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

SUMMONS FOR JUDGMENT NO.52 OF 2014
IN
SUMMARY SUIT NO.480 OF 2014
WITH
NOTICE OF MOTION NO.947 OF 2014

IDBI Trusteeship Services Limited … Plaintiff
Versus
Hubtown Limited ... Defendant

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Dr. Veerendra Tulzapurkar, Senior Advocate a/w Mr. Sandip Parikh, Mr. Aditya Mehta, Ms. Sahara Ramesh and Ms. Aditi Thakur i/b Cyril Amarchand Mangaldas for the Plaintiff.
Mr. Shailesh Shah, Senior Counsel a/w Mr. Prakash Shinde And Mr. Chirag Bhavsar i/b MDP & Partners for the Defendant.

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CORAM : S.C. GUPTE, J.
DATE : 05 JUNE 2017.

P.C.:

. Heard learned Counsel for the parties.

2 This Summons for Judgement is taken out in a Summary Suit, praying for a decree for a sum of Rs.28,97,88,776.20 claimed to be due and payable by the Defendant to the Plaintiff as on 7 August 2013. The claim arises out of a corporate guarantee executed by the Defendant in favour of the Plaintiff towards dues in respect of optionally partially convertible debentures (“OPCDs”) issued by two Indian companies.

3 In 2009 and 2010, one Naderlandse Financierings-Maatschappij voor Ontwikkelingslanden N.V., a foreign entity (“FMO”) invested in certain equity shares and compulsory convertible debentures of an Indian entity by the name of Vinca Developer Private Limited (“Vinca”).

Vinca in turn subscribed to OPCDs issued by Amazia Developers Private Limited ("Amazia") and Rubix Trading Private Limited ("Rubix") by investment of funds, respectively, of Rs.150 crores and 268 crores in Amazia and Rubix. The Plaintiff was appointed as debenture trustee in respect of the OPCDs. To ensure due payment by Amazia and Rubix under the debenture trust deed, the present corporate guarantee was provided by the Defendant to the Plaintiff. There has been a Summary Suit filed earlier by the Plaintiff against the Defendant herein for enforcement of the corporate guarantee. That suit claimed relief in respect of the principal amount of OPCDs as also, interest at the rate of 14.75 % per annum. A learned Single Judge of this Court, while hearing the Summons for Judgment in that suit, considered all defences raised by the Defendant and negatived them, save and except that the transaction respect of the OPCDs, which involved a foreign investor, namely, FMO, was in breach of FEMA Regulations framed by Government of India in respect of the foreign investments. The learned Single Judge was of the view that the defence meritted an unconditional leave to defend the suit and accordingly granted such leave to the Defendant. The matter was carried by the Plaintiff in an SLP before the Supreme Court. By its order dated 15 November 2016, the Supreme Court directed the Defendant to deposit the principal amount of the Corporate Guarantee in the sum of Rs.418 Cores or furnish an appropriate security in respect thereof to the satisfaction of the Prothonotary and Senior Master of this Court. According to the Defendant, this security has since been furnished by the Defendant, though, the Plaintiff disputes the adequacy of this security. Be that as it may, the present suit concerns a certain portion of interest which is said to be based on back end coupon rate applicable under the terms of the Guarantee. Under the corporate guarantee issued by the Defendant, the rate of interest applicable to the OPCDs consists of a running coupon rate as also a back end coupon rate (which shall be payable on the Redemption Date or Early Redemption Date, as the case may be). The running coupon was be paid in accordance with Condition 7.3 (*payment of interest*) and could range between 8 and 12 per cent per annum at the discretion of the issuer. The back-ended coupon rate was to be payable on the Debentures over and above the running coupon rate for the period between the Issue Date of of the Debentures and the Redemption Date or the Early Redemption Date, as the case may be, and was to be of an amount so that, when added to the running coupon rate, it would result in an aggregate IRR equal to 14.75% per annum payable quarterly and compounded annually, on the commitment as on the date of such calculation. It is the Plaintiff's case that whereas the earlier suit covered the principal amount and running coupon rate of interest, the present suit is filed in respect of the back-ended coupon rate of interest payable under the corporate guarantee.

