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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION (L) NO. 905 OF 2015

IN

SUIT (L) NO. 290 OF 2015

1. **UNITED BREWERIES (HOLDINGS) LTD**,
a Company incorporated under the provisions of the Companies Act, 1956, and having its registered office at UB Tower, Level 12, 24 Vittal Mallya Road, Bangalore – 560 001.

2. **KINGFISHER FINVEST (INDIA) LTD**,
a Company incorporated under the provisions of the Companies Act, 1956, and having its registered office at UB Tower, Lever 12, 24, Vittal Mallya Road, Bangalore – 560 001. … Plaintiff

versus

1. **3I INFOTECH TRUSTEESHIP SERVICES LTD**,
a Company incorporated under the provisions of the Companies Act, 1956, and having its registered office at Akruti Centre Point 6th Floor, MIDC Central Road, Next to Marol Telephone Exchange, Mumbai – 400 093

2. **ICICI BANK LTD**,
a Company incorporated under the provisions of the Companies Act, 1956, and having registered office at Landmark, Race Course Circle, Vadodara 390 007 also a branch office at ICICI Bank Tower Bandra Kurla Complex, Mumbai – 400 051.

3. **KINGFISHER AIRLINES LTD**,
having its registered office at UB Tower, Lever 12, 24 Vittal Mallya Road, Bangalore 560 001, and having its Corporate Office at Kingfisher House, Western Express Highway, Vile Parle (East), Mumbai – 400 099. … Defendants

APPEARANCES

FOR THE PLAINTIFFS	**Mr. N. H. Seervai, Senior Advocate**, *with Mr. M. S. Doctor, Senior Advocate, & Ms. Ankita Singhania, i/b M/s. Bachubhai Muim & Co.*
FOR DEFENDANT NO. 1	**Mr. Ashish Kamat**, *i/b M/s. RES Legal.*
FOR DEFENDANT NO. 2	**Mr. Janak Dwarkadas, Senior Advocate**, *a/w Mr. Ankit Lohia, Mr. Anuj Menon and Ms. Shreevardhini Parchure, i/b M/s. Desai & Diwaniji.*

CORAM	: **G. S. Patel, J.**
DATED	: **16th April 2015**

JUDGMENT:

1. This is the Plaintiffs' Notice of Motion. By consent, it is taken up for hearing and final disposal. I have heard Mr. Seervai, learned Senior Counsel for the Plaintiffs, and Mr. Dwarkadas, learned Senior Counsel for Defendant No. 2. With their assistance I have considered the pleadings and affidavits as also some of the relevant documents on record.

2. The Plaintiffs seek an injunction restraining the 1st and the 2nd Defendant from acting on a Power of Attorney dated 12th November 2011, Exhibit "H" to the plaint and from acting on a "Non Disposal Arrangement" ("**NDA**") dated 12th November 2011, Exhibit "G" to the plaint. They also seek that 20.14 lakhs shares of United Breweries Limited ("**UBL**"), owned by Plaintiff No. 1 and deposited with the 2nd Defendant, and which are the subject matter of the NDA dated 12th November 2011 be taken into receivership.

3. Mr. Seervai's case is, briefly, this: The 2nd Defendant ("**ICICI Bank**") lent a substantial amount to Kingfisher Airlines ("**KFA**"). To secure its debts, the Plaintiffs pledged certain shares. ICICI Bank subsequently converted part of that debt into equity and took shares of Kingfisher Airlines of the value (at conversion) of Rs. 170 crores ("**the KFA Shares**"). According to Mr. Seervai, the pledged shares did not constitute any kind of security in respect of these converted KFA Shares; the former were collateral only to the extent of the debt that remained after conversion. The agreement between the parties required that the value of the pledged shares be

maintained at a certain level. To ensure this, the agreement had what Mr. Seervai describes a 'top-up' clause, one that set out a formula and required the pledge of additional shares to maintain the prescribed value level. ICICI Bank also had the option to demand a repurchase of the loan by the 1st Plaintiff. No top-up shares were ever pledged. Instead, the parties entered into another agreement, the NDA, by which the subject shares (201.4 lakh shares of UBL; "**the UBL Shares**") were deposited with ICICI Bank on the agreement that these would not be divested by their holder, the 1st Plaintiff. Mr. Seervai says that the NDA is thus linked to the top-up clause and in substitution of it, and that the top-up clause itself is linked to the loan repurchase option. ICICI Bank never exercised its loan repurchase option. It later assigned and transferred its debt (what remained after the conversion of part of that debt into equity) to another entity. The pledged security and the entitlement to it travelled with debt into third party hands. For some reason, the 20.14 lakh UBL Shares however remained with ICICI Bank, which, therefore, held these shares but no longer the remaining debt. Now ICICI Bank today finds that the KFA Shares it took by conversion from the initial debt are worth very much less than they were at the time of the conversion. It seeks to recoup its loss or shortfall in value by invoking what is called in the documentation between the parties a 'recompense clause' and to liquidate the UBL Shares in its hands to cover this claim. This, according to Mr. Seervai, is entirely illegal and outside the contractual arrangements between the various parties to these transactions. Mr. Dwarkadas on the other hand submits that, closely read, the documents on record indicate beyond a shadow of doubt that the pledged shares were intended to serve as security not only for the repayment of the debt but also to cover the difference or shortfall between the price of the KFA Shares at conversion and their value today, and the UBL Shares are, therefore, available to ICICI Bank to recover its claim under the 'recompense' clause, i.e., for the differential between the value of the shares taken by ICICI Bank at conversion and their price today.

