

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

**SUMMONS FOR JUDGMENT NO.257 OF 2010
IN
COMMERCIAL SUIT NO.30 OF 2010
WITH
CHAMBER SUMMONS NO.1 OF 2010**

Edelweiss Finance & Investments
Limited (formerly known as
Crossborder Investments Private Ltd.) ... Plaintiffs
Versus
Shri Ashish Jhunjhunwala ... Defendant

.....

Mr. Rashmin Khandekar a/w Naserali Rizvi I/b Thakore Jariwala And
Associates for the Plaintiffs.
Mr. Vivek V. Khemka for the Defendant.
....

CORAM : S.C.GUPTE, J.

DATE : 9 FEBRUARY 2018

P.C. :

. This Summons for Judgement is taken out in a Summary Suit instituted upon leave granted by this Court under Clause-XII of the Letters Patent. The Defendant herein has moved a Chamber Summons for revocation of that leave. Both the Summons for Judgment and Chamber Summons are on Board today before the Court.

2 It is the Plaintiffs' case that one Ramsarup Industries Limited ("Company") was granted a short term loan of Rs.25 crores by the Plaintiffs (formerly known as Crossborder Investments Private Limited). A loan agreement dated 10 December 2008 was entered into between the parties in respect of this loan. The company also caused to be executed various other documents, through itself and its directors, for securing the loan. One of the documents was a personal guarantee executed by the Defendant in favour of the Plaintiffs on 28 January 2009. By this guarantee, the Defendant guaranteed repayment of the balance loan amount of Rs.15 crores. It is the Plaintiffs' case that the company failed and neglected to pay a substantial part of the balance loan and as a result, the Plaintiffs invoked the personal guarantee of the Defendant and filed the present Summary Suit relying on the guarantee.

3 Insofar as the suit claim is concerned, it is an admitted position that a part of the loan amount is not repaid by the company to the Plaintiffs. The Plaintiffs had approached Calcutta High Court in a winding up petition against the company. In its order passed on 1 February 2010, Calcutta High Court noted that the company had admitted the principal claim of Rs.9.46 crores. The Company Petition, in the premises, was admitted. The company was, however, permitted to pay off this sum along with interest in installments. It was provided that in the event of such payment, the winding up petition would remain permanently stayed. In default of any one of the installments, the Plaintiff was permitted to advertise the winding up petition. It is also an admitted position that in pursuance of this order, installments aggregating to Rs.7.10 crores were received by the plaintiff from the company. The balance amount was clearly due and payable by

the company to the plaintiff. In the meantime, a reconstruction application respect of the company was moved before BIFR. During the pendency of the BIFR proceedings, the new Companies Act and Insolvency and Bankruptcy Code came into force. As a result, the proceedings stood transferred to NCLT and the matter is currently pending before NCLT, Calcutta. Be that as it may, there is clearly no defence as far as at least the principal amount payable by the company is concerned. Even the Defendant herein does not dispute the same.

4 The only dispute raised by the Defendant on merits of the claim pertains to interest. It is the case of the Defendant that the amount of interest appropriated by the Plaintiffs in pursuance of the admission order passed by Calcutta High Court in the winding up petition is not correct. The Defendant also disputes further interest charged by the Plaintiff. Even if the entire amount paid by the company to the Plaintiffs in pursuance of the order of Calcutta High Court were to be appropriated towards the principal amount, there is absolutely no defence insofar as balance amount of Rs.2.81 cores is concerned.

5 The only other defence to the Summons for Judgement is by way of an objection to the jurisdiction of this court to hear the present Summary suit. It is submitted that no part of cause of action in the present summary suit has arisen within the local limits of the jurisdiction of this Court and that the leave obtained under Clause-XII of the Letters Patent is liable to be revoked and the suit dismissed. The Defendant has to that end also taken out the Chamber Summons herein, as noted above, for revocation of the leave. That is the only controversy before the Court calling for a

decision, that is, if we leave out the issue of interest, as I have noted above.

