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

% *Date of decision: August 25, 2015*

\+ **RFA(OS) 50/2015**

SANDEEP KUMAR ..... Appellant

Represented by: Mr.N.S.Dalal and Mr.Devesh Pratap Singh, Advocates.

versus

HOUSING DEVELOPMENT FINANCE CORPORATION LIMITED & ANR ..... Respondents

Represented by: Mr.Ajay Saroya, Advocate for Respondent No.1.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. Aggrieved by the order dated March, 11, 2015 dismissing the leave to defend application under Order XXXVII Rule 3 (5) CPC filed by the appellant Sandeep Kumar in the suit being CS(OS) No.2502/2012 filed by respondent No.1 Housing Development Finance Corporation Ltd. (in short 'HDFC Ltd.') under Order XXXVII CPC, Sandeep Kumar prefers the present appeal.

2. In the suit HDFC Ltd. pleaded that while it is engaged in the business of granting loans, especially housing loans, Sandeep Kumar and defendant No.2 M/s Golf Course Sahkari Awas Samiti Limited (in short 'M/s Golf Course') jointly approached to avail the housing loan for Sandeep Kumar for purchase of Flat No.3022, Second Floor, Shivkala Charms, Plot No.7, Sector PI-II, Greater Noida, Uttar Pradesh (in short 'the flat') in the apartments by

the name of 'Shiv Kala Charms' being constructed by M/s Golf Course. According to HDFC Ltd. Sandeep Kumar had represented to HDFC Ltd. that he had satisfied about the integrity and capability of M/s Golf Course to complete the project on time and thus a Tripartite Agreement was entered between HDFC Ltd., Sandeep Kumar and M/s Golf Course pursuant whereafter a loan agreement was entered into between HDFC Ltd. and Sandeep Kumar.

3. M/s Golf Course vide their letter dated March 10, 2011 also marked lien of HDFC Ltd. on the flat. Based on the representation of Sandeep Kumar, duly consented and acknowledged by M/s Golf Course, HDFC Ltd. sanctioned a sum of ₹22 lakhs as loan to Sandeep Kumar for the flat. Out of the total amount of ₹22 lakhs a sum of ₹20,35,000/- was disbursed to Sandeep Kumar and a cheque dated March 15, 2011 drawn on HDFC Bank, Surya Kiran Building was issued in favour of M/s Golf Course. The said disbursement in favour of M/s Golf Course was authorised by Sandeep Kumar. Sandeep Kumar also executed a Promissory Note dated March 15, 2011 for the sanctioned sum of ₹22 lakhs in favour of HDFC Ltd. besides an Indemnity Bond on March 25, 2011. Vide the Indemnity Bond Sandeep Kumar agreed to complete the disbursal under the loan on account of Sandeep Kumar to M/s Golf Course.

4. As per the Tripartite Agreement the loan was payable by Sandeep Kumar by way of equated monthly instalments (EMI) or Pre-equated instalments (PEMI) irrespective of the stage of construction of the project and the date of handing over the possession of the flat. Under the Tripartite Agreement Sandeep Kuamr further agreed to secure HDFC Ltd. by mortgaging the flat to it and M/s Golf Course agreed and confirmed the

mortgage created by Sandeep Kumar. M/s Golf Course also undertook not to create any third party rights or security interest whatsoever on the flat without prior written consent of HDFC Ltd. As per the Tripartite Agreement it was also agreed that in case of default in payment of loan to HDFC Ltd. by Sandeep Kumar, any amount payable by M/s Golf Course to Sandeep Kumar on account of cancellation of allotment of flat shall be paid directly to HDFC Ltd. by M/s Golf Course. However, the same shall not absolve Sandeep Kumar from his liability to pay the residual amount outstanding under the loan agreement.

5. It is the case of HDFC Ltd. in the plaint that the last payment made by Sandeep Kumar towards repayment of loan was dated October 05, 2011 and thereafter no amount was paid except that just before the filing of the suit a further a sum of ₹38,606/- was paid. The outstanding dues not having been repaid HDFC Ltd. sent a loan recall notice dated March 06, 2012 recalling the loan and demanding its outstanding amount as on the date of notice however, Sandeep Kumar failed to pay the sum. When HDFC Ltd. sent a demand notice to M/s Golf Course on April 27, 2012 to refund the amount owed by Sandeep Kumar directly to it even M/s Golf Course failed to refund the amount to be adjusted against the loan account of Sandeep Kumar. Thus according to HDFC Ltd. the principal amount of ₹20,10,678/- coupled with EMI, additional interest and incidental charges, amounting to ₹20,36,857/- was due. On the strength of the Loan Agreement, Promissory Note and Indemnity Bond the suit under Order XXXVII CPC was filed by HDFC Ltd.

6. In the leave to defend application filed by Sandeep Kumar it was pleaded that in terms of the Tripartite Agreement, loan amount was paid by HDFC Ltd. directly to M/s Golf Course towards payment of flat purchased

by Sandeep Kumar. Later Sandeep Kumar came to know about serious dispute of M/s Golf Course with Noida Authority and that a serious fraud was going on in the society. Thus Sandeep Kumar surrendered his allotment which was accepted by M/s Golf Course vide its letter dated March 20, 2012.

