(2009) 08 BOM CK 0113

In the Bombay High Court

Case No : Summons for Judgment No. 361 of 2007 and Summary Suit No. 929 of 2007

Smita Conductors Ltd. APPELLANT

Vs

Prabhudas Liladhar Pvt. Ltd. and Another RESPONDENT

Date of Decision : 06-08-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 1, Order 37 Rule 1(1), Order 37 Rule 1(2)
Presidency Small Cause Courts Act, 1882 — Section 41, 41(1), 41(2)

Citation : (2009) 08 BOM CK 0113

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

Bench : Single Bench

Advocate : Virag Tulzapurkar, Sowmya Srikrishna and instructed by Kanga and Co, for the Appellant; V.J. Mehta, A. Nityananthi Nadar, instructed by . and Divyakant Mehta, Associates for Defendant No. 1, for the Respondent

Judgement

S.J. Vazifdar, J.—The suit is filed to recover from Defendant No. 1 a sum of Rs. 28,45,027/-together with further interest at 15% p.a. on the principal sum of Rs.19,67,105/-from 15.3.2004 to the filing of the suit and thereafter at 18% p.a. till payment. Defendant No. 2 is only a formal party for the reasons referred to later.

2. There is absolutely no dispute as to the liability of Defendant No. 1 to pay the amount claimed in the suit. Nor is there any dispute as to the amount claimed. Apart from questioning the jurisdiction of this Court, the only defence on merits is that the time or occasion for Defendant No. 1 to pay the amount has not arrived.

3. The Plaintiff is a member of Defendant No. 2, Raheja Center Premises Co-operative Society Limited. The Plaintiff owns three units being unit Nos.701, 702 and 703 admeasuring 3600 sq.ft. in aggregate in the building, Raheja Center.

4(A). Defendant No. 1 filed a suit in this Court being suit No. 2091 of 2000 for specific performance of an agreement in terms of a draft leave and licence agreement entered into between the Plaintiff and itself.

(B). By an order dated 26.5.2000, the suit was disposed of in terms of the consent terms signed by the Plaintiff and Defendant No. 1 and their advocates.

(i). Under the consent terms, Defendant No. 1 was allowed to use and occupy the said premises as per the terms and conditions of the draft leave and licence agreement which was annexed thereto. The consent terms recorded that on execution thereof, Defendant No. 1 herein had paid the Plaintiff herein a sum of Rs. 43,00,000/-towards the balance security deposit. The aggregate security deposit was Rs. 48,00,000/-.

(ii). Clause 3 of the consent terms provided that Defendant No. 1 in addition to the licence fees or compensation had also agreed to pay to the Plaintiff ....municipal taxes as provided in Clause 3 of the draft agreement annexed as Exhibit-A to the consent terms. The said Clause 3 reads as under:

3. The Licensee shall pay to the Licensor maintenance charges, non-occupation charges and municipal taxes from the society bills but will not be liable to pay any amount towards the sinking fund, repair fund or major repair fund or any charges which are not attributable to the occupation of the premises by the Licensee. The licensee shall also pay any increase in maintenance charges or municipal taxes if the same are increased due to the reason or as a result of the licence hereby granted for the period of their occupation only.

(emphasis supplied)

5. A formal leave and licence agreement dated 20.12.2000 was executed between the Plaintiff and Defendant No. 1 which incorporated by reference the above consent decree including the draft leave and licence agreement annexed thereto as Annexure-A. Annexed to these documents were the consent decree and the order of this Court.

6(A)(i). The Bombay Municipal Corporation (B.M.C.) by a notice dated 29.3.2001, informed the society, Defendant No. 2, that the ratable value of the said building had been increased to Rs. 1,99,02,055/-for the year 2001-2002. The society raised a complaint with the B.M.C. against the same. Defendant No. 2 by a circular dated 9.6.2001 informed all its members about the same. Defendant No. 2 stated that the society had lodged a formal complaint against the increase in the ratable value and added:

But it shall be the duty of the members concerned to take appropriate action against the same or accept the assessment already made by the Bombay Municipal Corporation and pay the increased tax.

