter referred to as "the said Bank" which expression shall unless repugnant to the subject or context mean and include its successors in office, executors, administrators, permitted assigns and the like) have agreed to give such guarantee as hereinafter mentioned.

3. We hereby undertake and agree with BCCI that if any default is committed by Nimbus, in performing any of the terms and conditions of the said contract including non payment of any money payable to BCCI, we shall on first claim in writing from BCCI without any demur, any reservation, contest, recourse or project and/or without any reference to pay to BCCI a sum not exceeding Rs. 93,75,00,000/- (Rupees Ninety Three Crores Seventy Five Lakhs Only), either in full or in part, in such manner as BCCI may direct from time to time. Any such claim made by BCCI on us shall be final, conclusive and binding notwithstanding any difference or any dispute between BCCI and Nimbus or any other legal proceedings, pending before any Court, Tribunal, arbitrator or any other authority.

4. BCCI shall have the full liberty, without reference to us and without affecting this guarantee, to postpone for any time or from time to time the exercise of any of the powers and/or any rights conferred on BCCI under the said contract, which under the Law relating to the Sureties would but for this provision have the effect of releasing us.

5. The guarantee herein contained shall not be determined or affected by the liquidation or winding up or dissolution or change(s) in constitution of Nimbus, but shall for all purposes be binding and operative until payment of all money due to BCCI in respect of the said contract are paid or till its expiry or termination, whichever is earlier.

6. This guarantee shall be irrevocable and shall be effective from 01st April 2010 and will remain valid upto 31st March 2014 with a claim period of two month upto 31st May 2014.

7. Notwithstanding anything contained hereinabove:

(a) Our liability under this Bank Guarantee shall not exceed and is restricted to Rs. 93,75,00,000/- (Rupees Ninety Three Crores Seventy Five Lakhs only);

(b) This Guarantee shall remain in force up to and including 31st May 2014 (including claim period of Two month);

(c) Unless the demand/claim under this guarantee is served upon us in writing before 31st May 2014 all the rights of BCCI under this guarantee shall stand automatically forfeited and we shall be relieved and discharged from all liabilities mentioned hereinabove.

In my view what is sought to be agreed by the parties in the first part of clause 5 of the Bank Guarantee viz. "The Guarantee herein contained shall not be determined or affected by the liquidation or winding up or dissolution or change(s) in constitution of Nimbus...." is that the Guarantee shall not be terminable or affected in the event of liquidation or winding up or dissolution or change in constitution of Nimbus. The second part of the said clause 5 viz. "but shall for all purposes be binding and operative until payment of all money due to BCCI in respect of the said contract are paid or till its expiry or termination, whichever is earlier" provides for the period during which the Guarantee shall

remain binding and operative. This part of the clause provides that a Guarantee shall be binding and operative until any of the following three events take place:

- (i) payment of all monies to BCCI in respect of the said contract are paid;
- (ii) "its" expiry; and
- (iii) (its) termination.

The crucial debated question is, what is meant by "its". Does it stand for the noun "contract" occurring in the clause or the noun "Guarantee" also appearing in the clause. Applying the simple grammatical rule, breaking up the sentence into its parts and according natural meaning to each part produces in my view, the following result:

The sentence, namely "(the Guarantee) shall for all purposes..... whichever is earlier" is nothing but a compound sentence with three "principal" or "main" clauses joined by the conjunction "or" the subject of each of the three clauses being "the Guarantee". The three clauses are:

- (i) (The Guarantee) shall for all purposes be binding and operative until payment of all money due to BCCI in respect of the said contract are paid;
- (ii) (The Guarantee) shall for all purposes be binding and operative till its expiry;
- (iii) (The Guarantee) shall for all purposes be binding and operative till (its) termination.

It is but obvious that the word "its" in the above analysis, can only stand for the "Guarantee". Apart from the rule of plain meaning, there are also other considerations applying to commercial documents, which favour the above meaning of the word "its".

19. If the words "its expiry or termination" have to be read as referring to "the MRLA", it would result in an anomalous situation as submitted by the Plaintiff since the Bank Guarantee cannot be invoked, the moment the party at whose instance the Bank Guarantee is furnished (in this case Nimbus) terminates the MRLA. A dishonest person/entity would therefore terminate the underlying contract and defeat the purpose of the Bank Guarantee. Such an interpretation is also defeated by clauses 6 and 7 of the Bank Guarantee which categorically states that the Bank Guarantee is valid upto 31st May 2014. The MRLA admittedly expires on 31st March 2014. In view thereof, if the interpretation given by the Defendants is to be accepted, there would be no sense in keeping the Bank Guarantee valid/alive after expiration of the MRLA. Again, as pointed out by the learned Senior Advocate appearing for the Plaintiff, clause 7.6 (b) of the MRLA assists in the interpretation of clause 5 of the Bank Guarantees. The said clause provides that in the event of termination of the MRLA by the Plaintiff, the Plaintiff shall be entitled to offer the Media Rights for retender to third parties and in respect of Bank Guarantees in BCCI's possession at the time of such retender, BCCI shall encash the Bank Guarantee and shall appropriate the

