

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

% **Date of decision: 27th February, 2018.**

+ **CS(COMM) 783/2017 & IAs No.13341/2017 (u/O II R-2 CPC),
13342/2017 (for exemption), 14988/2017 (u/O XXXVII R-3
CPC) & 1361/2017 (u/O XXXVII R-3(5) CPC)**

ORCUS CAPITAL ADVISORS PVT. LTD. Plaintiff
Through: Mr. Rajat Navet and Mr. Kushagra
Pandit, Advs.

Versus

AJAY CHANDRA Defendant
Through: Mr. Saket Sikri and Ms. K. Gayatri,
Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff has instituted this suit under Order XXXVII of the Code of Civil Procedure, 1908 (CPC) for recovery of Rs.3,65,13,000/- along with *pendente lite* and future interest @ 18% per annum.
2. The suit was entertained and summons for appearance and on the defendant entering appearance, summons for judgment were served on the defendant and leave to defend application being IA No.1361/2018 has been filed by the defendant and to which the counsel for the plaintiff on 30th January, 2018 stated that no reply was required to be filed.
3. The counsels were partly heard on 30th January, 2018, when during the hearing, proceedings were adjourned to enable the parties to explore the possibility of settlement.

4. No settlement has been arrived at between the parties, according to the counsel for the defendant, for the reason of the defendant being in custody in another case.
5. The counsels have been heard on the application for leave to defend.
6. The plaintiff has instituted this suit pleading (i) that the plaintiff made Inter Corporate Deposits (ICDs) aggregating to Rs.93 crores in Prakausali Investment (India) Private Limited (PIIPL) and May Fair Investments Pvt. Ltd. (MFIPL); (ii) that PIIPL was subsequently amalgamated with May Fair Capital Private Limited (MFCPL) and MFIPL was also subsequently amalgamated with MFCPL; (iii) that the said ICDs were subsequently converted into term Loan Agreements by way of two separate Loan Agreements, both dated 27th May, 2013; (iv) that the loan granted to PIIPL was in the sum of Rs.63 crores and the loan granted to MFIPL was in the sum of Rs.30 crores; (v) that the defendant also signed the Loan Agreements as a personal guarantor and has also executed two Deeds of Guarantee, both dated 27th May, 2013, and has undertaken as a guarantor to pay the dues under the said Loan Agreements; (vi) that the rate of interest payable under the Loan Agreements was @ 17.5% per annum, to be paid on the last date of every month and the term of loan facility was nine months from the date of the said Agreements with the entire loan being repayable to the plaintiff on or before 26th February, 2014; (vii) that on amalgamation of PIIPL and MFIPL with MFCPL, the loans granted by the plaintiff stood transferred to MFCPL; (viii) that on default on payment of interest, the entire loan

became repayable forthwith; (ix) that as on 16th October, 2014, a principal sum of Rs.2,25,00,000/- and interest of Rs.1,10,95,479/- (net of TDS) was due from MFCPL to the plaintiff under the term Loan Agreements; (x) that by way of a confirmation letter dated 16th October, 2014 MFCPL has confirmed a sum of Rs.3,35,95,478/- to be due to the plaintiff; (xi) that MFCPL failed to pay back the outstanding amount on or before 24th December, 2014 as undertaken by way of its confirmation letter dated 16th October, 2014; (xii) that out of the aforesaid loan amount, MFCPL has paid a sum of Rs.92 lakhs to the plaintiff; (xiii) that the plaintiff has initiated winding up proceedings against MFCPL in this Court and in which proceedings also, the dues of Rs.2,25,00,000/- with interest were admitted; (xiv) that in view of the National Company Law Tribunal (NCLT) having allowed application under Section 7 of the Insolvency and Bankruptcy Code, 2016 with respect to MFCPL on 27th June, 2017, an Insolvency Professional has been appointed and moratorium period under Section 14 of the Insolvency Code has come into operation and the plaintiff as such is unable to institute recovery proceedings against MFCPL; (xv) that the defendant, in his capacity as guarantor, is liable to pay the outstanding amount to the plaintiff severally with MFCPL.

7. The defendant has sought leave to defend pleading (a) that since a moratorium period against MFCPL is operating, unless and until the liability of the principal debtor is determined, the defendant as a guarantor cannot be held liable; (b) that PIPL and MFIPL had furnished security in the form of mortgage of land admeasuring 3.94375 acres of Unitech Service Apartments Limited (USAL) to the plaintiff under the Loan Agreements; (c) that under Clause 3.5 of both the Loan Agreements, the

security was to be released on *pro-rata* basis by the lender in favour of mortgagor/security provider i.e. USAL; (d) that the plaintiff, despite payment of almost entire loan amount having been made, has not released the said security on *pro-rata* basis; (e) that the plaintiff is thus guilty of breach of the terms of the Loan Agreements; (f) that the suit is bad for non-impleadment of MFCPL; (g) that the plaintiff, without suing MFCPL cannot proceed against the guarantor i.e. the defendant only; (h) that the present proceedings are only to harass and pressurise the defendant guarantor; (i) that winding up proceedings i.e. Co. Petition No.249/2016 titled ***Orcus Capital Advisors Pvt. Ltd. Vs. Mayfair Capital Pvt. Ltd.*** are already pending in this Court.

