

**United Breweries (Holdings) Limited Vs. Bangalore International Airport Limited**

**United Breweries (Holdings) Limited Vs. Bangalore International Airport Limited**

**SooperKanoon Citation :** [sooperkanoon.com/1195929](http://sooperkanoon.com/1195929)

**Court :** Karnataka

**Decided On :** Oct-10-2014

**Judge :** ARAVIND KUMAR

**Appeal No. :** WP 19524/2013

**Appellant :** United Breweries (Holdings) Limited

**Respondent :** Bangalore International Airport Limited

**Judgement :**

1 R IN THE HIGH COURT OF KARNATAKA AT BANGALORE DATED THIS THE10h DAY OF OCTOBER, 2014 BEFORE THE HONBLE MR.JUSTICE ARAVIND KUMAR WRIT PETITION NO.19524/2013 (GM-CPC) C/W C.R.P.NO.193/2013 W.P.No.19524/2013 BETWEEN: UNITED BREWERIES (HOLDINGS) LIMITED, A COMPNAY INCORPORATED UNDER PROVISIONS OF THE COMPANIES ACT1956 HAVING ITS REGISTERED OFFICE AT LEVEL-15, UB TOWER, UB CITY VITTAL MALLYA ROAD, BANGALORE-560 001 BY ITS AUTHORISED SIGNATORY (BY SRI D.L. N. RAO, SR.COUNSEL AND SRI. AJITH A.SHETTY, ADVOCATE) AND: BANGALORE INTERNATIONAL AIRPORT LIMITED A COMPNAY INCORPORATED UNDER PROVISIONS OF THE COMPANIES ACT1956 HAVING ITS REGISTERED OFFICE AT BENGALURU INTERNATIONAL AIRPORT DEVANAHALLI, BANGALORE-560 300 REP. BY ITS MANAGING DIRECTOR ... PETITIONER (BY SRI. SAJJAN POOVAYYA, SR. COUNSEL AND MS. HEMA LAWRENCE, ADVOCATE) ..RESPONDENT2WRIT PETITION IS FILED UNDER ARTICLE226AND227OF THE CONSTITUTION OF INDIA, PRAYING TO QUASH THE IMPUGNED

ORDER

DATED303.2013 PASSED BY THE LEARNED CIVIL JUDGE, BANGALORE CITY IN O.S.No.8306/2012 ON I.A.NO.1 AS PER ANN-G TO THE LIMITED EXTENT OF THE CONDITION IMPOSED, REQUIRING THE PETITIONER/DEFENDANT TO DEPOSIT A SUM OF RS. 7,00,00,000/- WITH INTEREST ACCURED THEREON AT THE RATE OF8 P.A. FROM THE DATE OF THE SUIT AS A CONDITION PRECEDENT FOR GRANT OF LEAVE TO DEFEND. C.R.P.No.193/2013 BETWEEN: BANGALORE INTERNATIONAL AIRPORT LIMITED A COMPNAY INCORPORATED UNDER PROVISIONS OF THE COMPANIES ACT1956 HAVING ITS REGISTERED OFFICE AT BENGALURU INTERNATIONAL AIRPORT DEVANAHALLI, BANGALORE-560 300 REPRESENTED BY ITS ASSISTANT GENERAL MANAGER LEGAL MR. SHREEDHAR HEGDE ..PETITIONER (BY SRI. SAJJAN POOVAYYA, SR. COUNSEL AND MS. HEMA LAWRENCE, ADVOCATE) AND: UNITED BREWERIES (HOLDINGS) LIMITED, A COMPNAY INCORPORATED UNDER PROVISIONS OF THE COMPANIES ACT1913 HAVING ITS REGISTERED OFFICE AT LEVEL-12, UB TOWER, UB CITY24VITTAL MALLYA ROAD, BANGALORE-560 001 BY ITS MANAGING DIRECTOR (BY SRI D.L. N. RAO, SR.COUNSEL AND SRI. AJITH A.SHETTY, ADVOCATE) ... RESPONDENT3THIS PETITION IS FILED UNDER SECTION115OF CPC, AGAINST THE

ORDER

DATED3003.2013 PASSED IN O.S.No.8306/2012 ON THE FILE OF THE XXVII- ADDL. CITY CIVIL JUDGE,

BENGALURU ALLOWING THE I.A.No.1 FILED U/O-XXXVII, RULE-3(5) R/W SEC. 151 OF CPC AND I.A.NO.2 FILED UNDER SECTION 151 OF CPC. THESE PETITIONS COMING ON FOR PRELIMINARY HEARING IN B GROUP THIS DAY, THE COURT MADE THE FOLLOWING:

## ORDER

Order dated 30.03.2013 passed by 27th Addl.City Civil Judge, Bangalore in O.S.No.8306/2012 partly allowing I.A.I filed by defendant under Order 37 Rule 3(5) read with Section 151 CPC and granting leave to defendant to defend the suit conditionally on depositing 50% of the suit claim in any nationalized or Scheduled Bank together with interest @ 8% p.a. from the date of suit has been questioned by the defendant as well as plaintiff.

