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

SUMMONS FOR JUDGMENT NO. 51 OF 2014
IN
SUMMARY SUIT NO. 398 OF 2014

WITH
SUMMONS FOR JUDGMENT NO. 53 OF 2014
IN
COMMERCIAL SUIT NO. 64 OF 2014

WITH
SUMMONS FOR JUDGMENT NO. 54 OF 2014
IN
COMMERCIAL SUIT NO. 63 OF 2014

Urban Infrastructure Venture Capital Ltd. ...Plaintiff
vs.
Neelkanth Soham Developers Pvt.Ltd. & Ors. ...Defendants

Mr.Virendra Tulzapurkar, Senior Advocate with Arif Doctor and Ms.Sonali Aggarwal I/b. Junnarkar & Associates for Plaintiff in SS 398/2014.

Mr.Arif Doctor and Ms.Sonali Aggarwal I/b. Junnarkar & Associates for Plaintiff in Coms 64/2014.

Mr.Navroze Seervai, Senior Advocate with Arif Doctor and Ms.Sonali Aggarwal I/b. Junnarkar & Associates for Plaintiff in Coms 63/2014.

Mr.Gaurav Joshi, Senior Advocate with Mr.Parimal Shroff, D.V. Deokar, Kazan Shroff, Sachin Pandey, Pinakin Modi and Dhruvesh Parikh, Advocates I/b. Parimal K. Shroff & Co. for Defendant No.1 in all suits.

Mr.Dinyar Madon, Senior Advocate with J.S. Kini I/b. Suresh Dubey for Defendant Nos.2 to 7 in all suits.

CORAM : S.C. GUPTE, J.

DATE : 12 FEBRUARY 2018

<u>P.C. </u>:

Heard learned Counsel for the parties.

2 This summons for judgment is taken out in a summary suit seeking a money decree on the basis of a purported Inter-Corporate Deposit Agreement ("ICDA"). It is the Plaintiff's case that under this ICDA, Defendant No.1 had undertaken to repay the entire principal amount of the deposit on or before 7 April 2011. The ICDA provided interest at the rate of 15% per annum payable quarterly as also penal interest on delayed payment, that is to say, if the repayment was not completed on or before 7 April 2011, at the rate of 18% p.a. during the period of such delay. It is the Plaintiff's case that the Defendant failed to pay the principal amount as well as the interest payable under the ICDA and the Plaintiff is entitled to recover an admitted debt arising on a written contract.

3 The debt arising on default in payment under the ICDA was also the subject matter of a company petition filed by the Plaintiff herein. A learned Single judge of this court, by his order dated 9 May 2014, passed a conditional order on the company petition directing Defendant No.1 herein (the Respondent in the petition) to pay the entire amount due under the ICDA, which comprised of the principal amount as well as interest. This order was challenged by the Defendant before a Division Bench. By its order dated 9 March 2016, the Division Bench dismissed the appeal. The matter was thereafter carried before the Supreme Court in a Special Leave Petition. The Supreme Court, in its order dated 8 April 2016, held that if

the Defendants herein made payment of the principal amount to the Plaintiff herein within a stipulated period, the company court should not proceed with the impugned winding up proceedings. It was made clear that this arrangement was without prejudice to the rights and contentions of both sides. On the date when the Supreme Court passed this order, there was a pending arbitration reference principally between Defendant Nos.1 and 2 herein, to which the Plaintiff herein was sought to be joined. Several reliefs, which bear on the controversy in the present suit, and particularly the defence therein, were claimed against the Plaintiff herein in the arbitration reference The Supreme Court observed that the arbitration proceedings would proceed uninfluenced by any findings or observations made by this court in its impugned order dated 9 March 2016.

4 It is chiefly the defence of Defendant No.1 in the present suit that the real transaction between the parties was of investment in a joint venture. The Defendant relies on investments made by the Plaintiff in the group companies of Defendant No.1 from time to time so as to invest in joint venture development projects through companies incorporated as special purpose vehicles. It is the Defendant's case that some of these projects have been completed and the amount of investments, some of which came through ICDs as in the present case, and some through shareholding and other debt instruments, were rolled over for further investments. It is pointed out that there are four such schemes of investments involving rolled over amounts. It is submitted that for these joint ventures through special purpose vehicles, the Plaintiff and Defendant No.1 herein were to invest in certain fixed ratios, the funds to be brought in either by way of equity or through debt. It is submitted that the excess funding on the part of the Plaintiff was to be held in ICDs and the principal

amount as well as interest provided under these ICDs was to be repaid after successful accomplishment of the respective joint venture projects. Learned Counsel for Defendant No.1 referred to a chart showing these investments and their routing through the years. Learned Counsel also relied on various fund flow statements issued in this behalf by Defendant No.1, and accepted by the Plaintiff. This chart read with the fund flow statements, none of which is factually controverted, does lend credence to the Defendant's case that the entire funding, i.e. the funding not only including the debt and equity contributed to by the Plaintiff but even the ICDs, in which investments were made, was to form part of an umbrella transaction, namely, development of real estate through the means of special purpose vehicles.