4. Having heard both sides at some length, I am not persuaded that the defence is at all tenable at least at this *prima facie* stage. There is a strong *prima facie* in the Plaintiffs' favour. I have also concluded that unless interim reliefs are granted, considerable and irretrievable prejudice and loss will be caused to the Plaintiffs, and that this tilts the balance of convenience in their favour.

5. Before I turn to the facts of the case, I must note that the Defendants had in fact filed and served a Caveat on the Plaintiffs. Despite this, the Plaintiffs moved on 27th March 2015 for urgent *ex-parte* reliefs without notice. They contended, and, in my view, quite correctly, that at the shortest notice ICICI Bank could liquidate the UBL Shares given that these transactions can be effected rapidly. I did grant an *ex-parte* injunction on 27th March 2015. This was then continued by consent of parties for a limited time till all affidavits were filed. The Motion was peremptorily placed for hearing and final disposal today. That is specifically noted in my order of 9th April 2015. This is how the present Motion comes to be taken up for final hearing today.

6. These are the facts. Some time in 2003, Kingfisher Airlines started its airline business in India. By three agreements dated 8th September 2006, 30th June 2008 and 4th August 2009, ICICI Bank

lent Kingfisher Airlines various amounts totalling Rs. 573.72 crores. These are referred to throughout as the "Existing ICICI Bank Facilities". By two separate documents dated 8th Separate 2006 and 30th June 2008, the Existing ICICI Bank Facilities were secured by a pledge of 3,147,985 shares held by the 1st Plaintiff in United Spirits Limited ("**USL**"), 59,150,000 shares held by the 1st Plaintiff in Kingfisher Airlines and 1,789,410 shares held by Kingfisher Airlines in USL. The pledge was initially in favour of IDBI Trusteeship Services Limited. These shares are referred to throughout as the "Pledged Shares".

7. As is well known, Kingfisher Airlines' financial condition declined from 2008 onwards. The airline never recovered from its financial woes. On 21st December 2020 a consortium of banks, all lenders to Kingfisher Airlines, agreed amongst themselves to restructure Kingfisher Airlines' debt. This was recorded in a Master Debt Recast Agreement ("**MDRA**"). Part of this reconstructing involved ICICI Bank agreeing to grant additional financial assistance of Rs. 78 crores to Kingfisher Airlines. This is referred to as the "Additional ICICI Bank Facility". This is of little relevance; it needs only to be noted that the Additional ICICI Bank Facility was never actually taken. What is material is that it was agreed that the security in the form of the Pledged Shares would extend to the additional ICICI Bank Facility as well. Thus, the Pledged Shares, admittedly, covered both ICICI Bank Facilities, viz., the Existing ICICI Bank Facilities of Rs.573.72 crores and the Additional ICICI Bank Facility of Rs.78 crores, making a total of Rs.651.72 crores. This was recorded in a consolidated Deed of Pledge also dated 21st December 2010.

8. We come now a critical turn of events. At exactly this time, on 21st December 2010, and as part of this debt reconstructing, ICICI Bank and Kingfisher Airlines agreed that an amount of Rs. 170 crores (from the total ICICI Bank Facilities debt of Rs. 651.72 crores) would be converted into what were called Convertible Cumulative Preference Shares ("**CCPS**") of Kingfisher Airlines. These are what I have earlier described as the KFA Shares. An agreement for purchase of or subscription to these shares was also executed on 21st December 2010.

9. On that very date, the Plaintiffs also executed a Loan Purchase Agreement ("**LPA**") in favour of ICICI Bank (not the consortium). I will turn to the terms of this LPA, and to which Mr. Seervai and Mr. Dwarkadas have referred extensively, including its recitals and definition clauses, later. For the purpose of the factual narrative I need only note that the LPA required that the value of the Pledged Shares would always remain sufficient to cover the debt and would always be maintained at a specified level, i.e., that the value of the Pledged Shares of USL would never fall below 1.25 times the aggregate ICICI Bank Facilities and the value of the Pledged Shares of Kingfisher Airlines would never fall below 0.75 times the aggregate ICICI Bank Facilities. Of course, since Rs. 170 crores worth of debt had been converted into equity by issue of the CCPS,the aggregate ICICI Bank Facilities were reduced to that extent. The LPA provided that should either of these categories of Pledged Shares fall below the stipulated benchmark percentages, the Plaintiffs would be required to pledge additional shares as a "top up" security cover. In short, the value of the Pledged Shares was

always to be maintained above a defined waterline to secure the remaining ICICI Bank Facilities.

10. The LPA also contains what is called a recompense clause and this specifically governs the CCPS. As I understand this clause, and to which too I will turn subsequently, it in essence provided that should ICICI Bank on sale of the KFA Shares recover an amount less than Rs. 170 crores, that difference or shortfall would be paid to ICICI Bank. The clause also provided that the obligation to pay the recompense amount would survive the end of the LPA. The LPA also contained a 'loan purchase option' by which ICICI Bank could compel a buy-back of its remaining debt.