2. W.P.No.19524/2013 has been filed by the defendant challenging above said order insofar as order directing it to deposit 50% of suit claim in any 4 Nationalised or Scheduled Bank with interest accrued thereon @ 8% p.a. from the date of suit as a condition precedent for granting leave to defend itself.

3. C.R.P NO.193/2013 invoking Section 115 CPC has been filed by plaintiff against the above said order granting leave to defendant to defend conditionally and praying for setting aside the said order and issue summary judgment and decree for a sum of Rs.14 Crores and interest thereon @ 18% p.a. from 21.04.2012 till date of payment or realization.

4. I have heard the arguments of Sri D.L.N.Rao, learned Sr.Counsel appearing for defendant and Sri Sajjan Poovayya, learned Sr.Counsel appearing for plaintiff.

5. Facts in brief which has led to filing of these petitions can be briefly summarized as under:

5. Plaintiff has established an Airport at Bangalore in terms of the approval granted by Government of India and is carrying on maintenance, operation and management of said Airport by providing services like Aviation services for the various aircrafts amongst others which would operate from said Airport. Kingfisher Airlines Limited, a subsidiary of defendant company operating an Airline under the name of Kingfisher Airlines was utilizing the services of Airport established by plaintiff and was required to pay various charges to the plaintiff as per its payment policy. Pursuant to the services provided by the plaintiff to Kingfisher Airlines, defendant executed a Corporate Guarantee on 05.12.2011 (hereinafter referred to as Corporate Guarantee for short) whereunder defendant irrevocably and unconditionally guaranteed the plaintiff that all payments that were due to plaintiff from Kingfisher Airlines for an amount not exceeding Rs.14 Crores would be paid on a written demand by the plaintiff stating that Kingfisher Airlines was in default or due for payment to plaintiff.

6. It is stated by the plaintiff that on account of services provided by the plaintiff, Kingfisher Airlines became liable to pay the plaintiff a sum of Rs.78,49,87,872/- as on 31.03.2012 and a sum of Rs.64,21,53,172.98 as on 16.04.2012.

7. Plaintiff made a demand on the defendant in writing on 16.04.2012 by calling upon the defendant to pay the plaintiff the said sum of Rs.14 Crores as per Corporate Guarantee which defendant was required to pay on demand raised by plaintiff since the amounts due by Kingfisher Airline to plaintiff had not been paid. It is not in dispute that said notice was served on the defendant on 19.04.2012. Kingfisher Airlines has also acknowledged in writing that a sum of Rs.67 Crores is due and payable by it to the plaintiff. Defendant has 7 also acknowledged the service of notice of demand made by plaintiff. These are undisputed facts.

8. Plaintiffs contended that on account of demand made by it having not been complied by defendant, it was perforced to file a suit against defendant and sought for a judgment and decree against defendant in a sum of Rs.15,47,00,000/- which is the aggregate of principal sum of Rs.14,00,00,000/- with interest thereon @ 18% p.a. together with future interest by invoking Order 37 of CPC. Said suit came to be filed on 22.11.2012 and on issuance of summons of the summary suit, defendant entered appearance on 03.12.2012 and filed an application on 14.12.2012 seeking leave to defend the suit. In the affidavit supporting the application to

