

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**SUMMONS FOR JUDGEMENT NO.111 OF 2014
IN
SUMMARY SUIT NO.776 OF 2014**

IDBI TRUSTEESHIP SERVICES LIMITED, a company
incorporated under the provisions of the
Companies Act, 1956, having its registered office
at Ground Floor, Asian Building, 17 R. Kamani
Marg, Ballard Estate, Mumbai-400 001 .. Plaintiff

Versus

HUBTOWN LIMITED, a company
incorporated under the provisions of the
Companies Act, 1956, having its
registered office at Hubtown Solaris,
N.S. Phadke Marg, Andheri (East),
Mumbai-400 069. .. Defendant

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Mr. Navroze Seervai, Senior Advocate a/w Mr. Kunal Dwarkadas Mr.
Varghese Thomas, Ms. Shanaya Irani and Ms. Aditi V. Deshpande i/b J.
Sagar Associates for the Plaintiff.

Mr. Aspi Chinoy, Senior Advocate a/w Mr. Gaurav Joshi a/w Mr. Nishit
Dhruva, Mr. Prakash Shinde and Mr. Chirag Bhavsar i/b MDP & Partners for
the Defendant.

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**CORAM : S.C.GUPTE, J.
RESERVED ON : 14 JANUARY 2016.
PRONOUNCED ON : 06 JUNE 2016.**

Judgment :

The Plaintiff seeks a decree in the sum of over Rs.33 Crores in this
Summary Suit. The Plaintiff is a company engaged in the business of

providing trusteeship services. The Defendant is a public company engaged in the business of real estate development. The suit is in respect of a guarantee provided by the Defendant on behalf of its group company, Rubix Trading Pvt. Ltd. ('Rubix'), for a loan extended to the latter by Deutsche Investments India Pvt. Ltd. ("DI IPL") *inter alia* on the security of certain assets. The Plaintiff acted as a security trustee for and behalf of the lender, DI IPL, to hold upon trust, and enforce, the security. Rubix, the principal borrower, having failed to repay the loan, the Plaintiff demanded payment from the Defendant under the guarantee. The Defendant having failed to pay, the present suit is instituted by the Plaintiff. The facts of the Plaintiff's case may be briefly stated as follows :

2 By a Facility Agreement dated 1 December 2009, executed between Rubix (as a borrower), DI IPL (as a lender), the Plaintiff (as a security trustee) and the Defendant (as a confirming party), DI IPL provided a loan facility of Rs.23.50 Crores ("the Facility") on the terms and conditions mentioned therein. As part of such terms and conditions, the Defendant executed a Deed of Guarantee-cum-Mortgage ("Deed of Guarantee") agreeing to stand surety for repayment of the loan in favour of the Plaintiff in the latter's capacity as a security trustee for the benefit of DI IPL. On 22 January 2010, the amount of Rs.23.50 Crores was disbursed by DI IPL to Rubix. On 22 April 2012, Rubix defaulted in quarterly payment of interest. The default continued in respect of all subsequent quarterly payments (except for a part payment made on 5 March 2013). In the premises, by its recall notice dated 5 June 2013, DI IPL cancelled the Facility and recalled the entire amount paid thereunder together with accrued and overdue interest. The amount was not paid by Rubix. On 9 July 2013, the Plaintiff

issued a Demand Certificate (“Demand Certificate”) to the Defendant for enforcement of the Deed of Guarantee in terms thereof, calling upon the latter to pay a sum of over Rs.30 Crores. The Defendant failed to pay any amount in response to the Demand Certificate. This was followed by a Supplementary Recall notice and a Supplementary Demand Certificate, respectively issued by the Plaintiff to Rubix and the Defendant for repayment of the Facility and enforcement of the Deed of Guarantee. Both Rubix and the Defendant failed to pay, leading to the filing of the present suit.