11. On 12th November 2011, Plaintiff No. 1 and ICICI Bank executed a Non Disposal Arrangement ("**NDA**"). According to Mr. Seervai, this NDA was a substitution of the 'top up' provision in the LPA. The NDA is in respect of the 20.14 lakh shares of UBL (and which I have earlier described as "**the UBL Shares**"). The NDA contains an agreement or an undertaking by the 1st Plaintiff not to sell these 20.14 lakh UBL Shares of UBL. As part of the NDA, the 1st Plaintiff executed a Power of Attorney in favour of Defendant No. 1 authorising it to sell these 20.14 lakh UBL shares on the occurrence of a defined "event of default".

12. As I have noted, the LPA contained a loan purchase option, by which ICICI Bank could have called on the Plaintiffs to purchase the ICICI Bank Facilities. ICICI Bank never exercised this option. Instead, for a sizeable consideration, on 27th June 2012, ICICI Bank transferred and assigned its rights, including its then existing debt,

along with the accompanying security, to another entity known as a India Global Competitive Fund (“**IGCF**”). There is no dispute about this, or about the fact that thereafter a new lender agreement was then entered into with IGCF superseding all previous agreements and understandings. IGCF effectively stepped into the shoes of ICICI Bank.

13. In 2013, the 1st Plaintiff and Kingfisher Airlines brought suit in the City Civil Court at Calcutta, *inter alia* against IGCF’s trustee. They contended that the consolidated Deed of Pledge was illegal and of no effect and that they had been discharged of all obligations under the initial pledge agreements, and that the security they gave under the consolidated Deed of Pledge stood released and discharged. On 19th September 2013, the Calcutta High Court granted an injunction in favour of the 1st Plaintiff and Kingfisher Airlines in an appeal against IDBI Trusteeship, which was restrained from acting under a Power of Attorney previously given in its favour.

14. In parallel, a winding up petition was admitted by the Karnataka High Court against the 1st Plaintiff. This was brought by one of the 1st Plaintiff’s creditors, namely, BNP Paribas. There follows at this point some correspondence in relation to the UBL Shares that continued to remain with ICICI Bank. Again this is material to which I will return subsequently. At this stage it is only to be noted that the 1st Plaintiff asked ICICI Bank to release these shares contending that in view of the transfer, assignment and novation to IGCF, ICICI Bank could not possibly retain these UBL Shares any longer. There was no response from ICICI Bank.

Instead, it made its recompense claim under the LPA. Correspondence in this behalf continued from December 2013 to January 2014.

15. It seems that despite the restraint order of the Calcutta High Court, IDBI Trusteeship nonetheless acted on the Power of Attorney in its favour and disposed the Pledged Shares. Although the Plaintiffs claim that this sale was at a gross under-valuation, it is not in dispute that what was recovered from this sale was considerably in excess of the secured debt. In consequence, the Karnataka High Court on 20th June 2014 ordered IGCF to deposit in court the surplus sale proceeds from this sale aggregating to Rs. 651 crores.

16. On 9th February 2015, ICICI Bank once again reiterated its demand for recompense amount. The 1st Plaintiff replied, reiterating its stand that ICICI Bank had no right to retain the 20.14 lakh UBL Shares.

17. It is in these circumstances, that the present suit has been brought.

18. The questions before me today are these: was it contemplated by the parties in the LPA (or in the NDA that followed) that the alleged shortfall between the price or value of the KFA Shares (those converted from Rs. 170 crores' worth of debt) at conversion and the value at sale was to be collateralized by the Pledged Shares, or were the Pledged Shares only intended to be a security for the

debt? If, as Mr. Seervai says, the KFA Shares taken on conversion by ICICI Bank were never collateralized, then there is no question of ICICI Bank being allowed to sell the UBL Shares even assuming that the UBL Shares are, in fact, also pledged. There is also the question as to whether the NDA can be said, at least at this *prima facie* stage, to constitute a pledge properly so called of the UBL Shares for any purpose at all.

19. Clearly, in order to address these questions, I must consider the provisions of the LPA and the NDA. A copy of the loan purchase agreement is at Exhibit "F" to the plaint. This document is dated 21st December 2010. Some of the recitals to this agreement, and which in terms of the agreement itself are to be taken into account in the interpretation of this document, as are the schedules, are of some consequence. Recitals A, B, C and G read as follows:

> "(A) Kingfisher Airlines Limited, a company incorporated under the Companies Act, 1956 having its registered office at UB Tower, Lever 12, UB City, 24, Vittal Malllya Road, Bangalore - 560 001 (The "Borrower" / "KFA", which expression unless contrary to the subject and context thereof, shall mean and include its lawful successors and assigns) is one of India's leading airlines and has significant operations across India and the world.
>
> (B) The Borrower has availed of various financial assistances from ICICI Bank (the "Existing ICICI Bank Facilities", which are more particularly described in part A of Schedule I hereto) on the terms and conditions as contained in the respective facility agreements (the "Existing

Facility Agreements", details of which are provided in Part B of Schedule I hereto). In addition to this, the Borrower has also availed of various financial assistances from other banks / financial institutions (the "Additional Financial Assistance", which is exclusive of the ICIC Bank Facilities).