defend, defendant contended that after issuance of notice of demand by the plaintiff on 19.04.2012 an accord and satisfaction was mutually reached between Kingfisher Airlines (Debtor) and the plaintiff (Creditor) which necessarily covered the conditions of Corporate Guarantee and as such, the said guarantee stood discharged and so also original cause of action pleaded in the demand notice dated 19.04.2012. It was contended that aggregate amount of Rs.15,15,00,000/- paid by Kingfisher Airlines to the plaintiff after service of demand notice was unconditionally accepted and appropriated by the plaintiff which was in discharge of Kingfisher's liability as demanded by the plaintiff in its demand notice dated 16.04.2012 made on the defendant and as a guarantor. Hence, defendant contended that Corporate Guarantee executed by defendant in favour of the plaintiff stood discharged including all the obligations and liabilities arising under the Corporate Guarantee executed by it. On these grounds it sought for permission to grant leave unconditionally and contending that defence raised by it is not illusory or moonshine and plea raised by it is a triable issue which requires to be adjudicated by the Court after full fledged trial. 9 9. Said application came to be resisted by the plaintiff by filing detailed statement of objections as per Annexure-F (in W.P.No.19524/2013). After considering rival contentions raised by the learned Advocates, trial Court formulated following points for its consideration: (1) Whether defendant has made out grounds to condone the delay?. (2) Whether the defendant has made out acceptable grounds to grant leave to defend the suit of the plaintiff unconditionally?. (3) What order?. and answered point No.2 in the affirmative but granted leave to defend conditionally by imposing a condition as already noticed herein above namely, defendant should deposit 50% of the suit claim in any Nationalised Bank or Scheduled Bank together with interest @ 8% p.a. from date of suit. 10 10. It is the contention of Mr.D.L.N.Rao, learned Sr.Advocate appearing for defendant that trial Court grossly erred in not considering the defence set up by defendant seeking grant of leave in proper perspective inasmuch as, trial Court has proceeded as though defendant has contended that amounts due to the plaintiff has been paid by it and as such, it has to be absolved of its liability, though defendant had contended that as per the Corporate Guarantee defendant was liable to pay the plaintiff a sum of Rs.14 Crores and after receipt of the notice invoking guarantee by the defendant, the defendant as well as its subsidiaries had paid various sums to Kingfisher Airlines and by virtue of such payment made by defendant to Kingfisher Airlines which was routed by defendant, Corporate Guarantee given by defendant to plaintiff agreeing to pay the amounts to the tune of Rs.14 Crores had stood extinguished or in other words, obligation on the part of defendant to honour the 11 Guarantee did not exist or Corporate agreement had got spent itself.

11. He would draw the attention of the Court to paragraph 19 of the order under challenge to buttress his argument and contend that trial Court has accepted the plea putforward by defendant about defendant having defence available to it to grant leave and when there is semblance of defence put up by defendant and same being a triable issue, it was incumbent upon the trial Court to grant leave to defendant unconditionally to defend the suit and prove its defence particularly when the said defence cannot be construed as false defence, illusory or without any merit.

12. To support his contentions, he would draw attention of the Court to two communications dated 04.01.2013 which emanated from the defendant to Kingfisher Airlines and reply to the said communication dated 05.01.2013 received from Kingfisher Airlines by 12 the defendant to contend that it would prima facie indicate about defendant and its subsidiaries having extended financial support to Kingfisher Airlines during the period 19.04.2012 to 30.09.2012 to the tune of Rs.992,46,39,609/- Crores which was after notice invoking Guarantee was served on defendant by plaintiff. Hence, he contends that plea putforward by the defendant cannot be held or construed as one without merit and same being a triable issue, trial Court ought to have granted leave unconditionally. In support of his submissions, he has relied upon following judgments: (1) (1976)4 SCC687M/S.MECHELEC MANUFACTURERS EQUIPMENT CORPORATION vs ENGINEERS & M/S.BASIC (2) (3) (1958) SCR1211SANTOSH KUMAR vs BHAI MOOL SINGH AIR1998SC2317M/S.SUNIL AND ANOTHER vs SBI COMMERCIAL & INTERNATIONAL BANK LTD. ENTERPRISES13(4) AIR1965SC1698MILKHIRAM OTHERS vs CHAMANLAL BROS., (INDIA) PRIVATE LTD. & (5) AIR1990SC2218Mrs.RAJ DUGGAL vs RAMESH KUMAR BANSAL (6) AIR2004BOMBAY99SMT.SHEEL ARORA vs SANJAY FETAH BAHADUR SRIVASTAVA13 Per contra, Sri Sajjan

Poovayya, learned Sr.Counsel appearing on behalf of plaintiff would contend that trial Court ought to have signed the judgment since suit in question is a summary suit and defendant having not disputed the fact that it had executed a Corporate Guarantee in favour of plaintiff and said contract being independent and distinct contract, defendant cannot stave off its liability. He would elaborate his submission by contending that defendant under Corporate Guarantee in question had unequivocally agreed to pay the plaintiff on demand in respect of amounts due to plaintiff from Kingfisher 14 Airlines but had restricted its claim to be indemnified to an extent of Rs.14 Crores and this Corporate Guarantee cannot be construed as contemporaneous document along with any other document since there is no such contract entered into between the plaintiff and defendant. He would also contended that when Guarantee agreement stipulates that defendant is required to pay the plaintiff when demand is made as per the said contract, defendant cannot contend that it is not liable to indemnify such claim by not honouring such guarantee and the plea now put forward in the affidavit supporting the application to defend would clearly indicate that it is illusory and moonshine and there is no triable issue required to be tried by the trial Court and as such, trial Court ought to have signed the judgment by refusing to grant leave to defend sought for by the defendant conditionally.

