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***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ I.A. No. 11691/2002 (u/O 37 R 3(5) CPC) in CS(OS)
411/2002

Decided on 28th March, 2012.

NATIONAL HORTICULTURE BOARD Plaintiff
Through: Mr. Sanjeev Singh, Adv.
versus

M/S GLOBAL INDUSTRIES LIMITED &
ORS. Defendants
Through: Mr. Anil Sharma, Adv. for
D-1.
Mr. Hem C Vashisht, Adv.
for D-2 & D-3.

Coram:

HON'BLE MR. JUSTICE A.K. PATHAK

A.K. PATHAK, J. (ORAL)

1. By this order I shall dispose of an application under Order 37 Rule 3 Sub Rule 5 of the Code of Civil Procedure (CPC, for short) filed by the defendants for grant of leave to defend.

2. Plaintiff has filed this suit under Order 37 of the Code of Civil Procedure, 1908 (CPC for short) for recovery of ₹1,76,68,908/- together with pendente lite and future interest @ 18% per annum and costs against the defendants.

3. It may be noted here that during the pendency of suit defendant no.1-company has been wound up by the High Court of

Punjab & Haryana, vide order dated 28th February, 2008 passed in Company Petition No. 151/2003. Pursuant to the said order Official Liquidator has been appointed. Defendant no.1 is, thus, being represented through the Official Liquidator. Vide order dated 27th August, 2010, Single Judge of High Court of Punjab & Haryana has granted permission to the plaintiff to continue with the present suit, subject to the condition that any decree, which may be passed, shall not be executed against the assets of the company (in Liquidation), without the permission of said Court.

4. It is alleged that the plaintiff is a Society registered under the Societies Registration Act, 1860 and has been formed by the Government of India, Ministry of Agriculture, inter alia, for the purpose of promoting, developing and supporting horticulture activities by rendering financial assistance to various institutions engaged in horticulture activities including processing of fruits and vegetables and floriculture. Defendant no. 1 is a company registered under the provisions of the Companies Act, 1956 having its registered office at Flat No. 10, Gauri Apartments, 3-4, South End Lane, near Aurangzeb Road, New Delhi – 110011. Defendant nos. 2 and 3 had guaranteed the due payment of the loan extended to defendant no. 1 by the plaintiff.

5. Vide application dated 9th August, 1994 defendant no. 1 requested the plaintiff to grant financial assistance for its integrated floriculture project. Vide Letter of Intent/sanction dated 3rd February, 1995 plaintiff granted term loan of ₹76 lacs to defendant no.1. Loan Agreement dated 13th February, 1995 was executed by the defendant no. 1 whereby it had agreed to pay the principal sum in five equal yearly installments of ₹15,20,000/- each commencing from 31st March, 1997. It was further agreed that whole principal amount would be refunded latest by 31st March, 2001. Defendant no. 1 further agreed to pay service charges @ 4% per annum on the outstanding loan amount. Defendant no.1 further agreed that, in case of default of payment of any installment of principal amount as per the schedule, the entire amount of term loan or balances then due including the outstanding service charges and penal interest will become forthwith due and payable by defendant no. 1. Defendant no. 1 also created first charge by way of hypothecation in favour of the plaintiff on all its movable properties including movable machinery, machinery spares, tools, accessories etc. by executing an agreement to this effect on the same day. Demand Promissory Note was also executed on 13th February, 1995. Defendant no. 1 further created pari pasu charge and joint equitable mortgage of its

immovable property situated on a plot of land measuring 17 acres 2 Canal and 8 marlas at Village Abhaypur to Garhi Bazidpur Permitline, P.O. Damdama, District Gurgaon, Haryana, in favour of plaintiff, Haryana State Industrial Development Corporation Limited (HSIDC) and Canara Bank, 74, Janpath, New Delhi.

6. Defendant nos. 2 and 3 extended their personal guarantee and executed Guarantee Agreement dated 13th February, 1995.

7. Subsequently, defendant no. 1 again approached the plaintiff and requested for further financial assistance vide application dated 27th June, 1995. This request was also considered by the plaintiff and loan of ₹24 lacs was sanctioned vide Letter of Intent/sanction dated 8th October, 1996. Defendant no.1 again executed Loan Agreement dated 9th October, 1996. Defendant nos. 2 and 3 executed Guarantee Agreement dated 9th October, 1996 to secure this loan as well. The second loan amount of ₹24 lacs was also repayable in five equal yearly installments of ₹4.80 lacs each commencing from 31st October, 1997 till the payment of the whole principal amount. Defendant no. 1 was also to square up this loan latest by 31st October, 2001. Service charge @ 4% per annum on the outstanding loan amount was agreed in respect of the second loan transaction as well. Letter of hypothecation was executed on

9th October, 1996 for covering this loan as well. Demand Promissory Note for ₹24 lacs was executed on 9th October, 1996. On execution of the aforesaid documents loan of ₹24 lacs was disbursed in two installments of ₹15 lacs and ₹9 lacs on 27th November, 1996 and 12th December, 1996 respectively.

