**(2023) 06 KL CK 0002**

**In the High Court Of Kerala**

**Case No :** Appeal Suits No.542 Of 2002

**Catholic Syrian Bank Ltd A 2 Z Builders (P) Ltd**

**Date of Decision :** 05-06-2023

**Acts Referred:**

**Citation :** (2023) 06 KL CK 0002

**Hon'ble Judges :** Sathish Ninan, J

**Bench :** Single Bench

**Advocate :** N.P.Samuel, V.R.Rejithkumar, N.N.Sugunapalan, K.Vinod Chandran

**Final Decision :** Partly Allowed

## Judgement

Sathish Ninan, J

1. The suit for money was decreed by the trial court. Defendants 1 and 2 are in appeal.

2. The plaintiff is a builder. On 03.08.1995, plaintiff purchased 26.69 acres of property in Thrikkakkara village through court auction in CP 3/1984 held by the official liquidator. The auction amount was ☐ 6.75 Crores. For financial assistance, the plaintiff approached the third defendant. They agreed to grant a loan of ☐ 5.34 Crores on the security of equitable mortgage of the property. Till the title deed is obtained and mortgage created, the plaintiff was to furnish a bank guarantee. To obtain bank guarantee, the plaintiff approached defendants 1 and 2 (hereinafter referred to as, “the Bank”). The plaintiff's application for bank guarantee was sanctioned by the Bank as per Ext.A1 sanction letter dated 01.03.1996. Pursuant thereto, Ext.A2 guarantee agreement was executed between the parties. As per Ext.A2 agreement, the bank guarantee was to be for a period of three months within which the plaintiff was to have the mortgage created in favour of the third defendant. However, the agreement further provided that in case of failure to have the mortgage created within the said period of three months, the guarantee shall stand extended till the creation of the mortgage. The plaintiff obtained the title deed and created the mortgage on 27.06.1996. The Bank guarantee was released on the same date. The grievance

of the plaintiff is with regard to the commission payable to the Bank for the bank guarantee. Though the bank guarantee was in force for a period of only 96 days, the Bank has sought to recover commission for one year. At best the bank would be entitled to realise commission for six months since the guarantee remained in force for a few days beyond the period of three months. The commission amount for one year is ☐ 10,68,000/- and the same is recovered from the plaintiff. One half of the above namely, ☐ 5,34,000/-, is liable to be repaid to the plaintiff. It is claiming the said amount with interest at 18% from the date of discharge of the bank guarantee (27.06.1996), that the suit is filed for recovery of an amount of ☐ 7,93,480/-.

3. The contention of defendants 1 and 2 is that, as per the terms of sanction the Bank is entitled to realise commission for the entire period of one year.

4. The trial court held that, since the bank guarantee was in force for a period of only 96 days, there has been unjust enrichment by the Bank by collecting commission for a period of one year. Accordingly, the suit was decreed for ☐ 5,34,000/-(being the commission amount for six months) with interest at the rate of 12% from 27.06.1996(the date of release of bank guarantee) till date of decree, and thereafter at 6%. The plaintiff was also permitted to recover the proportionate costs.

5. Heard learned counsel Sri.Pleasant Samuel on behalf of the appellants and Sri.N.N.Sugunapalan, learned Senior Counsel for the first respondent-plaintiff.

6. The short question that falls for determination is, whether the Bank is entitled to realise commission for a period of one year when the bank guarantee in question was in force for a period of only 96 days.