14. He would also draw the attention of the Court to Sections 59, 60 & 61 of the Contract Act, 1872 to 15 contend that Creditor - Kingfisher Airlines had not intimated the plaintiff that partial amount paid by it is to be appropriated towards discharge of Corporate Guarantee and when it is not indicated by creditor, it would be in the discretion of such creditor to appropriate the amount as contemplated under Section 60 of the Contract Act, 1872 and accordingly it has been appropriated by plaintiff and as such the defence sought to be raised by defendant is not only illusory but also without any merit. He would also submit that Corporate Guarantee in question issued by defendant to plaintiff would fall under Section 126 of the Contract Act, 1872 and surety's liability being co-extensive with that of principal debtor namely, Kingfisher Airlines in the instant case, defendant cannot be absolved of its liability since undisputedly, debt due to the plaintiff from Kingfisher Airlines being to the tune of Rs.67 Crores after excluding Rs.15 Crores paid by Kingfisher Airlines. Hence, he contends that amounts if any paid by the principal borrower namely, Kingfisher Airlines to 16 the plaintiff, appropriation of the said amount in discharge of the debt would be in the manner of precedence namely, towards earlier debt due to the creditor and at plaintiffs discretion amounts paid by Kingfisher Airlines can be appropriated as per Sections 60 and 61 of the Contract Act, 1872. He would also elaborate his submission by contending that Corporate Guarantee executed by defendant will not stand extinguished or discharged so long as monies due to plaintiff is not paid by the Kingfisher Airlines namely, by the Debtor to the creditor and till such time, guarantee continues and it would not get discharged.

15. On facts, he would further contend that defendant in this case has, as an afterthought, set up this illusory and moonshine defence of having paid either by itself or paid through its subsidiary to the Kingfisher Airlines that too only after receipt of the notice dated 16.04.2012 (invoking the guarantee) i.e., between the period 20.04.2012 to 27.09.2012 and as such, it is claiming 17 that said guarantee has stood discharged and contends if it were to be so, nothing prevented the defendant to either notify the plaintiff in this regard by itself or it could have informed the plaintiff of such payments having been made by the defendant to the Kingfisher Airlines or alternatively, Kingfisher Airlines having paid the amount of Rs.15,15,00,000/- between 20.04.2012 to 27.09.2012 to plaintiff could have intimated the plaintiff that said amount was in discharge of Corporate guarantee given by defendant to plaintiff. This exercise having not been undertaken either by the principal debtor-Kingfisher Airlines or by the guarantor namely, the defendant, said plea has to be necessarily construed as moonshine or illusory. Hence, he seeks for allowing the revision petition filed by the plaintiff and prays for dismissing writ petition filed by the defendant. In support of his submissions, he has relied upon the following judgments: (1) (2012)5 SCC60418 HOUSING DEVELOPMENT AND FINANCE CORPORATION vs GAUTAM KUMAR NAG AND OTHERS (2) AIR1977SC577M/S.MECHELEC MANUFACTURERS EQUIPMENT CORPORATION vs ENGINEERS & M/S.BASIC (3) SUMMONS FOR

JUDGMENT

NO.361/200 AND SUMMARY SUIT NO.929/2007, DECIDED ON 06.08.2009 CONDUCTORS SMITA vs PRABHUDAS

LILADHAR PVT.LTD AND ANOTHER LTD (4) AIR2004BOMBAY337MUKESH GUPTA vs SICOM LTD. (5) (1996)4 SCC622DELHI DEVELOPMENT AUTHORITY vs SKIPPER CONSTRUCTION CO.(P) LTD AND ANOTHER16 Having heard the learned Advocates appearing for the parties and on perusal of the order under challenge and the case laws cited at the Bar, I am of the considered view that following points would arise for my consideration in these petitions:

19. (1) Whether trial Court was justified in granting conditional leave to the defendant by allowing I.A.No.I filed by the defendant under Order 37 Rule 3(5) CPC read with section 151 CPC?. Or Whether trial Court ought to have refused to grant leave by signing the judgment?. (2) Whether order passed by the trial Court requires to be set aside, affirmed or modified?. (3) What order?. Discussion on point Nos.(1) and (2) is likely to overlap each other and as such, they are taken up together for consideration.