8. After availing the amount of ₹1 crore defendants failed to adhere to the financial discipline. Vide letters of acknowledgment/revival dated 27th June, 1997, 22nd June, 2000, 21st July, 1999 and 4th October, 1999, defendants acknowledged their liability to pay all the outstanding in respect of the advances made by the plaintiff to defendant no.1 under the aforesaid loan agreements. However, defendants failed to clear the dues of the plaintiff. Legal notice dated 17th April, 2000 sent by the plaintiff through its lawyer did not bring any fruitful results.

9. As on 15th January, 2002 following amount was due and payable by the defendants:-

Principal	₹1,00,00,000/-
Service Charges for 1994-95	₹38,312/-
Service Charges for 1995-96	₹3,04,000/-
Service Charges for 1996-97	₹3,04,000/-

Service Charges for 1997-98	₹4,31,397/-
Service Charges for 1998-99	₹4,00,000/-
Service Charges for 1999-2000	₹4,00,000/-
Service Charges for 2000-2001	₹4,00,000/-
Penal Interest on Principal & Service Charges (Upto 15-1-2002)	₹57,34,344/- ₹1,80,12,053/-
Less: Service Charge received on 18-4-1996	₹3,43,145/-
Total amount outstanding as on 15.01.2002	1,76,68,908/-

10. In *Mechalec Engineers & Manufacturers vs. Basis Equipment Corporation* (1997) 1 SCR 1060, Supreme Court has held that the question of granting leave to defend has to be considered in the light of following principles:-

- a) If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.
- b) If the defendant raised a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.
- c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend,

that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose condition as to the time or mode of trial but not as to payment into Court or furnishing security.

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

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

11. In *Raj Duggal vs. Ramesh Kumar Bansal* AIR1990SC2218, Apex Court has been held that leave to defend must be declined where the Court is of the opinion that grant of leave would enable to prolong the litigation by raising untenable and frivolous defences. It has been held that the test is to see whether the defence raises a real issue and not a sham one. It has been further held that when there is a plausible defence leave to defend must be granted.

It has been held that if there is a dispute as to the meaning of a document or uncertainty as to the amount actually due or the facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witness leave should not be denied.

12. In the backdrop of the above settled legal position, it has to be seen as to whether the defendants have been able to disclose triable issues or that the defence raised by them is sham, frivolous and moonshine.

13. It is alleged that plaintiff had taken signatures of the defendants on certain blank documents and the contents whereof have been filled up by the plaintiff later on as per its own convenience, thus, the documents were not binding on the defendants. In my view, this plea does not raise any triable issue. No prudent persons is expected to sign on blank documents. Defendants were carrying on business and cannot feign their ignorance about the consequences of signing blank documents. It is highly improbable that the defendants would have signed the blank documents merely on asking of plaintiff. It is also not understood as to why the officials of plaintiff, which was formed by the Government, would take signatures of the defendants on blank documents and manipulate the same. That apart, this plea has been

raised for the first time when the plaintiff has filed this suit for recovery of its dues. No complaint was made either to the higher officials of the plaintiff or any other concerned authority, within a reasonable time from the date when plaintiff's officials had allegedly taken signatures of the defendants on blank documents, inasmuch as, it is not in dispute that the amounts mentioned in the documents had been released to the defendant no. 1 and loan has been availed by it. It appears that this plea has been taken as an afterthought and same cannot be accepted being a sham plea. In **Dinesh Kumar Vs. S.N.Chit Fund Pvt. Ltd. 1999 (78) DLT 671** a learned Single Judge of this court held that it cannot be believed that petitioner would have signed a blank printed form of agreement of guarantee without caring for the contents and their implications. In **Indian Bank vs. Cheese Wafers (India) Pvt. Ltd. 1998 (76) DLT 892** it has been held that "defendants did not raise even a whisper after signing this letter of acknowledgement of liability, therefore, now to contend that the documents signed by the defendants were blank, which were subsequently filled up, is only an afterthought to cover their acknowledgement which they have made in the year 1992. Why the defendants chose to keep silent about their signatures having been obtained on blank documents.

This plea was taken at the time of filing of the application for leave to defend not earlier at any stage. Conclusion, therefore, is that plea now sought to be raised by the defendants to the effect that the signatures were obtained on blank documents, is merely a sham plea and devoid of any force”. Accordingly, in my view, the plea of the defendants having signed blank documents does not raise any triable issue.