7. It is case of Sandeep Kumar that M/s Golf Course having accepted its liability to return the loan amount, he had no liability to pay to HDFC Ltd. Since as per the Tripartite Agreement dated March 10, 2011 it was agreed that in case of default in repayment of loan to HDFC Ltd. by Sandeep Kumar, on account of cancellation of allotment of flat or for any other reason whatsoever loan amount shall be refunded directly to HDFC Ltd. by M/s Golf Course, thus HDFC Ltd. is disentitled to reclaim the loan from Sandeep Kumar. It was pleaded that there is no default of any nature on account of Sandeep Kumar and the liability, if any, is of M/s Golf Course. It was further pleaded that this Court had no jurisdiction to try the case as the subject matter of the property was in Noida.

8. The learned Single Judge vide the impugned order noted that the controversy in the suit centres around clauses 10 and 11 of the Tripartite Agreement and a conjoint reading of the clauses of the Agreement would show that it was at the request of Sandeep Kumar that HDFC Ltd. granted a loan of ₹22 lakhs. There was an unconditional undertaking given by Sandeep Kumar that there would be no repayment default for any reason whatsoever including any issue between Sandeep Kumar and M/s Golf Course. Irrespective of the stage of construction, Sandeep Kumar was liable to pay HDFC Ltd. regularly the EMIs as laid down in the loan agreement. Thus Sandeep Kumar was solely responsible to repay the amount. Even as

per the House Loan Agreement executed exclusively between HDFC Ltd. and Sandeep Kumar it was the liability of Sandeep Kumar to repay the loan in 240 months of EMI of ₹20,868/-. Though observing that this was the case where M/s Golf Course appears to have duped Sandeep Kumar and disappeared after taking money from the investors, learned Single Judge came to the conclusion that no case for grant of leave to defend was made out as no triable issue is made out and thus dismissed the leave to appeal application and decreed the suit.

9. Before this Court the learned counsel for Sandeep Kumar urges that HDFC Ltd. itself contends in the reply to leave to defend application that Sandeep Kumar was duped by M/s Golf Course which fact has found favour even with the learned Single Judge, thus leave to defend ought to have been granted to him and the suit proceeded on merit. The liability, if any, is of M/s Golf Course and not of Sandeep Kumar and thus triable issues having been raised, leave to defend ought to have been granted by the learned Single Judge.

10. We have heard learned counsel for the parties.

11. Legal position as to the grant of leave to defend in a suit under Order XXXVII CPC was laid down by the Supreme Court in the decision reported as 1976 (4) SCC 687 *M/s Mechelec Engineers & Manufacturers vs.M/s Basic Equipment Corporation*, 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 17 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 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, 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 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.

12. Before proceeding further it would be appropriate to note the terms of the Tripartite Agreement. The relevant clauses are reproduced as under:

> *"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.*
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> *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.*
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> *5. The Borrower shall ensure to pay to the Builder his own contribution in full i,e the cost of the flat minus the loan amount being disbursed by HDFC before availing of the disbursement from HDFC.*
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> *6. xx xx xx xx xx*
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> *7. xx xx xx xx xx*
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> *8. That if the Borrower fails to pay the balance amount representing the difference between the loan sanctioned by HDFC and the actual purchase price of the flat/residential*

apartment, or in the event of death of the Borrower or in the event of cancellation of the residential apartment for any reason whatsoever the entire amount advanced by HDFC will be refunded by the Builder to HDFC forthwith. The Borrower hereby subrogates all his rights for refund with respect to the said residential apartment in favour of HDFC.

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 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.

That the Borrower agrees that it unconditionally and irrevocable subrogates its right to receive any amount payable by the Builder to the Borrower in the event of cancellation in favour of HDFC and that the act of payment by the Builder to HDFC under this clause shall amount to a valid discharge of the Builder of its obligation to pay the Borrower such cancellation amount.

Further that the parties agree that the Builder shall in no circumstances forfeit any amount over and above the amount equivalent to the Borrowers contribution towards *the purchase consideration paid to the Builder. Borrower's contribution for the purpose of this clause shall mean and include the difference between the total cost of the residential apartment and the Loan amount as mentioned above.*

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."

13. Further as per the Indemnity Bond executed by Sandeep Kumar he agreed to indemnify HDFC Ltd. at all times for all/any loss that may be a direct or remote consequence of and/or arising out of any dispute between the Indemnifier and the Builder subsequent to HDFC Ltd.'s disbursing the entire loan amount to the Builder at the request and under the written instruction of the Indemnifier.

14. Even if M/s Golf Course was to return the money directly to HDFC Ltd. and M/s Golf Course having not done so, the same does not absolve Sandeep Kumar of his liability. In the light of the clauses noted above and the indemnity bond, it is evident that Sandeep Kumar took upon himself the responsibility of indemnifying HDFC Ltd. and now he cannot revert back to

say that it was the responsibility of M/s Golf Course to repay and thus HDFC Ltd. should recover the said amount from M/s Golf Course. This is an issue inter se Sandeep Kumar and M/s Golf Course for which HDFC Ltd. has no concern.

15. Regarding the issue raised in the leave to defend application that no cause of action took place at Delhi it may be noted that Sandeep Kumar a defendant in the suit is a resident of Delhi, thus this Court has territorial jurisdiction to entertain the suit.

16. No triable issue having been raised, the learned Single Judge committed no error in declining to grant the leave to defend.

17. Appeal is dismissed.

CM No.9071/2015 (Stay)

Application is dismissed as infructuous.

(MUKTA GUPTA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

AUGUST 25, 2015
'vn'