(Emphasis including the underlining is as per original)

(ii). By a letter dated 27.6.2002, Defendant No. 2 reiterated the above and stated that the society is supposed to collect the full amount from the concerned members as per the bills/tax charged by the B.M.C. for their respective taxes. Defendant No. 2 stated that pursuant to its representations, the ratable value had been reduced substantially and as a consequence thereof, the property tax payable by the Plaintiff had been reduced to Rs. 12.50 per sq.ft. per month for the said premises let-out to Defendant No. 1. Defendant No. 2 stated that in case the Plaintiff desire to challenge even this rate, it was free to do so, but that the tax amount would have to be paid immediately and in case of any favourable decision, refund could be obtained.

7. The Plaintiff by its letter dated 9.9.2002 in turn informed Defendant No. 1 the above facts and requested it to forward a cheque for an additional amount to be paid in accordance with the terms of the leave and licence agreement/consent decree referred to above.

8(A). Defendant No. 2 by a letter dated 30.4.2003 informed the Plaintiff inter-alia that the B.M.C. had also levied higher property taxes for the premises let-out ; that the same was challenged by the society by filing a Writ Petition in this Court and that the B.M.C. thereafter sent the revised notices. Defendant No. 2 clarified that as far as it was concerned, the liability vested with the concerned member and that it would collect the same from the member.

(B). The Plaintiff by its letter dated 5.5.2003, informed Defendant No. 1 the above development and stated that the above liability would be to its account.

(C). By a letter dated 8.5.2003, addressed to the first Defendant, the Plaintiff inter-alia stated that the B.M.C. would levy the property taxes at higher rates for which the first Defendant would be liable. In paragraph 4 of the letter, the Plaintiff stated that it is the responsibility of Defendant No. 1 to make satisfactory provision for the discharge of such liabilities before the expiry of the period of the leave and licence agreement on 25.5.2003, failing which such amount as may be necessary would be deducted from the deposit of Rs. 48,00,000/-lying with the Plaintiff.

9. Defendant No. 1 by its reply dated 12.5.2003 confirmed that the additional property tax, if any, payable by it for the period of the agreement will be paid by it as per the consent terms.

10. It is important to note that the Plaintiff was fully secured at this stage by virtue of holding the security deposit of Rs. 48,00,000/-against any default on the part of Defendant No. 1 in failing to pay the taxes/additional B.M.C. taxes. In the event of any failure by Defendant No. 1 in paying the same in accordance with its admitted liability the Plaintiff had to do no more than to deduct the same from the security deposit.

11. Defendant No. 1 however desired that the Plaintiff return the security deposit till the B.M.C. finalized its demand. The Plaintiff did not have to accede to this request. But as a gesture of undoubted generosity it did on the faith and trust of the representation of Defendant No. 1. Defendant No. 1 has unfortunately

betrayed the faith and trust reposed in it.

12. Defendant No. 1 executed a Corporate Guarantee dated 24.5.2003 in favour of the Plaintiff in order that the Plaintiff would refund the entire amount of security deposit of Rs. 48,00,000/-at the end of the licence period. I will read the document as a contract of indemnity and not a guarantee though for convenience, I will continue to refer to it as a guarantee. Clauses 6 to 10 read as under:

6. PLPL confirms and agrees that even after its vacating the office premises, it is still liable to pay to SCL municipal taxes as provided in the said agreement for the period from 26th May, 2000 to 25th May, 2003.

7. PLPL has requested SCL not to deduct any amount towards aforesaid liability, since the amount of the aforesaid liability has not been finally ascertained and has assured SCL that as and when the said society and/or Brihan Mumbai Municipal Corporation makes any demand for the same on SCL, PLPL shall forthwith, without raising any dispute regarding the validity and/or quantum and/ or otherwise, unconditionally and irrevocably pay the same to SCL. For any delay in payment PLPL will be liable to pay interest @ 15% per annum.

8. PLPL has also agreed that it will execute a Corporate Guarantee in favour of SCL.

9. In the premises aforesaid SCL, on the PLPL handing over the vacant and peaceful possession of the office premises to SCL, on 25th May, 2003, has refunded the security deposit of Rs. 48,00,000/-(Rupees Forty Lacs Only) to PLPL, without any deduction.

10. Now in consideration of aforesaid, PLPL hereby undertakes and agrees to SCL that as and when the said society and/or Brihan Mumbai Municipal Corporation makes any demand on SCL for municipal taxes as specified in Clause No. 3 of the Leave and Licence Agreement. PLPL shall forward without raising any dispute regarding the validity and/or quantum and/or otherwise in respect thereof, unconditionally and irrevocably pay the said amount on demand to SCL in Mumbai. For any delay in payment, PLPL shall also pay interest @ 15% per annum. SCL will be entitled to recover the aforesaid amount from PLPL in terms of Consent decree passed by the High Court, Bombay, in the above suit No. 2091 of 2000.

