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

Date of Reserve: February 11 , 2015

Date of Decision: March 11, 2015

+ **CS(OS)2502/2012**

HOUSING DEVELOPMENT FINANCE
CORPORATION LTD

..... Plaintiff

Through Mr.Ajay Saroya and Ms.Nisha
Mohandas, Advs.

versus

SANDEEP KUMAR AND ANOTHER

..... Defendant

Through Mr.Dhruv Kumra, Adv. for D-1

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

IA No.20485/2013 (leave to defend)

1. This is an application on behalf of defendant No.1 under Order 37 Rule 3 (5) CPC seeking unconditional leave to defend. The plaintiff has filed the accompanying suit.

2. The present case is a typical example of how unscrupulous builders are cheating and duping innocent small time investors in the hope of purchasing a small residential unit. These investors are being deceived by unregulated real estate market. This is also a glaring example of how statutory/government authorities like Greater Noida Industrial Development Authority are in deep slumber and are permitting unscrupulous builders to carry out their nefarious activities.

3. As per the plaint the suit is filed for recovery of Rs.21,36,857/-. The plaintiff is engaged in the business of granting loans especially loans in the category of housing loans.

4. It is urged that defendants approached the plaintiff for a housing loan for purchase of Flat No.-3022, Second Floor, Shivkala Charms, Plot No.7, Sector PI-II, Greater Noida, U.P. The apartments were being constructed by defendant No.2, the builder. It is averred that based on several representations of defendant No.1, the plaintiff sanctioned a loan of Rs.22 lacs to defendant No.1 for the flat. The parties entered into a Tripartite Agreement dated 10.03.2011. The plaintiff and defendant No. 1 also executed a loan agreement on 15.03.2011. The loan was sanctioned to defendant No.1 for a period of 240 months. The loan was disbursed by making the payment of Rs.20,35,000/- to defendant No.1 vide a cheque issued in favour of defendant No.2. The said disbursement in favour of defendant No.2 was authorised by defendant No.1. Defendant No.2 marked the lien of the plaintiff on the said flat. Defendant No.1 also executed a promissory note dated 15.03.2011 for Rs.22 lacs, an indemnity bond for Rs.22 lacs whereby defendant No.1 agreed to complete disbursement to defendant No.2. It is also pointed out that as per the loan agreement defendant No. 1 was to pay the necessary Equated Monthly Instalments. Some amount has been repaid by defendant No.1. Defendant No.2 has also on behalf of defendant No. 1 made payment of Rs.38,606/-. As there was default in paying to the plaintiff. On 06.03.2012, the plaintiff has sent a Loan Recall Notice recalling the entire loan amount. Despite demand letter dated 26.04.2012 no payment thereafter has been received and total amount of Rs. 21,36,857/- is due and payable.

5. In the application for leave to defend, defendant No.1 has relied upon clauses 10 and 11 of the Tripartite Agreement dated 10.03.2011 to contend that as per the tripartite agreement in case of default in repayment by defendant No.1, the builder shall on intimation to the plaintiff cancel the allotment of the residential apartment and refund all the monies to the plaintiff directly. It is urged that defendant No.1 has

surrendered the allotment to the builder/defendant No.2 which has been cancelled by the builder vide letter dated 20.03.2012. Hence, it is stated that now defendant No.1 has no liability and the liability is only of defendant No.2. It is pointed out that pursuant to an RTI application, defendant No.1 was informed by Greater Noida Industrial Development Authority on 22.10.2012 that on account of default by defendant No.2, the land allotted in favour of defendant No.2 has been cancelled vide order dated 09.09.2011.

6. Learned counsel appearing for defendant No.1/applicant has strenuously urged that in view of Clause 10 of the Tripartite Agreement, the applicant has no liability whatsoever. The entire liability, he submits, is that of defendant No.2. He submits that the plaintiff and defendant No.2 are hand in glove and have cheated defendant No.1. It is urged that the financial institution like the plaintiff verifies the legality of the project and only then sanctions the loan. Pursuant to the fraud played by defendant No.2 in connivance with the plaintiff various FIRs have been lodged against defendant No.2.

7. Learned counsel for the plaintiff has strenuously refuted the above contentions. He has relied upon various clauses of the Home Loan Agreement and Tripartite Agreement to contend that it was a transaction between the plaintiff and defendant No.1. Defendant No.1 is the primary borrower and it is the primary liability of defendant No.1 to repay the dues pursuant to the loan taken. Learned counsel for the plaintiff also relies upon the judgment of this Court in CS(OS) 2894/2012 titled as ***HDFC Ltd. vs. Umesh Kumar Rai & Anr.*** dated 02.09.2014 where in similar circumstances and on exactly identical facts relating to a flat financed by the plaintiff with defendant No.2 this court had declined to grant leave to defend and decreed the suit.

8. The controversy centres around Clauses 10 and 11 of the Tripartite

Agreement which reads as follows:-

“10. Further, the Builder, in the in the event of default of repayment as mentioned in clause 2 and 3 hereinabove, shall on intimation by HDFC cancel the allotment of the residential apartment in favour of the borrower and refund all monies to HDFC directly under intimation to the borrower for appropriation and adjustment by HDFC against all monies due to it from the Borrower as mentioned above.

11. The Builder also confirms and undertakes that it shall submit to HDFC all documents for the Project as requested by HDFC and shall keep HDFC informed of the progress of the project and shall obtain a clearance from HDFC before handing over possession of the respective apartment to the borrower.”