14. Next contention of learned counsel for the defendants is that the loan agreement, demand promissory note and other related documents are without consideration and not binding on the defendants, thus, the suit filed by the plaintiff on the basis of said written documents is liable to be dismissed. It is alleged that the first loan agreement, demand promissory note and other related documents for ₹76 lakhs were signed on 13th February, 1995; whereas the loan amount was disbursed to defendant no.1 on 14th February, 1995. Similarly, loan agreement, demand promissory note etc. in respect of second loan of ₹24 lakhs were executed on 9th October, 1996; whereas amount was released to defendant no. 1 in two installments on 26th November, 1996 and 12th December, 1996 respectively. I do not find any force in this contention of learned counsel either. It cannot be said that the loan agreement, demand

promissory loan and other related documents are without consideration more so, when defendants have admitted that the amount involved in the said documents was indeed released to defendant no.1, after execution of the documents. Thus, it cannot be said that loan agreement, demand promissory notes etc. were without any consideration. There is no law that the loan amount has to be released simultaneously upon execution of the relevant loan documents. It is not the case of the defendants that the amounts disbursed to defendant no. 1 are not connected with the documents relied upon by the plaintiff. Accordingly, this plea of the defendants is also baseless and does not raise any triable issue.

15. As per the defendants, the suit is barred by time. The issue of limitation is mixed question of law and fact and requires evidence; thus, unconditional leave to defend the suit has to be granted. This plea raised by the defendants is contrary to the documents placed on record which have been duly signed by the defendants. Two loan transactions are involved in this case. First loan was sanctioned on 3rd February, 1995. Documents were executed on 13th February, 1995. Loan amount was disbursed on 14th February, 1995. Defendants have executed revival /acknowledgment letters on two occasions in respect of this loan transaction. First set of revival

letters have been executed by the defendants on 27th June, 1997, that is, within a period of three years from 13th February, 1995. In view of the execution of the revival letters, the period of limitation is extended by another three years with effect from 27th June, 1997. Thereafter, second set of revival letters were executed by the defendants on 22nd June, 2000. In view of this, period of limitation stood extended by another three years i.e. upto June, 2003. As regards second loan transaction of ₹24 lacs is concerned, loan documents were executed on 9th October, 1996. Revival letters in respect of this loan have been executed on 21st July, 1999, that is, within the period of three years from the date of execution of the loan documents; Meaning thereby, the period of limitation in respect of second loan stood extended upto July, 2002. Suit has been filed on 29th January, 2002, thus, is within the period of limitation. No evidence is required to be adduced in view of original documents on record.

16. Learned counsel has next contended that the documents were executed in Gurgaon within the State of Haryana, inasmuch as, the mortgaged property was also situated in Gurgaon, thus, Delhi courts have no jurisdiction to entertain and try this suit. In this case no relief relating to an immovable property has been claimed, thus

territorial jurisdiction of the court will not be governed by Section 16 of CPC. Plaintiff has filed this suit only for recovery of money, thus, territorial jurisdiction of the Court is attracted under Section 20 (a) CPC since defendant nos. 2 and 3 had been residing at Delhi at the time when suit was filed. Section 20 (a) envisages filing of suit, not falling under the categories as specified under Section 15 to 19, in a court within the local limits of whose jurisdiction the defendant or each of the defendant where there are more than one, at the time of commencement of the suit actually and voluntarily resides, or carries on business, or personally works for gain. It has not been alleged in the application that addresses of the defendants no.2 and 3, as given in the plaint, are wrong. Accordingly, the plea taken by the defendants to this effect also does not raise any triable issue.

17. The next contention of counsel for the defendants that HSIDC and Canara Bank are necessary and proper party since the plaintiff was claiming *pari pasu* charge over the properties of defendant no.1, also has no force. Defendants cannot raise this plea at this stage since their application for impleadment of Canara Bank and HSIDC has already been dismissed by a Single Judge of this Court on 9th November, 2005. It was specifically held by this order

that HSIDC and Canara Bank were neither necessary nor proper party to the suit. Defendants cannot be permitted to rake up this issue again. In the leave to defend application, defendant nos. 2 and 3 have denied that they had guaranteed the due repayment of loan extended to the defendant no.1. However, their this plea is contrary to the documents placed on record. Guarantee Agreements in respect of both the loan transactions have been placed on record. Defendant nos. 2 and 3 have not disputed their signatures on these personal guarantee bonds, thus, it cannot be said that defendant nos. 2 and 3 have not personally guaranteed the credit facilities extended to defendant no.1. This point also does not raise any triable issue.

18. Learned counsel for the defendants has further contended that during the pendency of suit, plant and machinery of defendant no. 1 was auctioned on 31st November, 2002 by HSIDC for ₹1.36 crores and out of the sale proceeds a sum of ₹30,19,695/- was given to plaintiff since it was having *pari pasu* charge over the assets of defendant no.1. This fact was concealed by the plaintiff, inasmuch as, it has not been stated as to when this amount was received by the plaintiff. Thus, the amount claimed in the suit is uncertain, therefore, unconditional leave to defend the suit has to be given to the defendants. Reliance has been placed on Raj Duggal (supra).