(C) The Borrower had, amongst others, provided third party security to secure the repayment of the Existing ICICI Bank Facilities in the form of pledge over equity shares of United Spirits Limited ("USL") and the Borrower's equity shares as pledged for the benefit of ICICI Bank by the Corporate Obliger. The equity shares of USL and KFA which were pledged in favour of ICICI Bank on the terms and conditions as contained in the pledge agreements dated September 8, 2006 June 26, 2008 and June 30, 2008 respectively (the "Existing Pledge Agreements") are collectively referred to as the "Pledged Shares", which are described more particularly in Schedule II hereto.

(G) In consideration of ICICI Bank agreeing to restructure the Existing ICICI Bank Facilities as proposed above and forbearing from enforcing the security created in its favour by the Borrower and other related group entities of the Borrower including the pledge created over the Pledged Shares and providing additional funding to the Borrower to the tune of Rs. 780.0 Million (Rupees Seven Hundred and Eighty Million only, hereinafter referred to as the "Additional ICICI Bank Facility", also proposed to be secured by the Pledged Shares) on the terms and conditions as contained in the Debt Recast CAL, the Purchasing Party has agreed, to irrevocably and unconditionally purchase the ICICI Bank Facilities (the "ICICI Bank Facilities", which is the aggregate of the Existing ICICI Bank Facilities and the Additional ICICI Bank Facility) from ICICI Bank in terms of this Agreement."

20. Clause 10 is the 'Recompense' clause:

"10. RIGHT TO RECOMPENSE AND OTHER PAYMENT OBLIGATIONS:

10.1 Recompense amount:

i. In case the Share Sale Proceeds recovered by ICICI Bank is of a value lesser than such Converted ICICI Bank Facilities and the Yield Amount which would have accrued to ICICI Bank on such Converted ICICI Bank Facilities, then the differential amount (the "Recompense Amount") shall be paid by the Purchasing Party within 7 Business Days of being called upon to do so by ICICI Bank in writing; or

ii. In case ICICI Bank is unable to divest either part / whole of the Equity Shares / CCPS due to any reason whatsoever, the Purchasing Party shall pay to ICICI Bank an amount equal to the Converted ICICI Bank Facilities and the Yield Amount (the "Redemption Amount") within 7 (seven) Business Days of being called upon to do so by ICICI Bank in writing. Upon payment of such Redemption Amount, part / whole of the Equity Shares / CCPS shall stand transferred to the Purchasing Party, as the case may be;

iii. Notwithstanding anything contained in this Agreement, the obligation of the Purchasing Party

> to pay the Recompense Amount or the Redemption Amount to ICICI Bank shall subsist even after the Loan Purchase Option has been exercised by ICICI Bank and shall survive till such time ICICI Bank recovers the Share Sale Proceeds which shall not be an amount lesser than the aggregate of the Converted ICICI Bank Facilities and the Yield Amount."

21. Clearly in this case we are concerned with sub clauses (i) and (iii) of clause 10. These two clauses used certain defined terms:

> "**Converted ICICI Bank Facilities**: Converted ICICI Bank Facilities shall mean that portion of the fund based ICICI Bank Facilities (which are more particularly described in Schedule III hereto), in lieu of which the Borrower proposes to issue Convertible Cumulative Preference Shares / Equity Shares to ICICI Bank on the terms and conditions as contained in the Debt Recast CAL;
>
> **ICICI Bank Facilities**: ICICI Bank Facilities shall have the meaning as ascribed to it in Recital G of this Agreement.
>
> **CCPS:** CCPS means the freely transferable Compulsorily Convertible Preference Shears to be issued by the Borrower in lieu of the Converted ICICI Bank Facilities having fact value of R. 10/- each and issued on the terms and conditions as contained in a subscription agreement to be entered into between the Borrower and ICICI Bank.
>
> **Recompense Amount:** Recompense Amount shall have the meaning as ascribed to it in Clause 10.1 of this Agreement.

Redemption Amount: Redemption amount shall have the meaning as ascribed to it Clause 10.1 of this Agreement.

Loan Purchase Secured Obligation: Loan Purchase Secured Obligation means the unconditional and irrevocable payment obligations of the Corporate Obligors under this Agreement including without limitation, the obligation to make payment of the Loan Purchase Price to IC ICI Bank on delivery of the Loan Purchase Notice.

Pledged Shares: Pledged Shares shall have the meaning as ascribed to it in Recital C of this Agreement.

Share Sale Proceeds: Share Sale Proceeds shall mean the sale proceeds of divestment of part / whole of the CCOS / Equity Shares as per the extant guidelines.

Yield Amount: Yield amount shall mean the amount which would have accrued to ICICI Bank from the Borrower if the Borrower had continued to make interest payment on the Converted ICICI Bank Facilities at the rate of 12.5% per annum."

22. The definition of 'Loan Purchase Secured Obligation' makes it clear, as Mr. Seervai says, that this obligation is unconditional and irrevocable. This is in direct contrast to Clause 10 which by its very nature is conditional upon ICICI Bank putting to sell the converted KFA Shares.

23. In order to appreciate the spectrum in which Clause 10 operates, it is necessary also to see Clause 4 of the LPA.

"**4. SECURITY**

4.1 Security for the Loan Purchase Secured Obligations:

4.1.1 The Corporate obligors shall ensure that the Loan Purchase Secured Obligations are secured by a first exclusive pledge over:

i. such Number of fully paid up equity shares of USL which provide a cover of 1.25 times the ICICI bank Facilities; and

ii. such number of fully paid up equity shares of the Borrower, which provide a cover of 0.75 times the ICICI bank Facilities.

as held by the Corporate Obligors, in a form and manner acceptable to ICICI Bank.