17. Execution of irrevocable and unconditional Guarantee by the defendant on 05.12.2011 in favour of the plaintiff agreeing thereunder to pay the plaintiff a 20 sum of Rs.14 Crores is an undisputed fact. Perusal of the said Corporate Guarantee would clearly indicate that guarantor namely, defendant has irrevocably and unconditionally guaranteed that all such payments due to the plaintiff from Kingfisher Airlines, the total sum of which at one time does not exceed Rs.14 Crores would be paid by it to plaintiff on a written demand made by the plaintiff. Clause (B) of the said guarantee would clearly indicate that guarantor is required to pay amount or amounts claimed by the plaintiff upon a demand made by plaintiff on the defendant stating that Kingfisher Airlines is in default of payments to the plaintiff. Clause (D) of the said agreement would also indicate that defendant has agreed that it would at all times effectively discharge its obligation unconditionally and irrevocably. In fact, defendant has agreed that notwithstanding the cancellation of agreement between the parties, guarantee can be enforced by plaintiff insofar as it pertains to settlement of amounts owed with respect to the financial obligations of Kingfisher 21 Airlines to the plaintiff that would have arisen till date of termination of the guarantee and in the event of there being no dispute with regard to quantum of amount, as otherwise, may be decided by an Arbitral Tribunal.

18. On account of outstanding amounts said to be due to plaintiff by the Kingfisher Airlines and same not having been paid by the Kingfisher Airlines, plaintiff invoked the Corporate Guarantee dated 05.12.2011 given by defendant to plaintiff which was due to expire on 31.07.2012 by issuance of notice of invocation dated 16.04.2012 raising a demand on defendant to pay the amount agreed to be paid under the Corporate Guarantee namely Rs.14 Crores. Said notice has been duly served on the defendant as evidenced from the postal acknowledgment produced along with writ petition indicating that same has been duly served on the defendant on 19.04.2012. The principal debtor namely, Kingfisher Airlines has also admitted that a sum of Rs.67 Crores is due by it and same is payable to 22 the plaintiff vide its communication dated 19.04.2012 addressed to the plaintiff. Subsequent to the said demand notice dated 16.04.2012 or between 20.04.2012 to 27.09.2012 Kingfisher Airlines is stated to have paid a sum of Rs.15,15,00,000/- to the plaintiff which is also admitted by plaintiff itself in the plaint at paragraph 8; thus, leaving balance amount of Rs.48,86,53,172.98 as of 21.11.2012.

19. At this juncture, it boils down to the fact that as to whether sum of Rs.15,15,00,000/- said to have been paid by the principal debtor - Kingfisher Airlines to the plaintiff is to be construed as payment said to have been made by the Kingfisher Airlines in discharge of the Corporate Guarantee or whether there is any semblance of nexus to the same or not; since, it is the specific defence of the defendant that defendant and its subsidiaries have advanced or given financial support to the Kingfisher Airlines during this period i.e., between 20.04.2012 to 27.09.2012 a sum of 23 Rs.992,46,39,609/- and on this ground, defendant sought for leave to defend contending that said defence is a triable issue and not illusory and it can substantiate its defence only during the course of trial and at the stage of considering prayer to grant leave such defence cannot be brushed aside either as illusory or as moonshine.

20. Honble Apex Court in the case of M/S.MECHELEC ENGINEERS & MANUFACTURERS vs M/S.BASIC EQUIPMENT CORPORATION reported in AIR1977SC577has approved the principles applicable to the cases

covered by Order 37 CPC propounded by the High Court of Calcutta. At paragraph 8, said propositions have been extracted by the Honble Apex Court, which read as under: 8. In *Sm. Kiranmoyee Dassi v. Dr. J.*