8. The counsel for the defendant, on 30th January, 2018 had referred to the judgment dated 6th September, 2017 of the High Court of Allahabad in Writ C. No.30285/2017 titled ***Sanjeev Shriya Vs. State Bank of India and six others*** but on a reading of paras 28 & 29 of the said judgment, to which attention was drawn, it was found to be holding that ‘till the liability is still in fluid situation and has not been crystallized, two parallel/split proceedings in different jurisdictions should be avoided, if possible’. It was thus observed in the order dated 30th January, 2018 that the judgment could not be read as holding a suit for recovery against the guarantor alone to be not maintainable.

9. A perusal of the two Loan Agreements which are stated to be identical, shows, (a) the defendant to be described therein as ‘personal guarantor’; (b) Article 1 thereof defines ‘Obligors’ as the borrowers, the personal guarantor and the security provider, jointly and severally; (c)

Article 3 thereof records the personal guarantee given by the defendant to be by way of security for re-payment of the loans granted thereunder; (d) Article 7.2 thereof provides the consequence of default, entitling the plaintiff to take any one or more of the actions stipulated therein including of enforcement of any of the securities furnished under the Loan Agreements and which in turn as aforesaid included the Deeds of Personal Guarantee admittedly furnished by the defendant.

10. Under the Deeds of Personal Guarantee furnished by the defendant also, the defendant has undertaken to be severally liable to the plaintiff.

11. It is thus quite clear that as per the Loan Agreements and the Deeds of Personal Guarantee, the liability of the defendant as guarantor is joint and several with the principal debtor.

12. I am unable to fathom any principle of law under which a creditor, if barred by law from initiating recovery proceedings against the principal debtor, is disentitled also from initiating proceedings against a personal guarantor who has agreed and undertaken to be liable jointly and severally with the principal debtor. In ***Bank of Bihar Ltd. Vs. Dr. Damodar Prasad*** AIR 1969 SC 297, it was held that under Section 128 of the Contract Act, 1872, save as provided by the contract, the liability of the Surety is coextensive with that of principal debtor and the liability of Surety is not deferred until the creditor has exhausted his remedies against the principal debtor. It was further held that the Surety has no right to dictate terms to the creditor and ask him to pursue his remedies against the principal debtor in the first instance. To the same effect are ***Ram Kishun***

Vs. State of Uttar Pradesh (2012) 11 SCC 511 and *Central Bank of India Vs. C.L. Vimla* (2015) 7 SCC 337.

13. The counsel for the defendant also has been unable to cite any precedent to the contrary.

14. Needless to state, the creditor would not be entitled to recover twice, from the guarantor as well as the principal debtor.

15. As far as the contention of the counsel for the defendant, of the plaintiff, inspite of an amount of Rs.92 crores out of the Loan Agreements of Rs.93 crores having been admittedly re-paid to the plaintiff, the plaintiff, having not released the security is concerned, I have enquired from the counsel for the defendant, the legal consequence, if any thereof and whether the same debars the plaintiff from recovering the loan.

16. In my opinion, even if the plaintiff has failed to perform any of its “reciprocal obligation”, as called by the counsel for the defendant, the remedy of the defendant was to claim damages from the plaintiff therefor. In fact, the said remedy under the Loan Agreements is not of the defendant but of the mortgagor/security provider/USAL. There is no plea even in the application for leave to defend application that mortgagor/security provider/USAL, at any point of time, called upon the plaintiff to release the security or that the plaintiff refused to do the same.

17. Thus, the said plea also is not found to be such which is required to be put to trial or which, if decided in favour of the defendant, would disentitle the plaintiff from a decree for recovery of the amounts claimed.

18. The third plea taken in the application for leave to defend, of non-joinder, has already been dealt with by me hereinabove.

19. The counsel for the defendant has also contended that the plaintiff cannot pursue the proceedings for winding up against the principal debtor as well as the proceedings for recovery of money against the defendant as the personal guarantor.

20. In my opinion, there is no bar to a creditor taking simultaneous proceedings especially when under the financial agreements such liberty has been expressly vested in the creditor (Article 9.13 of the Loan Agreements). No law to the contrary has been cited.

21. The application of the defendant for leave to defend thus does not disclose any grounds on which leave to defend is required to be granted.

22. IA No.1361/2018 is accordingly dismissed.

23. Axiomatically, a decree is passed in favour of the plaintiff and against the defendant, for recovery of Rs.3,65,13,000/- along with interest on the principal amount of Rs.2,25,00,000/- @ 12% per annum from the date of institution of the suit till realisation. The plaintiff shall also be entitled to costs of the suit.

24. Decree sheet be drawn up.

25. The counsel for the defendant states that vide order dated 20th November, 2017 of the Supreme Court in SLP(Crl.) Nos.5978-5979/2017, coercive steps for execution in respect of the petitioners therein including the defendant herein, have been restrained.

26. That is a matter to be considered in execution and not at this stage.

RAJIV SAHAI ENDLAW, J.

FEBRUARY 27, 2018

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