IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

FRIDAY, THE 20TH DAY OF APRIL 2018

THE HON'BLE MR. JUSTICE C.V.KARTHIKEYAN

O.A.Nos. 1203 and 1204 of 2017
in
C.S.No.938 of 2017

M/s. Florind Shoes Pvt Ltd
Represented by its Managing Director
Mr Shahid Mansoor
3rd Floor, Mashkur Building
Krishnamma Road, Nungambakkam
Chennai 600 034.

: Applicant/Plaintiff

Vs.

State Bank of India
Represented by its Chief Manager
Leather & International Branch
M.V.J.Towers, 177/1, Poonamallee High Road,
Kilpauk, Chennai 600 010.

: Respondent/Defendant

A.No.1203 of 2017

Application praying that this Hon'ble Court be pleased to pass an order of Interim Injunction, restraining the Respondent from transferring the account of the | Applicant to Streessed Assets Management Branch pursuant to letter dated 30.11.2017 bearing Ref No.AM1-I/372.

A.No.1204 of 2017

Application praying that this Hon'ble Court be pleased to pass an order of Interim Injunction, restraining the Respondent from in any manner acting in terms of the contents of the letter dated 27.11.2017 sent by the Respondent/Defendant.

These Original Applications coming on this day before this court for hearing the court made the following order:

The Plaintiff, M/s.Florind Shoes Private Limited, represented by its Managing Director, Shahid Mansoor, has filed the suit, against the State Bank of India, represented by its Chief Manager, Leather and International Branch, Chennai, seeking the following reliefs:-

a) declaration that the "International Swaps and Derivative Association Master Agreement" (ISDA), dated 15.12.2007, culminating in the four (4) derivative contracts, dated 17th December 2007, viz. SBI/DRV/07RTMU/Chennai, 452, 454, 456 and 458, are illegal as being violative of FEMA/RBI Guidelines, opposed to public policy, apart from being in contravention of the MOA of the Plaintiff and void ab initio and unenforceable and not binding on the Plaintiff.

b) declaration that the unilateral conversion of the impugned derivative losses of Rs.33,41,00,433/- (Rupees thirty three crores forty one lakhs four hundred and thirty three only) by the Defendant into a term loan is illegal and invalid.

c) permanent injunction, restraining the Defendant from in any way initiating any proceedings for recovery of any amount from the Plaintiff or from declaring the Plaintiff as an NPA in treating this Plaintiff as a defaulter in view of the fact that the Plaintiff is not liable to pay any amount.

d) for costs of the suit.

2. In the suit, the Plaintiff has filed the present applications, seeking interim injunction, restraining the Defendant, from transferring the account of the Plaintiff to Stressed Assets Management Branch,

pursuant to letter dated 30.11.2017, bearing Ref.No.AM1-1/372 and from acting in terms of the contents of the letter dated 27.11.2017, sent by the Defendant, pending disposal of the suit.

3. The Plaintiff is a private Limited Company, registered under the Companies Act, 1956 and incorporated in the year 1978. They have been engaged in the business of manufacturing, selling and exporting shoes and other leather products both within and outside India. They have been manufacturing shoes for the global brands, such as Florshem, Clarks, Caterpillar, Deichmann, Finsbury, Menswear House, Cebago, Kenneth Cole, Jones, etc. They had secured orders from European countries and USA. They also do export business. The Defendant is the Banker of the Plaintiff. The Plaintiff had availed various facilities from the Defendant in connection with the export business. They had availed a term loan and working capital finance in the nature of Open Cash Credit (Hypothecation), Export Packing Credit, Letter of Credit Facility, etc.

4. In the plaint, it has been stated that in the year 2007, the Officials of the Defendant approached the Plaintiff and invited the Plaintiff to deal with forward and derivative transactions. The Defendant had held out that their equipments have superior software and they also have manpower to judge and execute derivative contracts. The Plaintiff accepted the statement of the Defendant. They were totally dependent on the capability

of the personnel of the Defendant. They submitted to the advise, discretion and guidance of the Defendant. The Plaintiff signed the contract. According to Plaintiff, they were not aware of the terms. They had been having business relationship with the Defendant from 1987. They did not have any reason to suspect the intentions of the Defendant. However, they have now come to a conclusion that the Defendant had played a fraud on them.