This argument of the learned counsel may appear convincing at the first blush but has no force. It is not the case that the assets of defendant no.1 were sold by the HSIDC prior to filing of the present suit and a sum ₹30,19,695/- was received by the plaintiff was not given adjustment of at the time of filing the suit. Any amount received during the pendency of the suit can be given adjustment of from the decretal amount.

19. It has been further contended that the loan documents did not provide for charging of penal interest. Plaintiff has included ₹57,34,344/- towards the penal interest. Whether plaintiff is entitled to charge penal interest and on what basis can be resolved only after a full-fledged trial, for which purpose unconditional leave to defend is required to be granted. Counsel for the plaintiff submits that he has got instructions from his client not to press the claim of penal interest amounting to ₹57,34,344/-. Since the claim of penal interest has been given up, no triable issue arises on this point.

20. Learned counsel for the defendants has further contended that the plaintiff had extended soft loan to defendant no.1. As the name suggest soft loan cannot carry any liability of interest. I do not find any force in this contention either. Plaintiff has not charged any

interest but has only claimed service charges @ 4% per annum on the outstanding loan amount in terms of the loan documents. Service charges cannot be equated with 'interest'. That apart, defendants having signed the documents and agreeing to pay the service charges @ 4% per annum on the outstanding loan, now cannot be permitted to contend that this amount was not payable by them. In the similar facts, plaintiff had filed a suit bearing CS(OS) No. 390/2002 against M/s M.R. Mashrooms & Agro Forms Pvt. Ltd. & Ors. for recovery of money under Order 37 CPC. Similar plea was raised by the defendants in the said case which has been answered by this Court vide judgment dated 6th April, 2009 passed in the said case in the following manner:-

“Mr. Aggarwal, counsel appearing on behalf of the defendants, has further argued that in terms of the loan agreement dated 20.03.1995, the loan granted by the plaintiff to defendant no. 1 was a soft loan and, therefore, according to him, this soft loan could not carry any liability for payment of interest. I need not go into this argument of the counsel for the defendants because the plaintiff has not claimed any interest on the principal amount. What it has claimed is service charges at 4% per annum on the outstanding loan amount. Service charges cannot be equated with interest. The service charges have been claimed by the plaintiff in terms of the loan agreement between the parties dated 20.03.1995. Therefore, even if we assume that the soft loan granted by the

plaintiff to defendant no. 1 was not to carry any interest still it does not make any difference to the right of the plaintiff to recover this loan amount or the liability of the defendants to repay it in terms of the loan agreement. This plea of the defendants that the loan was a soft loan also does not raise any triable issue.”

21. No other argument has been advanced by the learned counsel for the defendants nor any other point has been pressed in support of leave to defend application.

22. For the foregoing reasons, I do not find any merit in the leave to defend application. In my view, aforementioned pleas, raised by the defendants, are baseless, frivolous, sham and moonshine and do not raise any triable issue.

23. It is not in dispute that defendant no. 1 had taken loan from the plaintiff to the tune of ₹1 crore i.e. first loan of ₹76 lacs and second loan of ₹24 lacs. It is also not in dispute that loan amount was disbursed to defendant no.1 and was duly availed by it. It is also not the case of the defendants that the loan amount was repaid. Plaintiff has given details of the amount due and outstanding against defendant no.1 in the plaint under different heads. Defendants have failed to give any explanation to show that this amount was repaid fully or in part. As regards claim of penal interest is concerned, plaintiff has already given up the same.

24. In the light of above discussions, leave to defend application is dismissed, consequently, a decree shall follow. From the averments made in the plaint and the documents filed therewith, plaintiff has made out a case for passing a decree in its favour in the sum of ₹1,19,34,564/- (i.e. ₹1,76,68,908/- - ₹57,34,344/-). This amount is payable by the defendant no.1 as principal borrower and defendant nos. 2 and 3 as guarantors, jointly and severally. Accordingly, I pass a joint and several decree in the sum of ₹1,19,34,564/- (Rupees One Crore Nineteen Lacs Thirty Four Thousand Five Hundred Sixty Four Only) in favour of the plaintiff and against the defendants together with costs and pendente lite and future interest @ 4 % per annum, that is, equivalent to service charges, till realization of the decretal amount. Adjustment of ₹30,19,695/- (Rupees Thirty Lacs Nineteen Thousand Six Hundred Ninety Five Only) received by the plaintiff during the pendency of the suit, shall be given while executing the decree. Decree sheet be drawn accordingly.

A.K. PATHAK, J.

MARCH 28, 2012

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