amounts due in pursuance of the MRLA. This clause therefore is in no uncertain terms a pointer to the fact that the Bank Guarantees can be invoked by BCCI even after the termination of the MRLA. Clause 7.6 (b) of the MRLA therefore is a clear aid in construction of clause 5 and militates against the construction sought to be placed by the Defendants on clause 5.

20. In the aforesaid premises, the interpretation sought to be given by the Defendants to clause 5 of the Bank Guarantee document and the reasoning advanced in support thereto cannot be accepted. The defence raised by the Defendants therefore cannot be termed "substantial".

21. The Defendants have, without prejudice to their aforesaid contention, next contended that the Plaintiff was not entitled to invoke the Bank Guarantees in question, the bulk of which were admittedly towards the fees of the future matches after termination of the MRLA. The cumulative aggregate of all the Bank Guarantees vis-a-vis all three Banks (Defendants in the three Suits) is Rs. 1601 crores approximately. The claim of the Plaintiff even on their own showing, mentions a demand for Rs. 63,78,75,000/-. It is submitted that the Plaintiff has not made out a case for recovery of the sums guaranteed under the said Bank Guarantees. There is no basis and/or particulars provided by the Plaintiff for the invocation of the Bank Guarantees to the extent of the sums set out therein. It is submitted that therefore invocation can be termed as fraudulent and/or a case involving special equities. It is submitted that the factors which need to be particularly considered in this behalf are: (i) The Bank Guarantees were for protecting the Plaintiff from any loss caused by the default of Nimbus; (ii) In the present case, the default of Nimbus resulted in the Plaintiff receiving (on a re-tender) an additional sum of Rs. 232.47 crores; (iii) In any event, the Plaintiff suffered no loss; and (iv) It would therefore in such circumstances be fraudulent and/or wholly inequitable and/or equally unfair and against the ends of justice for this Court to entertain a request for a claim for Rs. 1601 crores. The Defendants have also relied on the decisions of the Hon''ble Supreme Court in the cases of Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, , AIR 1990 2218 (SC) , Uma Shankar Kamal Narain and Another Vs. M.D. Overseas Ltd., and UBS AG Vs. State Bank of Patiala, , and has relied on the principles governing the grant of relief in a Summons for Judgment as set out by the Hon''ble Supreme Court in Mechelec Engineers & Manufacturers (supra). As can be seen from paragraph 8 of the said decision dated 1st November 1976, the said principles have in fact been laid down in the case of Kiranmoyee Dassi and another Vs. Dr. J. Chatterjee , i.e. much prior to the amendments to the said Order XXXVII including the amendments introduced by the CPC (Amendment) Act, 1976 (104 of 1976) Sec. 84(iv) (1-2-1977). Relying on the said decisions and the principles laid down in the case of Smt. Kiranmoyee (supra), it is submitted on behalf of the Defendants that the Defendants have a very good case on merit. Moreover, the Defendants have raised several triable issues and the defence of the Defendants is not by any stretch of imagination a sham and/or practically moonshine.

22. The learned Senior Advocate appearing for the Plaintiff has in response submitted that the Defendants are trying to contend that the Bank Guarantees are in the nature of indemnities and therefore require the Plaintiff to show proof of loss in order for the Defendants to make payments thereunder. It is submitted that such a contention on the part of the Defendants is fallacious and not borne out by the very terms of the said Bank Guarantees as also by the contemporaneous correspondence addressed by the Advocates for the Defendants, and is an after thought and a dishonest defence. It is submitted that in view of the law laid down by this Court in the case of Khetarpal Amarnath Vs. Madhukar Pictures, , the proposition is erroneous in law.