4.1.2. Notwithstanding anything to the contrary contained herein, the Confirming Party shall create Pledge only over teh fully paid up equity shares of USL while the Purchasing Party shall create pledge over fully paid up equity shares of both KFA and USL.

4.1.3. The Corporate Obligors shall ensure that during the currency of this Agreement:

i. The value of the USL equity shares pledged in favour of ICICI Bank shall always be at least 1.2 times the ICICI Bank Facilities and shall pledge additional shares of USL to ensure that the Value of the USL shares pledged / to be pledged in favour of ICICI bank does not fall below a 1.25 times cover of the ICICI Bank Facilities, within 15 days of being called upon to do so by ICICI Bank, in a form and manner acceptable to ICICB Bank; and

ii. the Value of the KFA equity shares shall always represent at least 0.75 times the ICICI bank Facilities. In case the Value of the KFA equity shares fall below the specified cover, the Corporate Obligors shall ensure:

a. that suitable number of fully paid up equtiy shares of a listed group entity are pledged in favour of ICICI bank so that a cover of 0.75 times the ICICI Bank Facilities is maintained; or

b. maintain a fixed deposit with lien marked to ICICI bank, in a form and manner acceptable to ICICI Bank, which shall be of an amount which represents the deficit in the cover being provided by the KFA equity shares pledged in favour of ICICI Bank.

iii. The Corporate Obligors shall ensure that at no point of time shall the pledge created/proposed to be created over the equity shares of USL and the Borrower, represent more that 30% (thirty percent) of the paid up share capital of either the Borrower or USL.

4.2. Security for the Additional ICICI Bank Facility.

4.2.1. The repayment of the Additional ICICI Bank Facility shall be secured by:

i. a fixed deposit (the “Cash Collateral”) with lien marked to ICICI Bank which shall be of an amount equal to the Additional ICICI Bank Facility;

ii. a pledge over the pledged shares in a manner acceptable to ICICI Bank, to be created by the Corporate Obligors.

4.2.2. The Cash Collateral shall be maintained by the purchasing Party in an account as designated by ICICI bank with a lien marked to ICICI Bank till

i. the Loan Purchase Settlement Date, at which point of time the Cash Collateral shall be appropriated by ICICI Bank towards all monies due and payable under the Additional ICICI Bank Facilities; or

ii. the Cash Collateral is liquidated and appropriated by ICICI Bank in terms of this Agreement. whichever is earlier."

24. Clause 4.1.3 set out above makes it clear that the LPA set a threshold limit or waterline and the value of the Pledged Shares were not to fall below this level. The 'Corporate Obligors' (the Plaintiffs) were required to ensure that that value always remained above this waterline, if necessary by pledging additional shares. This is what is called the 'top up' clause in the LPA. I must also note at this point that the definition of 'Converted ICICI Bank Facilities' is to be read with Schedule III. That schedule at page 384 merely states that the amount of the converted CCPS/Equity Shares is Rs.170 crores.

25. As I understand it, therefore, the LPA had three distinct elements. First, there was the reduction in value of the debt due to

ICICI Bank by an amount of Rs. 170 crores. That is set out in Schedule III to the LPA. The amount due to ICICI Bank was, therefore, reduced to that extent. Second, the remaining debt was covered or secured by the Pledged Shares. Third, this agreement required (Clause 4.1.3) that the value of those Pledged Shares be maintained always at a certain level, if necessary, by the pledge of additional or "top up" shares.

26. There is one other clause of consequence and that is Clause 3. This gave the ICICI Bank an option, said to be irrevocable, to require or to demand the purchase of the ICICI Bank debt by the 1st Plaintiff. Clearly this could only be a reference to the remaining debt, i.e., the original debt less the amount covered into equity. The 'Purchasing Party' mentioned in Clause 3 is the 1st Plaintiff. It is an admitted position that this option was never exercised by ICICI Bank at any time.

27. Mr. Seervai's case is two fold. The first is that the recompense clause 10.1 did not survive the end or termination of the LPA. However, for the present purposes, this is not the basis on which he makes his claim. His case is that the pledge of the shares and the undertaking to provide a top up security under Clause 4.1.3 extended to, and only to, the debt and did not extend to the KFA Shares, viz., the converted equity shares / CCPS. The top up Clause 4.3 must necessarily be linked to clause 3.1 of the LPA which, as I have noted, is the one that gave ICICI Bank a repurchase or buyback option. Mr. Seervai is careful to point out that the clause relating to an 'Event of Default' (Clause 9.1(c)) is defined to include a default in payment of the recompense amount. However, this, he says, does

not extend the security cover to the equity shares. As I understand the submission, it is that ICICI Bank decided to reduce its exposure by converting some of its debt into equity, i.e., by taking the KFA Shares. It purchased these KFA shares at a given price or conversion value. The LPA contemplated a situation where on a future sale of those shares, ICICI Bank might recoup less then the conversion value of Rs.170 crores. This was covered by the recompense clause. However, the Pledged Shares were security only for the remaining debt. It was the debt that was collateralized and not the converted KFA Shares.