5 It is an admitted position that, as a result of the company winding up proceedings undertaken by the Plaintiff, the principal amount due under the ICDs already stands repaid to the Plaintiff. The dispute now really pertains to the regular as well as penal interest payable on the ICDs at least insofar as the Plaintiff herein is concerned. As far as the defence is concerned, the entire dispute of principal as well as interest broadly forms part of the arbitration reference which is being contested by Defendant No.1 as a third party, who is sought to be joined to the arbitration reference as between Defendant No.1 and the respective special purpose vehicles and their shareholders. Learned Counsel for the Plaintiff submits that the application for joinder of the Plaintiff, who is a stranger to the arbitration agreement between Defendant No.1 and the special purpose vehicles and their shareholders, has been rejected by the learned arbitrator. The rejection, though, is challenged before this court in an appeal under Section 37 of the Arbitration and Conciliation Act, 1996.

6 On these facts, the basic contention of Mr.Tulzapurkar, learned Senior Counsel appearing for the Plaintiff, is that Defendant No.1 having failed in its challenge to the claim of return of principal amount under the ICDs, there is no case even as regards the interest payable on the ICDs, since the defence to the interest is the very same as in the case of return of the principal amount. This is not quite correct. Though the company petition was ordered not to be proceeded with in the event of payment of the principal amount due under the ICDs, the contest between the parties insofar as both principal amount and interest are concerned, is very much alive and part of a pending lis, that is to say, the pending appeal under Section 37 of the Arbitration and Conciliation Act, 1996, referred to above, and the suit herein. The only question to be considered in the context of the Plaintiff's claim of principal amount and interest under these ICDs, which forms part of the Plaintiff's claim in the present suit, is what should be the appropriate relief on the summons for judgment. Should there be an unconditional leave or should the Defendant be put to terms including terms as to deposit. If the overall dispute under the ICDs, that is to say, the dispute as regards return of principal amount and payment of interest, is, thus, viewed as one composite dispute, deposit of the principal amount (which has come in by way of the without prejudice receipt by the Plaintiff of the principal in the winding up proceedings, as noted above) appears to be an adequate condition to which the Defendant may be put to enable it to defend the present suit. No further order needs to be passed in that case as regards the two components of interest claimed under the ICDA.

7 Insofar as Defendant Nos.2 to 7 are concerned, they are evidently sued as guarantors of the amounts due and payable by

Defendant No.1 under the ICDs. There is an additional defence raised by these Defendants, i.e. apart from the common defence discussed above. It is submitted that under the letter of commitment issued by these Defendants, on which the Plaintiff sues them, the commitment was to execute requisite documents, including undertaking the liability to repay the principal amount and interest under the ICDs as guarantors, in future, is so required. It is submitted that under the ICDA in the present case, the only documents of security required were a demand promissory note and a board resolution of Defendant No.1. It is submitted that since these were considered to be an adequate security and no further documents were required to be executed by Defendant Nos.2 to 7, no guarantee was, in fact, executed by these Defendants. There is, accordingly, no case to proceed against the guarantors. This forms an additional triable issue insofar as these Defendants are concerned. This indeed seems to be plausible defence meriting a full-blown contest.

8 In that view of the matter, there are several triable issues, which arise in the present summary suit and on which plausible defences have been raised by the Defendants herein.

9 In the premises, the following order is passed :

(I) The Defendants are granted unconditional leave to defend the suit, since the principal amount of ICD actually stands paid to the Plaintiff, though without prejudice to the rights and contentions of all parties.

(II) Written statement to be filed within six weeks from today.

(III) The suit to appear on board for directions after six weeks;

10 It is agreed between learned Counsel for parties that insofar as the other two companion summons for judgment are concerned, the contest between the parties is practically on the same lines, though under different ICDs and for different claims. This order governs the respective controversies in those suits as well and accordingly, for the reasons stated above, the same operative order is passed even in these two commercial suits. Accordingly, unconditional leaves to defend are granted in the two companion summonses for judgment, namely, Summons for Judgment Nos.53/2014 and 54/2014, on the ground that the principal amounts respectively due under the relevant ICDs have been received by the Plaintiff as in the case of Summary Suit No.398 of 2014. Written statements in these two commercial suits to be filed within six weeks from today. The suits to appear on board after six weeks.

(S.C. GUPTE, J.)