*Chatterjee* (1945) 49 Cal WN246 at p. 253, Das. J., after a comprehensive review of authorities on the principles applicable to cases covered by the subject, stated 24 Order 37, C.P.C. in the form of the following propositions (at p. 253): (a) (b) (c) and leave leave entitled to and is entitled If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign the judgment defendant to unconditional to defend. If the defendant raises a triable issue indicating that he has a fair or bonafide or reasonable defence although not a positively good defence the plaintiff is not sign the judgment to defendant unconditional to defend. If the defendant discloses such facts as may be deemed sufficient to entitle him to defend that is to say, although the affidavit does not and immediately make it clear that he had a defence, yet, shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiffs claim the plaintiff is entitled positively 25 (d) (e) the defendant is not entitled to judgment and is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court furnishing security. If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment the defendant is not entitled to leave to defend. If the defendant has no defence or the defence is illusory or practically moonshine then although the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition and thereby show mercy to the defendant by enabling him to try to prove a defence. ordinarily or sham and or if 26 21. It requires to be noticed that in the unamended provision of Order 37 CPC there was no compulsion on the part of the Court to make an order for deposit of amount by defendant as a condition precedent to grant leave to defend the suit. However, by virtue of proviso to sub-rule (5) Court would not refuse to grant leave unless such Court is satisfied that facts disclosed by defendant do not indicate that defendant has a substantial defence to raise or such defence intended to be put up is not frivolous or vexatious. Earlier concept of granting unconditional leave when triable issue is raised on behalf of defendant has been supplemented by 2nd proviso which mandates such defendant to deposit amount as admitted before leave to defend can be granted.

22. Though defendant in the writ petition in question has invoked both Articles 226 and 227 of the Constitution of India, it is made clear that this Court is 27 examining the order of the trial Court in exercise of supervisory jurisdiction which is traceable to Article 227 of the Constitution of India and the petition in question though styled as Article 226, it is explicitly made clear that said claim made by petitioner is not at all entertainable under Article 226 of the Constitution of India.

23. Grant of leave is a discretionary power exercised by the Courts. If there is a triable issue in the sense that there is a fair dispute to be tried, leave to defend would not be refused. An issue would be triable if it raises a bonfide defence which is not sham, is plausible and not improbable. If the exercise of such power by the Court when not being contrary to material available on record such order would not be lightly interfered in revisional jurisdiction more particularly, when it has not resulted in any material irregularity. However, if there is non-appreciation of material evidence or erroneous 28 appreciation of available material evidence, it gives rise for exercise of revisional jurisdiction by this Court.

24. In this background when the issue in question is examined with reference to the facts on hand and contours laid down in *M/S.MECHELEC ENGINEERS* case by the Honble Apex Court, it has to be seen as to whether the claim of parties would fall within the five clauses enumerated by the Honble Apex Court. In *M/S.MECHELEC ENGINEERS* case it has been held by Honble Apex Court that it is only in cases where defence is patently dishonest or so unreasonable that it could not reasonably be expected to succeed that the exercise of discretion by the trial Court to grant leave unconditionally can be questioned and on facts, exercise of jurisdiction under Section 115 CPC was held to be uncalled for. As to what amounts to triable issue or valid defence and not one of moonshine or illusory, no straight jacket formula can be laid. It depends upon the

facts and circumstances of each case. In a given case, ingenuity of the party through pleadings can be couched in such a manner to give an impression that defence raised is bonafide though it would not be so and even if such defence raised may tend to indicate that there is a triable issue, but on piercing of the Corporate veil, if it is found that such defence is illusory or factually there is no triable issue at all and one sought to be put forward is moonshine, then, Courts would refuse to grant leave and grant the prayer for signing of the judgment by decreeing the suit. As such, the facts of each case requires to be examined as to whether defendant would be entitled for leave to defend the suit. Hence, it will be incumbent upon the defendant to show that they have substantial defence and triable issue and defence raised by it is not frivolous or vexatious and leave to defend should be granted.