13. In the meanwhile hearings were held by the concerned authorities in respect of the complaints made by Defendant No. 2 against the increase in the ratable value. Eventually the B.M.C. by its letter dated 6.3.2004, finalized the ratable value for the entire premises. Pursuant thereto, the society made a demand upon the Plaintiff in the sum of Rs. 23,08,211/-for the period 25.5.2000 to 25.5.2003. The Plaintiff in turn informed Defendant No. 1 of the same and requested it to pay the same. Despite further representations by the society, the ratable value was not changed. As a result thereof, the Plaintiff by yet another letter dated

19.3.2004, requested Defendant No. 1 to pay the demand of Rs. 23,08.211/-.

14. Defendant No. 1 by a letter dated 23.3.2002, did not deny its liability qua the Plaintiff but requested the Plaintiff to advice Defendant No. 2 to appeal against the demand for additional property taxes and also requested the Plaintiff not to insist for the payment of the said amount. 15. Ultimately, pursuant to the representations and queries by Defendant No. 2 and the Plaintiff, the B.M.C. by a letter dated 3.3.2007 furnished the particulars regarding the ratable value and the property tax payable specifically in respect of the said three units given on leave and licence by the Plaintiff to Defendant No. 1. As per this statement, the amount payable stood finally crystallized to the amount claimed in the suit namely Rs. 19,67,105/-.

16. Defendant No. 2 ? society has paid the property taxes including in respect of the Plaintiff?s premises to the B.M.C. and has raised a demand against the Plaintiff in its quarterly bills. Despite repeated requests, Defendant No. 1 failed and neglected to pay the said amount.

17. In view of the above documents and the undertakings, there can be no doubt that Defendant No. 1 is bound and liable to pay the claim in suit to the Plaintiff. What is important to note is that under the guarantee and in particular Clause 10 thereof, Defendant No. 1 had undertaken and agreed to pay any demand made by the B.M.C. to the Plaintiff for the municipal taxes as specified in Clause 3 of the leave and licence agreement without raising any dispute regarding the validity and/or quantum and/or otherwise in respect thereof. Moreover, this undertaking was unconditional.

18. It was submitted on behalf of Defendant No. 1 that the Plaintiff and Defendant No. 2 ought to have challenged the fixation of the ratable value as well as the property taxes further.

19. I am unable to agree. In view of the above, this defence is merely with a view to avoiding the payment.

20. It was then submitted that the amount claimed by the B.M.C. had not crystallized. Firstly, in view of what is stated above, the statement is not well founded even in fact. The letter from the B.M.C. dated 3.3.2007 removes the doubt in this regard,if any. The exact amount claimed by the B.M.C. is claimed in the suit. That in future in some challenge, there may hypothetically be a refund of the amount is no ground for denying the Plaintiff a decree for the sum which at present stands crystallized. This is more so in view of the express unconditional terms inter-alia of the Corporate Guarantee and even of the earlier undertakings contained in the consent terms, leave and licence agreement as well as the correspondence.

21. The next defence is that this Court has no jurisdiction to try this suit in view of Section 41 of the Presidency Small Causes Act, 1884, which reads as under:

41. Suits or proceedings between licensors and licensees or landlords and

tenants for recovery of possession of immovable property and licence fees or rent, except to those to which other Acts apply to lie in Small Cause Court.

(1) Notwithstanding anything contained elsewhere in this Act but subject to the provisions of Sub-section (2), the Court of Small Causes shall have jurisdiction to entertain and try all suits and proceedings between a licensor and licensee, or a landlord and tenant, relating to the recovery of possession of any immovable property situated in Greater Bombay, or relating to the recovery of the licence fee or charges or rent therefore, irrespective of the value of the subject matter of such suits or proceedings.

(2) Nothing contained in Sub-section (1) shall apply to suits or proceedings for the recovery of possession of any immovable property, or of licence fee or charges of rent thereof to which the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, the Bombay Government Premises (Eviction) Act, 1955, the Bombay Municipal Corporation Act, the Maharashtra Housing and Area Development Act, 1976, or any other law for the time being in force, apply.