28. This stands to reason. The movement of the price of the KFA shares was at that time uncertain. An alternative scenario was equally possible, viz., that KFA Shares (converted from debt) might, on a later sale, fetch a much higher value than their conversion price. The debt, on the other hand, would forever remain a debt until discharged, and would be required to be serviced with interest. Clearly, therefore, the security cover could have been intended to function only as a security cover for the debt and could never have extended to the converted equity, viz., the KFA Shares.

29. Mr. Seervai also points out that not only did ICICI Bank not exercise its loan purchase option under Clause 3.1, it also did not demand the pledge of any additional shares as a top up security. Instead, by consent, the parties executed the NDA on 12th November 2011 a little under a year after the LPA. A copy of this agreement is Exhibit "G" to the plaint. Here again, the recitals are of some consequence. The three recitals in this agreement A, B and C read thus:

(A) Pursuant to the Loan Purchase Agreement dated December 21, 2010 (as may be amended from time to time) (the "LP Agreement") entered into *inter alia* between United Breweries (Holdings) Limited (the "Purchasing Party/UBHL/NDU Provider") and the Lender, the NDU Provider and the Lender mutually agreed on the NDU Provider granting to the Lender an irrevocable option to require the NDU Provider, either by itself or through its nominee/any third person to purchase all or part of the financial assistance lent to the Borrower by the Lender, in terms of the LP Agreement.

(B) One of the conditions set out in the LP Agreement is that the NDU Provider shall provide *security* of share pledge as detailed in the relevant provisions of the LP Agreement and shall create additional security to ensure that the stipulated *security cover* is maintained at all times during the currency of the LP Agreement.

(C) In terms of the LP Agreement and in order to provide assurance that it has the ability to fulfil its obligations under the LP Agreement, the NDU Provider has agreed not to divest or deal with the shares of the Company held by the NDU Provider unless such divestment or dealing is required to make payments as and when called upon by the Lender in terms of the this Agreement and/or the LP Agreement, and undertakes to irrevocable appoint and authorize the Attorney to fulfil the obligations of the NDU Provider under this Agreement.

30. Mr. Seervai submits that these recitals are determinative. They make it clear that the NDA is in substitution of the top-up Clause 4.1.3 of the LPA. This appears to be correct from the wording of Recital C above which speaks of shares being placed with ICICI Bank on the 1st Plaintiff agreeing not to divest these unless called on to do so under the NDA or the LPA. The details of these shares are set out in Schedule V and these are the UBL Shares that are the subject matter of the present agreement. Clause 3 of the NDA sets out the non-disposal arrangement. It make several provisions to ensure that the shares covered by the NDA are free from encumbrance and remain so. They require the 1st Plaintiff (defined as the NDU Provider) to execute a Power of Attorney said to be irrevocable and so forth. It also includes two clauses that are sought to be deployed by ICICI Bank in support of its case. These are Clauses 3.1(h) and 3.1(i), and they read as follows:

> 3(h) Occurrence of any Event of Default or Potential Event of Default under the MDRA and/or LP Agreement and/or failure of the NDU Provider to do all such acts, deeds and things as may be required under this Agreement shall constitute an Event of Default under this Agreement. The NDU Provider shall rectify/cure such Event of Default within a period of three (3) Business Days ("Cure Period") from the occurrence of such event of Default, failing which the NDU Provider shall promptly sell, transfer, assign and/or otherwise dispose-off for cash consideration on any arms length basis and with prior written consent of the Lender's Agent, the Cover Assets, and deposit the Share Sale Proceeds in the Designated

Account as per the terms of the Designated Account Agreement.

3(i) If there is occurrence of an Event of Default in terms of sub-clause 3.1(h), the Attorney shall be authorised, as its constituted attorney (by the execution of a power of attorney as per Schedule II (*Format of Power of Attorney)* hereto) to sell, transfer, assign and/or otherwise dispose of the Cover Assets, including through any Encumbrance on the Cover Assets, with the prior written consent of the Lender's Agent (in a form and manner acceptable to the Lender) for the benefit of the Lender. The NDU Provider agrees that sale, transfer, assignment and/or disposition (including creation of any Encumbrance) by the Attorney of all or any part of the Cover Assets shall be with the prior written consent of the Lender's Agent (in a form and manner acceptable to the Lender), at such costs and prices as may be decided by the Lender being held responsible for any losses (whether direct or indirect, including in relation to any future or present profit) or expenses that the NDU Provider may suffer or incur;

31. In correspondence, ICICI Bank invoked Clause 3.1(h). Exhibit "U" to the plaint at page 544 is ICICI Bank's final notice of 9th February 2015 to the Plaintiffs. This invoked the Event of Default under the LPA. It also referred to previous notices sent by ICICI Bank. In this notice, ICICI Bank demanded an amount of Rs. 14,62,96,005.45 claiming this to be the recompense amount (the value differential of the KFA Shares between the conversion rate and the sale price). In default, ICICI Bank threatened to sell the 20.14 lakh UBL Shares.