25. There may be instances where defence put up though prima facie would indicate to be triable issue and at the same time, it may be either a fantastic or 30 improbable and in such circumstances, discretionary power vested with the Court to put defendant on terms by granting leave would still be available. It has been held by Honble Apex Court in the case of MILKHIRAM (INDIA) PRIVATE LTD. & OTHERS vs CHAMANLAL BROS. reported in AIR1965SC1698as under: It is indeed not easy to say in many cases whether the defence is a genuine one or not and therefore it should be left to the discretion of the trial Judge who has experience of such matters to form his own tentative conclusion about the quality or nature of the defence and determine the conditions upon which leave to defend may be granted. If the Judge is of opinion that the case raises a triable issue, then leave should ordinarily be granted unconditionally. On the other hand, if he is of opinion that the defence raised is frivolous, or false, or sham, he should defend altogether. The majority of cases, however, cannot be dealt with in a clear cut way. The judge may entertain a genuine doubt whether the defence is genuine or sham or in other words whether it raises a triable issue or not. To meet such cases, by the amendment made by the Bombay High Court to O.37, R.2, even in cases where an apparently triable issue is raised the Judge may in impose conditions to refuse leave 31 granting leave to defend. The matter is in the discretion of the trial Judge which discretion has to be exercised judiciously. Care has, however, to be taken that the object of the rule to assist the expeditious disposal of commercial causes is not defeated and at the same time real and genuine triable issues are not shut out by unduly severe orders as to deposit. It would be undesirable and inexpedient to lay down any rule of general application. Whether the defence raises a triable issue or not has to be ascertained by the Court from the pleadings before it and the affidavits of parties and it is not open to the Court to call for evidence at that stage. If upon consideration of material placed before the Court, it comes to the conclusion that the defence is a sham one or highly improbable, an order putting the defendant upon terms before granting leave to defend would be justified. fantastic or is If a doubt were to arise as to whether defence is triable one or moonshine or is evenly balanced, in such circumstances, justice would demand that leave to defend should be granted putting defendant on terms. In the case of FIRM NEW AFGHAN CO., & ANOTHER vs FIRM SADHU SINGH THAKOR SINGH reported AIR321962 PUNJAB168it has been held that such course is left open to the Court. It has been held as under: that the defence 5. The Court below has also observed of defendants Nos. 1 and 2 cannot be said to be free from suspicion or doubt. It is true that this observation has been made-as it must obviously be- only on general impressions of the Court and not on any evidence. It is argued that this observation is in direct conflict with the finding that the defence raises a triable issue. I do not think it is so. The Supreme Court decision in Santosh Kumars case, AIR1958SC321does not in any way run counter to the proposition that a defence may raise a triable issue and yet may not prima facie impress the Court in view of the common so curse of human conduct. In such a case to refuse leave would certainly tend to lead to injustice; at the same time dictates of justice may demand that the leave to defend may be granted on some terms. The impression created on the mind of the Court to induce it to put is, however, always tentative and in the present case it may be easily removable by reliable evidence to be led in the case. Without pursuing this matter any further it is enough for our purposes to say that the discretion exercised by the Court below on facts and circumstances of this case cannot be described to be either contrary to any the defendant on terms the 33 any grave recognised rule of law or practice, or perverse or unjust.

6. The exercise of the revisional power under section 115, Code of Civil Procedure is indisputably discretionary

and when the impugned order does not disclose or irreparable injury and indeed does substantial justice between the parties, the power of revision should neither be invoked nor exercised: See Hari Singh vs. Moinud-din Khan, AIR1944Lah 397. Merely because this Court sitting on the original side may not have imposed the terms does not by itself justify interference on revision. injustice 26. In the instant case, defendant has set up a plea in the affidavit supporting the application to defend by contending inter alia that after receipt of notice of invocation on 19.04.2012 from the plaintiff, the principal debtor namely Kingfisher Airlines has paid the plaintiff a sum of Rs.15,15,00,000/- which is attributable to the claim covered under the Corporate Guarantee issued by defendant to plaintiff and as such Guarantee issued by it has stood extinguished. 34 27. Thus, it requires to be examined as to whether said defence is a valid defence and not illusory or a moonshine defence, raised for the purpose of staving of its liability or postpone the payment of amount to plaintiff by raising such plea or not. The defendant in the instant case does not dispute execution of the Corporate Guarantee nor the terms agreed to under the said Guarantee. There is no doubt that the principle is well established that a Corporate Guarantee is independent of the primary contract and Guarantor is not concerned with the underlying contract between Guarantee and its debtor. The liability of Guarantor is absolute and unconditional. However, its attempt to stave of its liability to indemnify the said claim arising thereunder is on the ground that defendant and its subsidiaries have paid amounts to the Principal Debtor Kingfisher Airlines to the tune of Rs.992,46,39,609/- between the period 20.04.2012 to 27.09.2012 and it is because of this reason, plaintiff did not initiate or file a suit against defendant and only after receiving the 35 amount of Rs.15,15,00,000/- from Kingfisher Airlines, it has filed a suit on 22.11.2012. It requires to be noticed that defendant company is a limited company and with its open eyes entered into a contract with plaintiff. Rights and liabilities flowing under the said contract was well within the knowledge of defendant. If really the contention of defendant is to be accepted that amount paid by it or its subsidiaries to Kingfisher Airlines is the one covered under the Corporate Guarantee executed by it in favour of defendant, the least that was expected of defendant was to intimate either the plaintiff to whom it had agreed to indemnify the Guarantee amount as agreed to under the Corporate Guarantee or alternatively inform the principal debtor- Kingfisher Airlines to whom it claims to have paid the amount by specifically indicating that said amount is to be appropriated towards Corporate Guarantee. This exercise having not been undertaken by the defendant, it cannot be heard to contend that it has a valid defence 36 raised by it and it requires to be tried by full fledged trial.