23. It is further submitted on behalf of the Plaintiff that the Bank Guarantees which are the subject matter of the suits are unconditional and irrevocable Bank Guarantees. Relying on the decision of the Hon''ble Supreme Court in the case of Oil and Natural Gas Corporation Ltd. Vs. State Bank of India, Overseas Branch, Bombay, , while dealing with a summary suit under a Bank Guarantee in which unconditional leave was granted by the trial Court, the learned Senior Advocate appearing for the Plaintiff has pointed out that the Hon''ble Supreme Court while setting aside the order of the High Court and dismissing the application for leave to defend filed by the Bank has held that the principle stated in decisions relating to injunction could be extended to understand the nature of defence raised by the Bank. It is further held that in the absence of a plea of fraud, the guarantee has to be given effect to. It was also held that if any excess amount had been paid, the same would be recovered in that case in Arbitration. The learned Senior Advocate appearing for the BCCI has submitted that the test whilst considering an application for leave to defend, is whether in the facts and circumstances of the case, an order of injunction restraining the encashment of the Bank Guarantee could be passed. If, on the basis of the law laid down by the Hon''ble Supreme Court, an order of injunction cannot be passed-then the leave to defend application also ought to be dismissed and a decree in a summary suit ought to follow. It is submitted that in the facts and circumstances of the present case, it is doubtless that an order of injunction restraining the encashment of the said Bank Guarantees can never be passed and as such the leave to defend application of the Bank ought to be rejected. It is submitted that no case of fraud is made out by the Defendants and mere use of the words "fraud" or "fraudulent" would lend no support to the allegation made by the Defendants that the conduct of the Plaintiff is fraudulent. It is further submitted that the Hon''ble Supreme Court has in its judgment in the case of Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, expressly set out the principles relating to the Bank Guarantee and has expressly negated the finding of the trial Court that there would be unjust enrichment. Relying on the decision of the Hon''ble Supreme Court in the case of Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others, , it is submitted that the defence of irretrievable injustice will also not assist the Defendants, as no case of irretrievable injustice as required under the law is made out by the

Defendants. The learned Senior Advocate appearing for the Plaintiff has therefore submitted that none of the defences sought to be raised by the Defendants are plausible and/or have the slightest possibility of being established. No triable issues have been raised by the Defendants. It is submitted on behalf of the Plaintiffs that while the amounts due from Nimbus to BCCI under the MRLA are irrelevant for the purposes of the present suit (as, on the terms of the Guarantees, the Defendants are required to make payment of the full amount without any reference to the MRLA or to Nimbus), the amounts due from Nimbus to BCCI (specified only in view of the argument advanced by the Defendants that only an amount of Rs. 63,78,75,000/- is due and payable by Nimbus to BCCI under the MRLA) as per the statement of claim of BCCI in the arbitration proceedings against Nimbus on 20th August, 2012 aggregate to Rs. 328,40,55,630.14. Out of this amount, Rs. 305,06,87,500/- is the principal amount, and the balance is the interest accrued upto 20th August 2012. It is submitted on behalf of the Plaintiff that as per the terms of the MRLA, the Plaintiff was entitled to encash the guarantees at any point of time, whether before or after the termination, for the full amount of the Guarantees notwithstanding the amounts due from Nimbus to BCCI at that time. BCCI was entitled to retain the full amount of the Guarantees till the rights for the remaining period of the MRLA (in respect of matches which have not been telecast by Nimbus) are re-tendered by BCCI. Upon such re-tender, BCCI was entitled to deduct the following sums from the full amount of the Guarantees and return the balance to Nimbus, viz:

(i) Amounts due from Nimbus to BCCI under the MRLA for matches already telecast by Nimbus; and

(ii) Loss (if any) occasioned to BCCI upon re-tender of the rights for the remaining period of the MRLA (in the event the new rights fee was less than the rights fee that would have been paid by Nimbus if the MRLA had not been terminated).

24. It is submitted that in the light of the above, the Defendants were bound to make payment of the full amount of the Guarantees to BCCI immediately upon their invocation on 13th December 2011. BCCI was entitled to retain the full amount of the Guarantees upto 4th April 2012 (date of re-tender). Thereafter, BCCI was entitled to deduct the amounts due from Nimbus to BCCI (under paragraph 21 (a)-there being no loss under paragraph (b) above in the present case). Consequently, the loss caused by the Defendants wrongful refusal to honour their solemn obligations under the Guarantees may be classified under the following heads:

(i) Interest on the full amount of the Guarantees between 13th December, 2011 (date of invocation) and 4th April, 2012 (date of re-tender);

(ii) Aggregate of the principal amount of Rs. 305,06,87,500/- (Rupees Three Hundred Five Crores Six Lakhs Eighty Seven Thousand and Five Hundred only)

due from Nimbus to BCCI along with the accrued interest thereon till 4th April 2012 (Deductible amount); and

(iii) Interest on the deductible amount from 5th April 2012, till date of payment or realisation.