3 The execution of the Deed of Guarantee, disbursal to, and non-repayment of the loan by, the principal borrower and demand under the Deed of Guarantee based on such non-repayment, are not disputed. The main defence to the suit is that the suit Deed of Guarantee is not a stand alone agreement, but a part of a larger transaction, which was said to be a colourable and artificially structured transaction, the object and purpose of which were to enable a foreign investor, Nederlandse Financierings-Martchapining Voor (“FMO”) to secure a fixed return on Foreign Direct Investment (“FDI”) in housing sector. Under this larger transaction, FMO brought in FDI into the Defendant's group companies, Rubix and Amazia Developers Private Limited (“Amazia”) by interposing another company-Vinca Developers Private Limited (“Vinca”). The investment of FMO was in Vinca, which in turn invested, respectively, Rs.150 Crores and Rs.268 Crores in Optionally Partly Convertible Debentures (OPCDs) issued by Rubix and Amazia, providing for a fixed rate of return. It is submitted that the loan of Rs.23.50 Crores by DIPL to Rubix was a related transaction. The subsisting FEMA regulation/FDI policy does not permit any equity

investment by a foreigner with a fixed/agreed rate of return in this sector. It is the case of the Defendant that the whole transaction was structured by Deutsche Bank A.G., the parent company of DIIPL, to get round the FEMA regulation/FDI policy; that the transaction was a colourable transaction designed to defeat the provisions of Indian law and was opposed to public policy and thus, illegal; and that the guarantee obtained by the Plaintiff, acting along with FMO and Deutsche Bank, was merely structured to facilitate a security for such assured returns on FDI in an impermissible sector.

4 Based on the pleadings of the parties and submissions of Counsel across the Bar, the question which arises for the consideration of the court is this: Whether the Deed of Guarantee was a part of an overarching transaction, which is opposed to public policy and as such illegal, or was it a separate transaction or, at any rate, severable from the other parts of the transaction. (Of course, since we are considering here a Summons for Judgment, the inquiry is limited to seeing if there are triable issues bona fide arising in the suit on this point.)

5 The Plaintiff's case is that the Deed of Guarantee executed by the Defendant relates to the following *three* separate and distinct transactions :

- (a) Repayment of the amount of Rs.23.50 Crores loaned by DIIPL to Rubix under the Facility Agreement ;
- (b) Due performance and repayment by Amazia, of its OPCDs of Rs.150 Crores issued to Vinca on terms and conditions mentioned in Amazia

OPCD Subscription and Debenture Trust Deed of 1 December 2009 ;
and

- (c) Due performance and repayment by Rubix of OPCDs totaling Rs.268 Crores issued and allotted to Vinca on terms and conditions mentioned in Rubix OPCD Subscription and Debenture Trust Deed of 1 December 2009.

Amazia and Rubix transactions referred to in (b) and (c) above involved Vinca which was a 100% holding company of both Amazia and Rubix. There was a separate Summary Suit filed by the Plaintiff herein for enforcement of the guarantee given by the Defendant herein for those two transactions. It was the case of the Defendant in that suit that the OPCDs reflected investments made by FMO (referred to above), though ostensibly in Vinca, actually meant for Amazia and Rubix operating in the housing sector and what the transaction really contemplated was FDI with assured/fixed returns in housing sector, i.e. in Amazia and Rubix, through a nominal recipient, Vinca. On a Summons for Judgment taken out in that suit, a learned Single Judge came to the conclusion that the factual matrix and transaction documents *prima facie* established that the transaction of routing FDI through the newly interposed Vinca was a colourable device and was structured to enable FMO to secure repayment of FDI at a fixed rate of return, thus contrary to the FDI policy and statutory FEMA regulations and thus, opposed to public policy and illegal. The learned Judge held that the Deed of Guarantee issued by Vinca being a part of this structure was also *prima facie* unenforceable. (The learned Judge, accordingly, granted unconditional leave to defend).

It is, however, the Plaintiff's case in the present suit that the Deed of Guarantee insofar as it relates to the DIPPL Loan (forming part of (a) above), which is the subject matter of the present suit, is on the basis of the Facility Agreement which is in fact a plain vanilla Indian Rupee loan provided by the Plaintiff, an Indian registered Non-Banking Finance Company to Rubix, an Indian Entity, to which no FDI law or policy applies. It is submitted that though this guarantee is contained in the same document as the guarantee provided for Amazia and Rubix OPCDs, it has nothing to do with either of these two transactions. It is submitted that it is an altogether separate transaction and in any event, severable from the other transactions.