32. This letter was preceded by correspondence spanning nearly two years from December 2013 onwards. Exhibit "O" to the plaint is the Plaintiffs' letter dated 5th December 2013 to the President of the Wholesale Banking Group of ICICI Bank, saying that ICICI Bank had no reason or right to hold on the 20.14 UBL Shares deposited under the NDU. The Plaintiffs pointed out that ICICI Bank had converted part of its stake into equity and had subsequently assigned, transferred and novated its entire remaining debt to IGCF. The Plaintiffs called on ICICI Bank to return the 20.14 lakh UBL shares. Mr. Seervai points out that there was no reply to this letter or to the others in the same vein that followed on 23rd December 2013 (Exhibit "R" to the plaint) and 27th January 2014 (Exhibit "T" to the plaint). Instead, ICICI Bank simply made a claim against the Plaintiffs, claiming that there was a shortfall between the conversion price of the KFA Shares taken by ICICI Bank in reduction of its debt and their sale price in the market. This is stated in ICICI Bank's letter dated 12th December 2013 (Exhibit "P" to the plaint), 17th December 2013 (Exhibit "Q" to the plaint), and 2nd January 2014 (Exhibit "S" to the plaint). In all these letters, ICICI Bank threatened to sell the 20.14 lakh UBL Shares to recover the shortfall. In short, ICICI Bank's stand was that the shortfall or the recompense amount was collateralized by the 20.14 lakh UBL Shares deposited under the NDA. The Plaintiffs' case, on the other hand, was that although ICICI Bank might have been entitled to make a claim for the recompense amount, it could not seek to recover the amount claimed by sale of the 20.14 lakh UBL Shares.

33. Mr. Dwarkadas relies on Clause 3.1(h) of the NDA to say that since there is an event of default, the 'Cover Assets' are required to

be sold to recoup the recompense claim made by ICICI Bank. He points out that under the NDA, an Event of Default means an Event of Default as defined under the LPA, and that the 'Cover Assets' are defined to mean the 20.14 lakh UBL shares.[1] Therefore, he says, reading the NDA and the LPA together, the Event of Default has occurred and the Plaintiffs must make good to ICICI Bank the loss it claims under the Recompense Clause 10.1 of the LPA. Mr. Dwarkadas's formulation is, I think, exceedingly difficult at this stage. What he suggests is that we must of necessity connect a convoluted series of dots between the NDA and the LPA only to arrive an assumption or supposition, i.e., we must extrapolate from the Event of Default definition of NDA to the Event of Default definition in the LPA to conclude that the 20.14 lakh UBL Shares were in fact pledged as a security for the recompense claim. There are several problems with this formulation. First of all, Clause 10.1 of the LPA, which deals with the recompense amount, does not say in terms or even by necessary implication that any amount of that recompense claim is in any way collateralized. This, as I have noted, is simply logical; only the debt could have been collateralized, never the equity. Nothing in Clause 10.1(i) or (iii) shows that ICICI Bank ever attempted to hedge its equity position at the time of conversion by extending the security cover to the recompense claim. It only retained its right to demand from the Plaintiffs the differential, if any. Mr. Dwarkadas' submission requires a finding that it was in fact possible to collateralize the recompense claim. I believe that in itself is problematic, simply because, unlike the debt and its recovery which are unconditional, the recompense clause is posited on an

[1] This definition is to be read with the definitions of 'NDU Shares' and 'NDU Assets' in the NDA.

uncertainty or a conditionality. Generally speaking, a security is used to cover an existing known debt or liability. I do not see how any security could ever have been offered in respect of a shortfall-based recompense claim that was always uncertain and conditional. To what extent would such a cover be required? When, in law, could that security be said to stand discharged? Mr. Dwarkadas' submission thus seems to me to demand a finding that ICICI Bank proceeded with the conversion knowing that, in so doing, it was getting for itself the short end of the stick; that it knew *at the time of conversion* that the KFA Shares it took on conversion were worth less than Rs.170 crores or were *certainly* going to be less than that amount and would never be worth more. This is simply unstateable.

34. Secondly, even on affidavit today it is not ICICI Bank's case that there was an actual pledge of the 20.14 lakh UBL Shares. Instead, on affidavit, it says that the deposit of the 20.14 lakh shares was "akin to a pledge/security". This is also problematic. Either there is a pledge or there is not. This concept of a deposit being 'akin to a pledge' and then seeking enforcement as if it is *in fact* a pledge is not something that can be accepted straightaway at the ad-interim stage. In itself this is sufficient to tilt the balance of convenience in favour of the Plaintiffs.

35. Mr. Dwarkadas points out that the shares were converted at Rs. 64.88 per share. Their value today is utterly negligible and will fetch nothing close to the conversion rate. I do not think that this is material in the least. There is a difference between the alleged indebtedness of the Plaintiffs and the enforcement of a security to cover that indebtedness. ICICI Bank may, under terms of the LPA

read with the NDA, be entitled to call on the Plaintiffs to make good the recompense amount, if any. That is a wholly different thing from demanding that the entire recompense amount be recouped by sale of the 20.14 lakh UBL Shares. In order to do this, Mr. Dwarkadas must show unequivocally that it was always the contractual intent to have the 20.14 lakh UBL Shares and, consequently, and by necessary implication, the entire underlying security, made available to ICICI Bank even for recovery of the recompense amount. On the face of it, this is not possible. The 20.14 lakh UBL Shares are linked to the top up clause and the loan purchase option in the LPA. They are not necessarily themselves pledged. ICICI Bank has divested itself of its debt and its cover security. To now claim, as ICICI Bank does, that it transferred the debt but retained part of the security for it to cover something else entirely, i.e., its debt-reduction formula of equity conversion, is I think entirely untenable. Mr. Seervai is correct in saying that the Rs. 170 crores worth of converted KFA Shares were never covered by the pledged security or by the 20.14 lakh UBL Shares that are the subject matter of this Notice of Motion; and, indeed, that there is no pledge at all of the UBL Shares.