6 The application for revocation of leave is on the footing that the averments in the plaint that the personal guarantee was accepted by the Plaintiffs in Mumbai or that the amount under the guarantee was payable in Mumbai, are false. The Defendant is also in this behalf relying on an oral agreement between the company and the Plaintiffs. In the premises, it is not feasible to dispose of the application for revocation of leave only on the basis of pleadings of the parties in the chamber summons. There is evidently a case for leading of oral evidence and determination of the issue of jurisdiction thereafter. Upon this being indicated, learned Counsel for the Defendant/Applicant submits that the Defendant's objection to the maintainability of this suit on account of the leave granted itself being revocable, must be considered at the very outset, since it goes to the root to the Defendant's defence to the summary suit and forms an important aspect of his reply to the summons for judgment. Learned Counsel relies on the judgment of a Division Bench of this Court in the case of **ICICI Limited Vs. Sri Durga Bansal Fertilizers Ltd**¹ as also the judgment of a learned Single Judge of this court in the case of **Reliance Industries Limited Vs. Anil Kumar Poddar**², in support of his submission.

7 In the case of **ICICI Limited** (supra), a division bench of our Court considered whether a chamber summons seeking revocation of leave granted under Clause XII of the Letters Patent can be rejected on the ground that the Court *prima facie* has jurisdiction. The Court held that such a course was impermissible and that the Judge before whom the

1 1999(4) Bom.CR 306

2 Chamber Summons no.1347/08 in S.2077/08

revocation application is moved, ought to give a final finding after recording evidence, if necessary and not a *prima facie* finding. Based on this judgment, a learned Single Judge of our Court in the case of **Reliance Industries Limited** (supra), held that in a case where an application is moved by a chamber summons for revocation of leave and there is also a preliminary issue raised under Section 9A of the Code of Civil Procedure, 1908, such preliminary issue on the question of maintainability of the suit would have to be framed and decided.

8 There is no doubt that when an application for revocation of leave is moved before the Court, the Court cannot decide that question simply on the basis of a *prima facie* assessment of the material before it and has to decide the question of revocation finally after allowing the parties to lead evidence, if necessary. There is no warrant, however, to suggest that the question of revocation of leave must be decided immediately as and when the application for revocation is made. In an appropriate case, where the matter of revocation of leave and the corresponding issue of jurisdiction of the Court can only be decided upon evidence, the hearing of the revocation application can be adjourned to the hearing of the suit. Particularly, in a case where there is no interim application and no issue framed under Section 9A of the Code of Civil Procedure and where jurisdiction of the Court can be relied on only after parties are allowed to lead evidence, there is no scope for deciding these issues at any stage prior to the hearing of the suit either under Section 9A or under Order 14 Rule 2 of the Code of Civil Procedure.

9 Learned Counsel for the Defendant, however, submits that that may be so for an ordinary suit, but as far as a summary suit is concerned, this issue goes to the very root of the Defendant's defence to the suit. Even if the issues of jurisdiction of the Court and correspondingly, revocation of leave under Clause XII, have a material bearing on Defendant's defence and accordingly, its reply to the summons for judgment, there is no warrant for deciding either the issue of jurisdiction or an application for revocation of leave at the stage of summons for judgment. As in the case of any other defence, this Court has to merely see if there is a triable issue raised by the Defendant concerning want of jurisdiction or revocation of leave. As in the case of any other defence bearing on the merits of the summons for judgment, the Court has to consider whether such triable issue does arise, whether it amounts to a substantial defence or a fair or reasonable defence, although not a positively good defence, or raises doubt as to its genuineness, or may be reckoned as defence which may be plausible but improbable. If the issue of jurisdiction raised by the Defendant and on which he applies for revocation of leave, raises a triable issue, but if there is a doubt left with the trial Judge about the defendant's good faith, or the genuineness of such trial issue, it is open to the Court to impose such conditions not only as to time or mode of trial, but also as to payment into court or furnishing of a security by the defendant. So also, if the defence of want of jurisdiction appears to the Court to be plausible but improbable, it is open to the Court to impose like conditions on the defendant. If the defence, on the other hand, does not raise any triable issue, it is open to the Court to either pass a decree or impose conditions and allow the defendant to defend a suit. These principles, stated by the Supreme Court in the case of **IDBI Trusteeship Services Limited Vs.**

Hubtown Limited³ in supersedation of *Mechelec* case, are very much applicable even to a defence of want of jurisdiction, on the basis of which the Defendant moves an application for revocation of leave under Clause XII.