6 The Defendant disputes this case. Mr. Chinoy, learned Senior Counsel appearing for the Defendant, relies on paras 8(iv), (x), (xiii), (xxi) and (xxiv), and paras 15 and 16 of the affidavit in reply and paras 4, 9, 14, 18, 20, 22, 24 and 25 of the affidavit in rejoinder and argues that the circumstances reflected therein show that these three transactions were related and formed part of one whole transaction. The gist of his contentions is this : Deutsche Bank A.G. agreed to act as an arranger of funds to be invested in a group company/companies of the Defendant to the tune of USD 60 million (with an option to increase it to USD 90 to 100 million) at an IRR of upto 20% per annum. (The OPCDs of Rubix and Amazia were part of this investment.) The consideration payable to Deutsche Bank was a stipulated arranger fee. The foreign investor identified by Deutsche Bank (i.e. FMO) was willing to invest around USD 90 to 100 million at a lower IRR (i.e. 14.75 % p.a.). As a result, Deutsche Bank asked for an increased arranger fee. The Defendant and its group

companies being in a desperate need of funds, had to give in to this demand and were constrained to pay revised arranger fee. Deutsche Bank, in turn, agreed to re-route a part of the revised arranger fee as a loan to the Defendant or any of its group companies. The loan of Rs.23.50 extended by DIIPL, at a far higher rate of interest, was a part of that commitment and thus, a part and parcel of the illegal structuring undertaken by Deutsche Bank. The Defendant submits that it was at the instance of the foreign investor that the loan of Rs.23.50 Crores was extended as an *“Indian leg of the structured transaction of the Foreign Investor along with Deutsche Bank A.G..... inspite of the fact that Rubix was in no need of the additional secured loan of Rs.23,50,00,000/- from DIIPL”*. Relying on these facts, namely, of increased arranger fees, proximity of the dates of the individual transactions and common security documents, Mr. Chinoy submits that the transaction is one whole and the DIIPL loan and the Deed of Guarantee insofar as it relates to that loan cannot be separated from FDI brought into India in an illegal and impermissible manner.

7 By all accounts, the Facility Agreement between the parties, referred to above, which is the basis and consideration for the Deed of Guarantee, is a stand-alone transaction. It does not refer to any transaction, overarching or otherwise, between Deutsche Bank and the Defendant for itself or its group companies. It is essentially between Indian parties. The lender (DIIPL), the borrower (Rubix), the promoter (Vinca), the confirming party (the Defendant) and the security trustee (the Plaintiff) are all Indian entities. The document agrees to extend an Indian Rupee Loan of Rs.23.50 Crores and requires a guarantee from the confirming party to secure its repayment. There is no question of any Foreign Direct Investment or

application of any FEMA regulation or FDI policy to this loan. Merely because it is said to be made available from out of fees which are received for a tainted or illegal transaction (for that is what the Defendant's argument at the highest suggests), the loan itself is not tainted or opposed to public policy or in any way illegal.

8 If the loan itself is not tainted by any illegality, it would be a far cry to suggest that a guarantee given for its repayment is in any way illegal. The guarantee furnished by the Defendant to the Plaintiff as a security trustee of the lender for securing repayment of a perfectly legitimate loan is supported by a valid consideration. Firstly, the guarantee is furnished to a third party, who has nothing to do with any foreign investor. (In the Amazia and Rubix OPCD transactions, the Plaintiff was held by the learned Judge as “*admittedly acting at the instance of FMO*”, a foreign investor). Here, the investor is an Indian party. Merely because the lender here is a subsidiary of Deutsche Bank, who was the arranger for tainted FDI into the Defendant and its group companies and who received fees for arranging such FDI, the lender (DI IPL, an Indian party) cannot be said to have indulged into any illegality or unauthorized structuring of an impermissible FDI transaction or something which is part of such transaction. No known parameter of the law of piercing of the corporate veil would countenance such an argument.

9 Merely because the security package for the Amazia and Rubix OPCD transactions is also shared on a *pari passu* basis by the Plaintiff under the Facility Agreement does not establish or even, for that matter, suggest that the Facility Agreement is part of a larger structure intended to override the

FDI policy or FEMA laws. It is pretty commonplace, where there are multiple lenders and a common security trustee, to have inter-creditor arrangements for sharing of the security package and enforcement proceeds and common documents drawn between the security trustee and the borrower. Neither by reason of common dates of such transactions nor by reason of common documents executed for the same do the transactions themselves become one or related to each other from the standpoint of the security interest of the trustee.