36. Mr. Dwarkadas also submits that the Plaintiffs have terminated the Power of Attorney in favour of the 1st Defendant. On the basis of the decision of the Supreme Court in *Seth Loon Karan Sethiya vs Ivan E. John & Ors.*[2] Mr. Dwarkadas submit that such a Power of Attorney is irrevocable. That termination, he says, is another Event of Default. That may indeed be so and there may indeed may have been event of default but that still does not mean

2 AIR 1969 SC 73

and cannot be held to mean that the 20.14 lakh UBL Shares are a security available to ICICI Bank to cover its recompense claim.

37. In any case, to my mind, Mr. Seervai is justified in his submission that even ICICI Bank did not see this deposit of 20.14 lakh UBL Shares either as a pledge or as anything ‘akin’ to a pledge to cover the recompense amount. Indeed, it is for that very reason that ICICI Bank sought a separate cover to the extent of Rs. 45 crores from one Margosa Consultancy Private Ltd (“**the Margosa Security**”), the 1st Plaintiff’s associate, and which had a fixed deposit with ICICI Bank, and got a lien marked in its favour over this fixed deposit. This was specifically directed towards covering ICICI Bank for part of its recompense claim. This is not denied. In itself, this is a factor that must weigh heavily against the Defendants and in favour of the Plaintiffs. For, on its own, it indicates that ICICI Bank itself did not see the 20.14 lakh UBL Shares as any kind of security for the recompense amount. In January-February 2012, ICICI Bank sold 96 lakh KFA Shares. It claimed a shortfall of Rs.47 crores.

38. Viewed from another perspective also the Plaintiffs must succeed. Let us consider in the most simple terms what it is that ICICI Bank did. First it was a lender. It took a pledge to cover its debt due to it. It then restructured that debt. It converted part of that debt into equity. It took a security cover for the remaining amount. It also granted additional financial assistance and extended the security to that further loan. It then insisted that the value of the security be maintained at a certain level to cover the whole of the debt that remained after conversion. It also left itself the option of

calling on the Plaintiffs to make good the difference or shortfall, if any, between the conversion price of the converted shares and their final sale price. However, in this restructuring it did not specifically extend the security to this shortfall; indeed, as I have noted above, it could not have so done. Thereafter, rather than insist on a top-up to maintain the value of the pledge securities, it entered into an NDA by which it took an undertaking from the 1st Plaintiff not to dispose of the 20.14 lakh UBL Shares. It then transferred its entire debt, with its accompanying and underlying security to IGCF. By this time, therefore, ICICI Bank had in its hands the converted KFA Shares of the initial value of Rs. 170 crores and the 20.14 lakh UBL Shares that are the subject matter of this Notice of Motion. What it did not have was the remaining debt or the entitlement to the security covering that debt. What ICICI Bank now seeks to do is, without having in its hands any debt or any right to any security to cover that debt, to make a claim in respect of the 20.14 lakh UBL Shares although these could never have covered the equity component (the KFA Shares) but were always only ever limited to the debt, one of which ICICI Bank divested itself.

39. It is impossible at this interim stage to say that the Plaintiffs have not made out a *prima facie* case or that the balance of convenience is not in their favour. To the contrary: I find there is a more than sufficient *prima facie* case in favour of the Plaintiffs. If the reliefs they seek are not granted, the Plaintiffs cause is all but lost. Mr. Dwarkadas' submission that there is no vestige of a case does not commend itself. To substantiate this, ICICI Bank must explain how it comes to pass that the UBL Shares continue in its hands when ICICI Bank has assigned and transferred the debt itself. It

must also show that the UBL Shares constituted a pledged security, a matter by no means beyond doubt, and, further, that this security extended to the recompense claim arising from a sale of the debt-to-equity converted KFA shares. This, too, is not clear, and the recompense clause that ICICI Bank invokes does even remotely suggest that the shortfall was in any way secured. Finally, there is the matter of ICICI Bank not once bothering to respond to the Plaintiffs' letters or addressing the question squarely raised of how ICICI Bank could continue to hold on to the UBL Shares. This want of a response is telling, particularly when we juxtapose this with the response now of affidavit that the deposit of those UBL Shares was 'akin' to a pledge or a security, and, further, ICICI Bank's taking of the Margosa Security. The Plaintiffs' case is as compelling as ICICI Bank's case is not.

40. For all these reasons, the Notice of Motion is made absolute in terms of prayer clause (a). As regards prayer clause (b), rather than appointing a Court Receiver in respect of the 20.14 lakhs shares of United Breweries Limited, Defendant No. 2 is directed to deposit those shares with the Prothonotary & Senior Master of this Court within a period of two weeks from the date of pronouncement of the judgment. The order directing a deposit of 20,14,000 shares of UBL is stayed for a period of two weeks from the date when this judgment is made available and uploaded.

(G.S. PATEL, J.)