22. The claim in the present case is not based on the leave and licence agreement alone. It is also based inter-alia upon the Corporate Guarantee dated 24.5.2003. The Corporate Guarantee is independent of the leave and licence agreement. In fact the Corporate Guarantee correctly construed dealt with the rights and liabilities of the parties after the leave and licence agreement had come to an end. Indeed even the security deposit under the leave and licence agreement had been refunded as stated in Clause 9 of the Corporate Guarantee. It was in consideration inter-alia of the same that the Corporate Guarantee was executed.

23. The present suit is not to recover possession of the premises. Nor is it one to recover compensation under the leave and licence agreement at least in so far as the cause of action therein is based on the corporate guarantee and not under the leave and licence agreement. Even assuming that the amounts due under the corporate guarantee pertain to the leave and licence agreement they are not part of the compensation due under the leave and licence agreement. Thus Section 41 does not bar the jurisdiction of the Court to entertain the suit.

24. Lastly, it was submitted that the suit is not maintainable as it is based on a contract of indemnity. Mr.Mehta relied upon the judgment of the Supreme Court in the case of State Bank of Saurashtra Vs. Ashit Shipping Services (P.) Ltd. and Another, in support of his submission that a suit on an indemnity can never be filed under the provision of Order 37 of the Code of Civil Procedure. The submission and the reliance upon the judgment of the Supreme Court in this regard are not well founded.

25. I have proceeded on the basis that the Corporate Guarantee in the present case is in fact an indemnity and not a guarantee. In the case before the Supreme Court also, the document was construed to be an indemnity bond. It is important

however to note the facts in that case.

(A). The first Respondent therein was the Plaintiff who was an agent of one M/s.Palm Oil Transportation Pvt. Ltd. for their vessel which arrived at the Kandla Port carrying timber consigned to various parties. The second Respondent sent the first Respondent a bond which inter-alia requested the first Respondent to deliver the goods to one M/s.Vasani Brothers despite the fact that the relevant bills of lading had not arrived. By the bond the second Respondent agreed to indemnify the first Respondent in respect of any liability or loss or damage which the first Respondent may sustain by reason of delivering the goods in accordance with the said request and to pay to the first Respondent the amount of any loss which inter-alia the first Respondent may incur as a result of so delivering the goods. By the bond, the second Respondent also agreed to purchase and deliver to the first Respondent bills of lading duly endorsed. On the said bond the following notation appeared 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?. The second Respondent took delivery of the cargo but never delivered to the first Respondent the duly discharged bills of lading. Thereupon the first Respondent contending that the said indemnity was a guarantee filed a summary suit thereon.

(B). It is important to note that in the affidavit in reply to the Summons for Judgment, the bank inter-alia contended that the endorsement on its behalf on the said indemnity bond was in violation of its procedure, without due sanction or permission, in excess of the Branch Manager?s power and fraudulently obtained in collusion and with the assistance of the then Branch Manager. It was further contended that there were discrepancies in the documents. What is important to note is that there was no rejoinder filed by the first Respondent/Plaintiff. The Supreme Court therefore at the end of paragraph 7 of the judgment held that there was thus no denial of the averments made in the affidavit in reply filed by the Appellant bank. The trial Court refused leave to defend and the Gujrath High Court dismissed the bank?s revision application against the said order terming the Appellant bank?s defence as sham.

(C). The Supreme Court proceeded on the basis that the document was an indemnity and not a guarantee. The Supreme Court in paragraph 13 observed that the document was contrary to the normal practice, the Manager of the bank having merely affixed the stamp and signed under a paragraph which stated that they have joined in the indemnity. The Supreme Court also observed that the averment that the documents submitted to the negotiating bank were not negotiated as there were discrepancies was not denied. The Supreme Court also held that the serious allegations of fraud and collusion and that the document did not exist in the records of the Appellant bank were not defences which could be characterized as sham and constitute triable issues. The Supreme Court therefore held that the bank ought to have been granted leave to defend.

26. Mr.Mehta however placed strong reliance upon the following observations of the Supreme Court in paragraphs 14 and 15:

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 is 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 bills 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 a 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 and Natural Gas Corporation Ltd. Vs. State Bank of India, Overseas Branch, Bombay, . 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.