28. Yet another factor which requires to be noticed by this Court is that two communications which have been very heavily relied upon by defendant namely, 04.01.2013 i.e., from defendant to Kingfisher Airlines and reply dated 05.01.2013 received by the defendant from Kingfisher Airlines are internal correspondences between them. Even if any transaction were to be there between them it would not bind the plaintiff or absolve the defendant of its performance under the Guarantee so long as debt is due to plaintiff from debtor - Kingfisher Airlines. Even otherwise at no point of time, plaintiff has been intimated either by Kingfisher Airlines or defendant about monies paid by defendant to the Kingfisher Airlines so as to construe such payment is in discharge of its obligation under the Corporate Guarantee. 37 29. Yet another reason which requires to be assigned for considering plea raised by the defendant to be held as one of being illusory in nature is the fact that defendant has not informed the plaintiff of any such amounts having been paid in discharge of its Corporate Guarantee and even after having received the notice of invocation dated 16.04.2012, it did not raise its little finger but has consciously kept quite being well aware of the consequences that would flow from non-adherence to the terms of Corporate Guarantee executed by it. Issuance of guarantee is to bind itself as surety on behalf of debtor and to bind the debtor of all such claims to which it would become liable to the extent agreed to under the Corporate Guarantee. If the plea as raised in the instant case by defendant is to be construed as triable issue, the very edifice of Corporate Guarantee would become otiose. Hence, plea raised by the defendant is to be held as one of moonshine and attempt been by defendant to depict as though it is a 38 bonafide dispute will have to brushed aside as an illusory plea raised by defendant.

30. The guarantee agreed to be adhered to by defendant under the Corporate Guarantee cannot be given a go-by by raisingsuch frivolous, vexatious and fantastic plea and attempt made to take umbrage under

internal communication between it and principal debtor by claiming it to be a genuine plea has to be held as a plea tainted with malafides and there is no triable issue at all. If the guarantor were to attempt to stave of its liability to the creditor namely, plaintiff in the instant case by raising such plea it would amount to granting a premium to such unfounded and vexatious plea. Trial Court was well aware of these two communications which was filed before it. Yet, it has failed to consider the same in proper perspective and thereby it has resulted in material irregularity giving rise for exercise of revisional jurisdiction. 39 31. A dispute would be substantial and genuine if it is bonafide and not spurious, speculative, illusory or misconceived. Court while examining prayer for granting leave to defend is not required to hold a mini trial. It must decide whether the grounds appear to be genuine or substantial. However, such defence must not consist of some ingenious mask invented to deprive the plaintiff of a just and honest entitlement and must not be a mere wrangle. It also requires to be examined by the Court that such defence set up by the defendant is not mere moonshine or illusory and there is prima facie material to grant leave to defend itself in the suit.

32. In the light of discussion made herein above, I am of the considered view that order passed by trial Court dated 30.03.2013 allowing I.A.No.1 partly and granting leave to defend suit conditionally on deposit of 50% of the suit claim in any Nationalised Bank or Scheduled Bank together with interest @ 8% p.a. from the date of suit is to be held as erroneous and 40 I.A.No.1 deserves to be dismissed in its entirety. Since the suit in question is a summary suit and defence raised by defendant having been held as not bonafide and said plea being illusory and there being no triable issue, this Court is of the considered view that plaintiff would be entitled for judgment as prayed.

33. For the reasons aforesaid, I proceed to pass the following:

ORDER

(1) W.P.No.19524/2013 is hereby dismissed. (2) C.R.P.No.193/2013 is hereby allowed. Order dated 30.03.2013 passed by 27th Addl.City Civil Judge, Bangalore in O.S.No.8306/2012 is hereby modified and I.A.No.1 filed by defendant under Order 37 Rule 3(5) CPC read with Section 151 CPC is hereby dismissed. 41 (3) Trial Court is directed to proceed in accordance with Order 37 CPC. (4) On peculiar circumstances of the case, parties are directed to bear their respective costs. Sd/- JUDGE \*sp

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**