4 In defence to the Summons for Judgement, it is contended by learned Counsel for the Defendant that, in the first place, both running coupon as well as back end coupon rates are claimed by the Plaintiff in its prior suit referred to above. It is submitted that together, that is to say, both running and back-ended coupon rates give a consolidated internal rate of return (IRR) of 14.70 % per annum. It is submitted that this IRR is infact claimed by the Plaintiff in its earlier suit. Learned Counsel draws my attention to the prayers in the earlier suit, where the interest is calculated at the rate of 14.70 % per annum. Mr. Tulzapurkar, learned Senior Counsel appearing for the Plaintiff, however, submits that this rate is claimed only from 11 August 2012 to 4 March 2013 as per Clause (3) of the guarantee and that the present claim is for the differential interest for the period between the date of issuance of debentures and early redemption date, that is to say, between 21

December 2009 and 3 July 2012. Mr. Tulzapurkar, contends that the cause of action in the present suit has accrued only after the letter of demand is issued by the Plaintiff to the Defendant. It is submitted that this letter of demand was issued on 7 August 2013, i.e. after the filing of the earlier suit. In answer, it is submitted by Mr. Shah, learned Senior Counsel for the Defendant, that, at any rate, the Plaintiff was in a position to invoke even this part of the corporate guarantee and demand the back end coupon rate over and above the running coupon rate in the prior suit. Learned Counsel submits that nothing prevented the Plaintiff to issue a notice of demand before filing of the earlier suit and claim the dues in that suit. To counter this argument, it is submitted by Mr. Tulzapurkar that the Plaintiff had reserved leave under Order 2 Rule 2 of the Code of Civil Procedure, 1908 in its earlier suit to sue the Defendant in respect of the present relief, i.e. the back end coupon rate. It is submitted that the Plaintiff had clearly averred in its earlier suit that it had "*a claim against the Defendant for failure to honour its obligations and for breach of contract*". It is submitted that the Plaintiff is now seeking to recover the differential rate of interest in pursuance of this leave reserved unto the Plaintiff by the Court under Order 2 Rule 2. It is arguable on the basis of the averments made in the earlier suit by the Plaintiff that the relief reserved was towards damages which arose as a result of the Defendant's failure to honour its obligations and breach of contract, whereas, the differential rate of interest, that is to say, back end coupon rate claimed by the Plaintiff, was very much part of the enforcement of the contract of guarantee and not by way of damages for its breach; this relief was not reserved under Order 2 Rule 2 and thus, ought to have been claimed and made part of the relief prayed for in the earlier suit.

5 Whereas, it is not for this Court to decide these aspects of the matter one way or the other at this stage, it is sufficient to note that these aspects merit consideration at the hearing of the suit and for which unconditional leave to defend deserves to be issued to the Defendant.

6 Besides, it is submitted that even if this Court were to proceed on the footing that what was claimed in the earlier suit filed by the Plaintiff was the running coupon rate and not back end coupon rate of interest which was reserved under Order 2 Rule 2, even the running coupon interest was not ordered to be deposited or secured to the satisfaction of the Court by the Supreme Court. What was ordered to be deposited or secured was the principal amount of the corporate guarantee and not interest. If that is so, there is no warrant for now securing the component of interest represented by the back end coupon rate. If there is no case for depositing or securing the component of running coupon rate, there is no authority for depositing or securing the back end coupon rate.

7 In the premises, the following order is passed :

: **O R D E R** :

(i) The Defendant is granted unconditional leave to defend the Suit.

(ii) Written statement to be filed within 12 weeks from today.

(iii) The Suit to come up for directions after 12 weeks.

8 Notice of Motion No.947 of 2014 prays for a relief in the nature of attachment before the judgement in respect of the Plaintiff's claim in the suit herein. Since the Plaintiff's claim is adequately secured in terms of

the order passed by the Supreme Court on 15 November 2016, in respect of the corporate guarantee executed by the Defendant in their favour, no separate order needs to be passed in the present Notice of Motion. Notice of Motion No.947 of 2014 is dismissed accordingly.

(S.C. GUPTE, J.)