10 The submission of learned Counsel for the Defendant that this creates a hardship for the Defendant, who may eventually succeed in establishing want of jurisdiction of this Court and thereby a case for revocation of leave, is neither here nor there. In every case where the defendant raises triable issues, he is allowed to defend the suit on the basis that he may eventually succeed at the trial and non-suit the plaintiff, and yet, in appropriate cases the Courts do grant conditional leaves. In each of these cases, the defendant suffers the same hardship as what is suggested by learned Counsel. Just as in those cases unconditional leave is not granted merely because a defence is raised and is to be tried and the defendant may eventually succeed, so in the case of want of jurisdiction, the Court will have to see if the defence is genuine or substantial or plausible and depending on its findings on these aspects, order unconditional or conditional leave, as the case may be.

11 Coming now to the merits of the defence of want of jurisdiction, with a view to assess its standing as a defence at the stage of summons for judgment, it needs to be noted that insofar as personal guarantee executed by the Defendant is concerned, there is no stipulation in the agreement as to the place at which the guarantor is obliged to make payment under the guarantee. If that is so, there is no reason why we should not follow the

3 (2017) 1 SCC 568

time honoured rule that the debtor must seek the creditor. The place of business of the creditor is the place where payment under the guarantee must ordinarily be made. Unlike in the case of the principal debtor, there is not even whisper in the case of the defendant guarantor that there was any oral agreement between parties to make this payment at any place other than Mumbai.

12 The only defence, which is based on the alleged oral agreement, is of an agreement made between the principal debtor and the Plaintiff creditor, which purportedly requires the principal debtor to make payment in Calcutta. First of all, an oral agreement like this between two corporate entities does not inspire much confidence. But be that as it may, merely because the principal debtor has agreed to pay the creditor at a particular place, the creditor cannot be said to be bound, as between him and the guarantor, to accept the payment only at that place and no other place. It needs to be noted in this behalf that after initial failure by dishonour of cheques given to the Plaintiff in Calcutta, many payments, particularly the electronic payments, were made by even the principal debtor to the Plaintiff's bank account in Mumbai. About nine payments aggregating to over Rs.90 lacs were made in this account.

13 In these facts, considering the material placed before the Court and the respective averments of the parties in their pleadings, this Court is of the considered view that though the defence of want of jurisdiction raises a triable issue, there is a serious doubt as to the good faith of the Defendant or the genuineness of such triable issue. This Court is also of the view that even if this defence is to be considered as plausible, it is improbable and in

that case the Defendant ought to be put to a condition as to deposit.

14 As I have noted above, whilst considering the condition of deposit, I have kept the entire component of interest, i.e. not only the further interest claimed on the principal sum as per the particulars of claim, but even the earlier payment of interest appropriated by the Plaintiff from out of the payments made by the company in pursuance of the order of Calcutta High Court.

15 Accordingly, the following order is passed :

(i) The Defendant is granted leave to defend the suit on and subject to the condition of his depositing a sum of Rs.2.81 crores, insofar as the principal amount claimed in the suit is concerned. Such deposit be made within a period of twelve weeks;

(ii) Insofar as the interest claimed in the suit is concerned, the Defendant is granted unconditional leave to defend the suit;

(iii) In case the amount is deposited by the Defendant, the same may be invested by the Prothonotary & Senior Master in fixed deposit/s of any Nationalized Bank/s, initially for a period of thirteen months and thereafter to be renewed from time to time and to abide by further orders that may be passed by this Court;

(iv) The Defendant shall file his written statement concerning the claim of principal amount within a period of four weeks of deposit of

the amount. Insofar as the suit claim as regards interest is concerned, the Defendant is already granted unconditional leave, and a written statement to that extent may be filed within sixteen weeks from today;

(v) Chamber Summons No.1 of 2010 is adjourned to the hearing of the Suit;

(vi) Place the Suit for directions after sixteen weeks.

(S.C. GUPTE, J.)