27. I do not read the judgment of the Supreme Court as holding that irrespective of the nature of an indemnity bond, a summary suit is not maintainable on the basis thereof or that in such cases unconditional leave ought to be granted irrespective of the terms and conditions thereof. Nor do I read the judgment of the Supreme Court as holding that all cases of a guarantee may be filed under the provisions of Order XXXVII Rule 1(2)(b)(iii). The maintainability of a suit on a guarantee or an indemnity under Order XXXVII would depend upon the terms and conditions of the guarantee or the indemnity. Further a summary suit on a guarantee is not maintainable only under Order XXXVII Rule 1(2)(b)(iii). Depending on the terms and conditions of the guarantee and the nature of its invocation, it could also be maintainable under Order XXXVII Rule 1(2)((b)(i). For the same reason a summary suit would also be maintainable under Order XXXVII Rule 1(2)(b)(i) on an indemnity depending on the terms thereof and the nature of its invocation.

28. A suit on a guarantee can be filed under Order XXXVII Rule 1(2) (b)(iii) only where the claim against the principal is in respect of a debt or liquidated demand only. Thus where there is no debt or liquidated demand against the principal, a suit on a guarantee under Order XXXVII Rule 1(2)(iii) is not maintainable. There are however guarantees under the terms whereof the guarantor agrees to pay the sum stipulated therein or any sum to be stipulated by the creditor. Indeed in commercial transactions it is such guarantees that are predominantly furnished. A summary suit even on such a guarantee is maintainable though there is no claim again the principal in respect of a debt or liquidated demand. A summary suit on such a guarantee though not maintainable under Order XXXVII Rule 1(2) (b)(iii) would be maintainable under Order XXXVII Rule 1(2)(b)(i). This is for the reason that the amount so stipulated in such a guarantee or by the creditor being authorized to do so as per the terms of the guarantee though not a debt or liquidated demand against the principal, would constitute a debt or a liquidated demand in money payable by the guarantor/surety on a written contract viz. the guarantee.

29. In Oil and Natural Gas Corporation Ltd. Vs. State Bank of India, Overseas Branch, Bombay, referred to in paragraph 15 of the above judgment the Supreme Court in fact dealt with precisely such a guarantee. Under the terms thereof, the S.B.I. bound itself to irrevocably and unconditionally pay to the O.N.G.C. on demand in writing without demur or protest and irrespective of any dispute between the O.N.G.C. and the principal debtor a sum of money upto a

stipulated limit on account of any liquidated damages from the principal debtor to the O.N.G.C. In the case before the Supreme Court, the loss could only have been determined in a trial. This is clear from the terms of the indemnity bond in that case. It was to indemnify any liability, loss or damage which the Respondent may sustain. There was nothing therein which determined or enabled the determination of the liability, loss or damage qua the principal except by means of an action instituted in a Court. The liquidated damages not having been ascertained when the suit was filed, would not constitute a debt or liquidated demand against the principal as required under Order XXXVII Rule 1(2)(b)(iii). It however, constituted a liquidated demand in money payable by the Defendant i.e. the guarantor on a written contract namely the contract of guarantee. It is a liquidated demand as under the terms of the guarantee, the surety was entitled to stipulate the amount payable by the guarantor and such sum was agreed under the terms of the guarantee to be payable without demur. In O.N.G.C. v. S.B.I., it was also held by the Supreme Court that the encashment of an unconditional bank guarantee does not depend upon the adjudication of the disputes between the creditor and the principal debtor and that where the beneficiary shall be the sold judge on the question of breach of contract, the bank shall pay the amount covered by the guarantee on demand without demur. This principle was applied to the defence raised by the S.B.I. even in a summary suit and the Supreme Court rejected the relief granted by the High Court to the S.B.I. to defend the suit unconditionally.

30. As regards the maintainability of a suit under Order XXXVII Rule 1(2)(b)(i), an indemnity is no different from a guarantee. Indeed the provision would apply to any written contract where the other conditions thereof are also satisfied. There is nothing in Order XXXVII Rule 1(2)(b)(i) which excludes from its ambit a suit on an indemnity. There is absolutely no proposition that a summary suit based on an indemnity is not maintainable. Nor is there any absolute proposition that unconditional leave to defend ought to be granted in a Summons for Judgment taken out in a suit based on an indemnity irrespective of the nature thereof. This would depend upon the nature of the indemnity. Where the amount is ascertained and crystlized as per the terms of the contract of indemnity as in the present case, a summary suit is maintainable on a written contract of indemnity not under Order XXXVII Rule 1(2)(b)(iii) but under Order XXXVII Rule 1(2)(b)(i). The observations of the Supreme Court in State Bank of Saurashtra?s case are in respect of Order XXXVII Rule 1(2)(b)(iii) and also where in respect of an indemnity there is no debt or liquidated demand in money. Indeed the provisions of Order XXXVII Rule 1(2)(b)(iii) can never apply to an indemnity on the plain terms thereof which expressly refer only to a guarantee.