7. Ext.A1 is the sanction letter issued by the Bank. The relevant portion thereof reads thus:-

“Sub:- Your application for a Bank Guarantee of Rs.534 lakhs

With reference to the above we are pleased to inform that a fresh Bank Guarantee limit of Rs.534 Lakhs is sanctioned to you to be issued in favour of M/s HUDCO Ltd., in lieu of title deeds of 26.69 acres of landed property at Kalamassery to be released by High Court of Kerala against which HUDCO has sanctioned a term loan of Rs.534 lakhs (Rupees five hundred and thirty four lakhs). Period 3 months. Commission as per Head Office Circular 98/95 (2% Upfront for full year). Cash Margin 7.5%”

The period of the guarantee is mentioned as three months. As regards the commission payable, it is to be as per Circular 98/95 of the head office. With regard to the words in the bracketed portion, “2% Upfront for full year”, whether the commission payable is for one year, whether the upfront payment for full year is just as an advance, as a condition for sanction of the bank guarantee, etc. are not very clear. However, it is stated that commission shall be as per Circular 98/95. Curiously, the said circular 98/95 is not produced before the

 

Court. It would have given a clear picture about the commission payable. For reasons not known, the said circular has been withheld from the Court.

8. Ext.A2 is the guarantee agreement. Clause 15 of Ext.A2 says that the guarantee shall be initially for a period of three months within which mortgage is to be created by the plaintiff. If within that period mortgage is not created, the guarantee will stand extended till creation of mortgage. Therefore it appears that, though the term of bank guarantee was stated to be three months, since the parties were not definite as to the period within which the mortgage could be created, a leeway was given to enable creation of mortgage immediately on receipt of title deed, and the bank guarantee was to be in force till then.

9. Construing Exts.A1 and A2 together, it is possible to understand that, because of the above indefiniteness, the commission was obtained upfront for a period of one year. If Circular No.98/95 was placed on record, there would have been clarity on the issue. Understanding the terms as above, it could not be concluded that irrespective of the period of bank guarantee the commission payable was for one year. If that be so, then how much is the commission payable?

10. Ext.B5 is a letter sent by the Bank to the Banking Ombudsman in response to a complaint preferred by the plaintiff. Paragraph 4 of Ext.B5 letter is of significance. The same reads thus:-

"The BG was issued for a period of 3 months and was further extended at the request of the party, till the registered mortgage of the property is created in favour of HUDCO. As per our Cir.222/95, in case of renewal/extension of Bank guarantee, the charge to be collected is the same as those applicable for issuance of fresh guarantees, is, Rs.100/- + the charge applicable to six months. We had not collected any extra charge for the extension of the guarantee."

Therein, referring to Circular 222/95 the Bank has stated that the charges for issuance of a fresh guarantee is Rs.100/- plus the charges applicable to six months. It is pertinent to note that Circular No.222/95 referred to above has also not been produced before the Court. At any rate, the above indicate that, for issuance of a fresh guarantee the charge leviable is for six months in addition to ☐ 100/-. Therefore, when Ext.A2 Bank Guarantee is issued by the Bank, the charges recoverable could only be for six months. As noticed earlier, it could be in the light of lack of clarity with regard to the period for which the bank guarantee was to remain in force that upfront commission for one year was required.

11. Going by the above, for issuance of a fresh bank guarantee the charges payable is for six months. Though the bank guarantee in question was kept alive for only a period of 96 days, the plaintiff is bound to pay the commission for six months. In the context as noticed, the upfront payment of commission for one year could only be considered to be an advance payment.

12. In the light of the discussions as above, it is to be held that the Bank is

 

entitled for commission for a period of six months only. The excess commission received from the plaintiff for the remaining period of six months is liable to be refunded to the plaintiff. The trial court has rightly granted the plaintiff a decree for recovery of the excess commission paid by the plaintiff viz. ☐ 5,34,000/-.

13. Coming to the rate of interest, the trial court has allowed 12% interest from the date of release of bank guarantee till the date of decree, and 6% thereafter. Considering the prevailing banking rate of interest, I deem it only appropriate that the interest from the date of realisation of bank guarantee till date of decree be refixed at 9% per annum. But for the above, no interference is called for with the trial court judgment.

Resultantly, the appeal is allowed in part. Interest payable for the period from 27.06.1996 till date of decree will stand re-fixed at 9% per annum. In all other respects, the trial court decree is maintained. Costs in the appeal is made easy.