9. The above clauses however have to be read along with the other clauses of Tripartite Agreement. Some of the relevant clauses read as follows:-

“AND Whereas HDFC has considered the said request with a clear understanding and an irrevocable undertaking by the Borrower that subsequent to the disbursement, if any, as requested by the Borrower, there would be no repayment default for any reason whatsoever including but not limited to any concern/issues by and between the Borrower and the Builder/Developer;

...

3. The housing loan advanced to the borrower by HDFC shall be repayable by the borrower by way of Equated Monthly Instalments (EMI). The date of commencement of EMI shall be the first day of the month following the month in which the disbursement of the loan will have been completed and consequently the due date of payment of first EMI shall in such a case be the last day of the said following month. Till the commencement of EMI the borrower shall pay Pre-EMI, which is the simple interest on the loan amount disbursed calculated at the rate of interest as mentioned in the respective loan agreement of the Borrower.

4. That irrespective of the stage of construction of the Project and irrespective of the date of handing over the possession of the residential apartment to the Borrower by the Builder the Borrower shall be liable to pay to HDFC regularly each month the EMIs as laid down in the Loan Agreement to be signed by and between HDFC and the Borrower. The Borrower shall execute an indemnity and such other documents as may be required by HDFC in favour of HDFC in this regard.

....

9. Further if the Borrower commits a breach of any of the terms and conditions of this Tripartite Agreement it shall be treated as an event of default under the Agreement for Sale/Allotment cum Agreement for sale or any such agreement or document signed by and between the Borrower and the Builder for the sale of the said residential apartment.

That in the event of the occurrence of default under the Loan Agreement which would result in the cancellation of the Allotment as a consequence thereof and/or for any reason whatsoever if the allotment is cancelled, any amount payable to the Borrower on account of such cancellation shall be directly paid to HDFC. However, it is further agreed between the Parties that such payment made by the Builder directly to HDFC shall not absolve the Borrower from his liability to pay the residual amount, if any, from the outstanding under the Loan Agreement.”

10. Hence a conjoint reading of above clauses of Tripartite Agreement clearly shows that it was at the request of defendant No.1 that the plaintiff has given a loan of Rs.22 lacs. There is an unconditional undertaking given by defendant No.1 that there would be no repayment default for any reason whatsoever including any issue between defendant No.1 and 2. The payment of EMI is to be made by defendant No.1. Clause 4 clearly states that irrespective of the stage of construction, defendant No.1 shall be liable to pay the plaintiff regularly each month the EMI as laid down in the loan agreement. A conjoint reading shows that it is defendant No.1

who is solely responsible. Clause 10 and 11 of the Tripartite Agreement appear to be for the benefit of the plaintiff rather than for the benefit of defendant No.1. The builder defendant No.2 is obliged to refund all monies to the plaintiff to safeguard the plaintiff. The clause does not shift liability from defendant No.1 to defendant No.2.

11. Similarly the Home Loan Agreement is exclusively between the plaintiff and defendant No.1. It spells out the obligations of the plaintiff and defendant No.1 respectively and it stipulates the loan amount as Rs.22 lacs repayable in 240 months @ EMI of Rs.20,868/-.

12. This court in the case of **HDFC Ltd. vs. Umesh Kumar Rai & Anr. (supra)** under the similar facts has declined to grant leave to defend. The argument that defendant No.1 has been duped by the builder and the bank in collusion has also been rejected.

13. It is however clear that defendant No.2 has completely duped defendant No.1. Though there is no clarity from the pleadings as to how much consideration was to be paid by the plaintiff to defendant No.2 as consideration for the flat, it appears that without a brick being laid down at the site the plaintiff and defendant No.1 have advanced a sum of nearly Rs.21 lacs to defendant No.2. Defendant No.2 has merely collected the money and appears to have disappeared leaving the investors to repent. It is an extremely unfortunate situation.

14. The Supreme Court in the case of **M/s. Mechalee Engineers & Manufactures vs. M/s. Basic Equipment Corporation, AIR 1977 SC 577** has drawn up the parameters to be considered by the court while dealing with the application for leave to defend. Relevant paras of the judgment reads as under:

“8. In Smt. Kiranmoyee Dassi and Anr. v. Dr. J. Chatterjee 49 C.W.N. 246 , Das. J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by order 37 C.P.C. in the form of the following

propositions (at p. 253):

(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 leave to sign judgment and the CS(OS) 2894/2012 Page 7 of 8 Defendant is entitled to unconditional leave to defend.

(b) If the Defendant raises 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, 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 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 conditions 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 is 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 leave to the Defendant on such condition, and thereby show mercy to the Defendant by enabling him to try to prove a defence.”

15. In my opinion defendant No.1 has failed to make out any ground for leave to defend. In case evidence is lead, no new facts or issues are likely to be clarified or likely to evolve. In the facts and circumstances of the case, given the legal position there is no option but to dismiss the present application for leave to defend. The present application is without any merit and is dismissed.

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16. In view of the above, the suit is decreed in favour of the plaintiff and against defendant No.1. The plaintiff shall be entitled to interest @ 5% per annum from the date of the filing of the suit till recovery.

17. Defendant No.2 was served on 16.08.2013. There is no appearance for defendant No.2. As this is a summary suit filed, the suit is also decreed against defendant No. 2.

18. It is however clarified that it is expected that the plaintiff shall in the facts and circumstances of this case first shall try to execute the decree against defendant No.2.

19. The suit is disposed of.

**(JAYANT NATH)
JUDGE**

**MARCH 11, 2015
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