25. The learned Senior Advocate appearing for the Plaintiff has relied on the decision of the Hon'ble Division Bench of this Court in Appeal (Lodging) No. 90 of 2012 in Arbitration (Lodging) No. 43 of 2012 and others, decided on 27th February, 2012, wherein the Division bench has accepted the prima facie view of the learned Single Judge that the Plaintiff-BCCI has made out more than a strong prima facie case that an amount of Rs. 305 crores is due and payable to it by Nimbus Communications Ltd., and directed Nimbus to furnish solvent security in the form of a Bank Guarantee of a Nationalised Bank in the amount of Rs. 305 crores to the satisfaction of the Prothonotary and Senior Master within a period of two weeks from the date of the said order. On a query raised by this Court as to what is the amount due and payable by Nimbus Communications Ltd. to BCCI as of date, the learned Senior Advocate appearing for the Plaintiff, without prejudice to the contention of BCCI that BCCI is entitled to invoke the entire amount guaranteed by the Defendants under the Bank Guarantees, which are the subject matter of the above Summary Suits has tendered a statement showing that the amounts due from Nimbus to BCCI under the MRLA is Rs. 398,12,17,770/- as on 18th December, 2012. A copy of the statement was also handed over to the Advocates for the Defendants who submitted that they do not admit that Nimbus has to pay an amount of Rs. 398,12,17,770/-.

26. From the facts narrated above, the contention of the Defendants that only an amount of Rs. 63,78,75,000/- is due and payable by Nimbus to BCCI under the MRLA and since the Plaintiff had called upon Nimbus through their Advocates letter dated 16th November 2011 to pay an amount of Rs. 63,78,75,000/-, the Plaintiff cannot invoke the Bank Guarantees to the extent of Rs. 1601 crores, cannot be accepted. Clauses 2, 3 and 4 of the Bank Guarantees establish beyond any doubt that all the Bank Guarantees are irrevocable and unconditional and upon a claim made by the Plaintiff as required under clause 9 of the Guarantees, the Defendants are bound to pay the amounts guaranteed under the said Bank Guarantees without demur and without reference to Nimbus. Clause 7.6 (b) of the MRLA itself provides that the Plaintiff can encash the said Bank Guarantees in its entirety and refund any excess amount due to Nimbus after taking into consideration the loss caused to the Plaintiff upon retender of the rights for the remaining period of the MRLA. It is settled law that encashment of an unconditional and irrevocable Bank Guarantee ought not to be enjoined by the Courts unless the case falls within the recognised exceptions laid down by the Hon'ble Supreme Court in a catena of decisions in which case an injunction restraining the encashment of a Bank Guarantee can be granted. An unconditional and irrevocable Bank Guarantee is an independent contract and whether encashment of the same ought to be permitted or not has to be

considered without any reference to the underlying or main contract or to the disputes/claims thereunder. It is trite law that the Court can restrain encashment of Bank Guarantee in cases of established fraud in issuance of the Bank Guarantee. The fraud has to be absolute and egregious vitiating the very foundation of the Bank Guarantee. In my view, in the present case, the Plaintiff has failed to make out any case of fraud. In the case of Dwarikesh Sugar Industries Ltd. vs. Prem Heavy Engineering Works (P) Ltd. and another (supra), the Hon''ble Supreme Court held in para 22 as under:

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.

No such circumstance exists in the present case.

I have thus come to the conclusion that (i) the interpretation sought to be given by the Defendants to clause 5 of the Bank Guarantees cannot be accepted;(ii) that as regards the claim of the Plaintiff that they are entitled to invoke/encash the entire amount guaranteed by the Defendants under the Bank Guarantees, the Defendants do not have a clear and/or immediate defence; and (iii) with respect to the Plaintiff's without prejudice claim/submission with regard to recovery of Rs. 398,12,17,770/-, the defence of the Defendants that they also do not admit the said claim, cannot be termed "substantial" and is practically moonshine. I am however inclined to give an opportunity to the Defendants to enable them to try and prove their defence. In such circumstances, it may be necessary to protect the Plaintiff by imposing condition on the Defendants. In my view, the following order would meet the ends of justice.

(i) The Defendants-Punjab National Bank, Indian Bank and Union Bank of India are granted conditional leave to defend the suit on depositing in Court 37.5 per cent, 37.5 per cent and 25 per cent amount of their respective Bank Guarantees i.e. aggregating to Rs. 400 crores with the Prothonotary and Senior Master of this Court on or before 15th February, 2012, which amount the Prothonotary and Senior Master shall invest in fixed deposits with the same Banks i.e. the Defendants, initially for a period of one year and thereafter renew the same from year to year until further orders.

(ii) The suits be transferred to the list of commercial causes.

(iii) The Defendants shall file their written statement on or before 28th February, 2013.

(iv) The hearing of the Suits is expedited.

(v) Place the Suits for framing of issues on 2nd March, 2013.