10 In **BOI Finance Ltd. Vs. Custodian**¹, the Supreme court has held that in the case of a composite agreement consisting of diverse reciprocal promises, the Court has to see whether the contract is such that the illegal or void part of the transaction can be severed from the legal and valid part and such severing does not amount to rewriting or rearranging the contract. The Supreme Court, in that case, was dealing with a ready forward contract. The Court held that there was one agreement, but it contained two sale transactions, the execution of each of which envisaged a transfer of title in the securities. The valid part (the ready leg) of the transaction was allowed whilst the invalid part (the forward leg) was ignored. Even in **Canbank Financial Services Ltd. Vs. Custodian**², the Supreme Court, relying on **BOI Finance Ltd.**, laid down the law on the subject in the following words :

“79. A contract may be unlawful or partly lawful or partly unlawful. If it is lawful, it will be given effect to whereas in case it is wholly unlawful being opposed to the public policy, it would not be. In case a transaction is partly lawful and partly unlawful, if they are severable, the lawful part shall be given effect to.”

1 (1997) 10 Supreme Court Cases 488

2 (2004) 8 Supreme Court Cases 355

11 These observations squarely apply to the facts of our case. We are concerned here with a Deed of Guarantee - one part of the guarantee dealing with an Indian Rupee Loan by an Indian entity to an Indian party and the other part dealing with FDI by a foreign investor in an Indian company, with securities of the common borrower being shared *pari passu*. Even if the foreign part, namely, FDI, cannot be permitted in law due to infringement with FEMA regulations or FDI policy of the country, that is no reason to refuse enforcement of the Indian part, namely, guarantee for a loan between two Indian parties. The latter part is clearly severable from the former and can be enforced independently of the former.

12 Learned Counsel for the Defendant relies on the analysis of the facts of the case in the Plaintiff's suit for enforcement of guarantees in respect of Amazia and Rubix OPCD transactions in **IDBI Trusteeship Services Ltd. Vs. Hubtown Ltd**³. by the Learned Judge (S.J. Kathawalla, J.), whilst dealing with the case of **Videocon Industries Limited Vs. Intesa Sanpaolo S.P.A.**⁴, in support of his defence. In that case, the learned Judge was considering the severability of the routing of FDI investment in Amazia and Rubix through the newly interposed Vinca (as the nominal recipient of FDI) and the guarantee given by the Defendant to ensure repayment of the FDI. The learned Judge held them to be *prima facie* inseverable. Here, we are considering the severability of the guarantee towards repayment of FDI and towards repayment of the Indian loan, which is separate from the FDI transaction. The observations of Kathawalla, J. in that case have no bearing on this severability.

³ Summons for Judgment No.39-13 in Summary Suit No.520-13 decided on 8 May 15.

⁴ 2014 SCC OnLine Bom 1276

13 In sum, there is not even a statable defence *bona fide* arising on the pleadings of the parties in the present suit. This Court would be perfectly justified in passing a decree by making the Summons for Judgment absolute. However, with a view to give the Defendant one chance of establishing its defence at the trial, by way of mercy, I am inclined to grant leave to defend on the condition of depositing the entire sum of Rs.33,55,16,946.85 (due as at the date of the suit) into the Court.

14 Accordingly, the Summons for Judgment is disposed of in terms of the following order :

- (i) The Defendant is granted leave to defend on and subject to the condition of depositing a sum of Rs.33,55,16,946.85 in this Court within a period of twelve weeks from today ;
- (ii) Upon such deposit being made, the suit shall be transferred to the list of commercial causes ;
- (iii) The Defendant to file its Written Statement in the suit within twelve weeks of making of the deposit ;
- (iv) The amount of deposit, if any, shall be invested by the Prothonotary & Senior Master of this Court in a fixed deposit of a Nationalized Bank initially for a period of two years and thereafter, to be renewed from time to time and to abide by further orders that may be passed in the suit ;

(v) The suit to come up on board for directions after twenty four weeks from today.

(S.C.GUPTE, J.)