31. What is important to note is the observations of the Supreme Court that the reason why normally a summary suit on an indemnity bond cannot be maintainable is that the loss would first have to be proved and that the summary procedure therefore cannot be adopted in such cases. The present case however is different. I have already referred to Clause 10 of the Corporate Guarantee

under which it is not any general or unascertained amount that Defendant No. 1 has agreed to indemnify the Plaintiff. In Clause 10, Defendant No. 1 has guaranteed/indemnified the Plaintiff in respect of any demand on the Plaintiff for the municipal taxes by the B.M.C. or the society. The amount remained undecided or unascertained only till the demand was made. The demand admittedly has been made. Thus in the present case, there is no question of proving any loss. The demand is established and admitted. The judgment of the Supreme Court would not apply in a case such as this.

32. In the present case, the Defendant had undertaken and agreed unconditionally and irrevocably to pay the Plaintiff any demand made upon the Plaintiff by the society or the B.M.C. In other words in the present case the indemnity was to the extent of the demand for municipal taxes by the society or the B.M.C. The present case is not one where the indemnity could have been invoked only upon the determination of the quantum at a trial in a properly instituted proceeding in a court of law. It stood determined upon the mere demand thereof by the society or the B.M.C. The determination of the extent of Defendant No. 1?s liability under the corporate guarantee/indemnity was not dependent upon the determination of the loss in an action but upon the mere demand of the municipal taxes by the B.M.C. or the society. That such a demand has been made is not disputed. This is further clear from the fact that the amount so demanded was to be paid by the first Defendant to the Plaintiff ? without raising any dispute regarding validity and/or quantum and/or otherwise in respect thereof.

33. Before passing the final order, it is necessary to note that though not bound to do so, Mr.Tulzapurkar, with a view to leave no room for grievance made the following statements which are accepted:

(i). The Plaintiff shall if called upon to do so by Defendant No. 1 and upon payment of the claim in suit execute a ?Special Power of Attorney? in favour of Defendant No. 1 only empowering to take such steps/remedies as are available in law to challenge the revision of property taxes by the MCGM. Such Special Power of Attorney shall stand automatically cancelled unless Defendant No. 1 takes such steps/remedies as are available to challenge the revision of property taxes within sixteen weeks from the execution thereof. Defendant No. 1/nominee shall not use and undertake not to use the Special Power of Attorney for any other purpose.

(ii). The execution of the Special Power of Attorney mentioned above shall be conditional upon Defendant No. 1 executing an indemnity in favour of the Plaintiff indemnifying the Plaintiff against any action taken and/or any claim/demand made on the Plaintiff or any loss/damage/injury suffered by the Plaintiff by reason of Defendant No. 1?s use of such Special Power of Attorney. In the event of any such claim/action/demand being made or loss arising, Defendant No. 1 shall and do make payment to the Plaintiff of such sum as may be demanded by the Plaintiff on demand, without demur and raising any dispute.

(iii). In the event of the Plaintiff receiving any refund from MCGM/Defendant No. 2 as result of further revision/reduction of property taxes relating to the period 26th May, 2000 to 25th May, 2003, the Plaintiff shall and undertakes on receipt of such refund, to pay over such sum refunded to Defendant No. 1.

(iv). Any amount that the Plaintiff may recover in the present case would be utilized only for the purposes of paying the said demand by Defendant No. 2/ B.M.C. less any amount that the Plaintiff may already have paid to them.

34. The compilation of the original documents is taken on record and marked Exhibit-A collectively. None of the documents are disputed. The Plaintiff shall be entitled to withdraw the original documents upon substituting the same with the copies thereof certified by its advocates to be true copies. The same shall be done in the presence of the Defendants and/or their advocates.

35. In the circumstances, leave to defend is refused, the Summons for Judgment is made absolute and the suit is decreed as prayed. However interest throughout shall be at the rate of 15% p.a.

36. Refund as per rules.

37. Mrs. Srikrishna states that the Plaintiff will not seek to execute the decree till 30.9.2009.