5. It has been further stated that the Plaintiff agreed to avail forex derivative facilities. They executed a standard agreement on 15.12.2007. This was known as International Swaps and Derivative Association Master Agreement (ISDA). It is stated by the Plaintiff that the Defendant, without any authority of the Board, compelled the Plaintiff to sign the International Swaps and Derivative Association Master Agreement through misrepresentation. The relief sought in the plaint is for declaration that this International Swaps and Derivative Association Master Agreement dated 15.12.2007, which culminated in four derivative contracts all dated 17.12.2017, are illegal and violative of FEMA / RBI Guidelines and opposed to public policy and in contravention of the Memorandum of Association of the Plaintiff and void and unenforceable. It has been further stated that the Plaintiff had been exploited by the Defendant to enter into a complex/ derivative option transactions.

6. It has been further stated that the export sale proceeds of the Plaintiff to USA were converted into Indian Rupees at the prevailing market rate until late 2007. The Plaintiff had not resorted to any 'hedging' strategy. This was because they did not have specialised knowledge required for using hedging instruments, such as derivative contracts. The Officials of the Defendant advised the Plaintiff that USD is likely to weaken against Indian Rupees during next 5 years. This would indicate that the export income in USD will fetch fewer Rupees. The Defendant, therefore, proposed a complex 'derivative' structure with one transaction a week during the next 5 years. Consequently, 240 transactions were covered under four contracts (SBI/DRV/07/RTMU/Chennai, 452, 454, 456 and 458, all dated 17.12.2007), arising out of International Swaps and Derivative Association Master Agreement dated 15.12.2007.

7. In the plaint, the Plaintiff has included in the relief for declaration with respect to International Swaps and Derivative Association Master Agreement dated 15.12.2007, the above four derivative contracts all dated 17.12.2007. It has been stated that the difference between the derivative contract and the rate prevailing on the maturity rate would be credited or debited to the Plaintiff's account every week for 240 weeks. The amount of derivative loss would not be known during each week for the next 5 years and could not be

quantified. The Plaintiff claimed that the Defendant advised them to enter into the said contract. However, contrary to the advise of the Defendant, the Indian Rupee started to weak sharply from August 2008 and USD appreciated by 25% from Rs.40 to Rs.52 in a matter of 12 months.

8. According to the Plaintiff, they were credited with positive difference for 20 transactions up to 3.05.2008. However, they were debited with repeated losses week after week for the next 220 transactions. The losses debited by the Defendant on the derivatives amounted to Rs.33.41 crores. According to the Plaintiffs, the derivative transactions are governed by the Foreign Exchange Management Act, 1999 (FEMA). The Reserve Bank of India has also promulgated the FEMA (Foreign Exchange Derivative Contracts Regulations, 2000). They have issued circulars and notifications. They had issued a master circular No.06/2007-2008, dated 2.7.2007, which lays down the conditions to be complied with by Banks when they advise their clients to engage into derivative transactions. The relevant Clauses are A1, A1(a), A1(b), A6 and A7.

9. It has been further stated by the Plaintiff that the Defendant Bank had violated the above provisions and had imposed a derivative structure running into 5 years without export orders which is a primary requisite. The Plaintiff had to sell double the amount

whenever the future rates moved against them. It has been further stated that the Reserve Bank of India under Clause A7 had given guidelines for drawing a risk management policy. It has been further stated that taking advantage of lack of knowledge and skill of the Plaintiff with respect to derivative products, the Defendant exerted undue influence on the Plaintiff. The Defendant also acted to the adverse interest of the Plaintiff by exerting undue influence under Section 16 of the Contract Act, fraud under Section 17 of the Contract Act, and misrepresentation under Section 18. The Plaintiff claimed that the agreement is void under Section 23 of the Contract Act. The derivative contracts were also violative of the provisions of FEMA as well as the notification issued by Reserve Bank of India and also to the provisions of the Indian Contract Act, 1872.

10. The Plaintiff has further stated that taking into consideration the violation indulged by the Indian Banks, by inducing the customers to participate in derivative transactions, the Reserve Bank of India had conducted an investigation and enquired into the actions of several banks including the Defendant bank. Nineteen Banks including the Defendant Bank had been found to have committed violations of the Banking Regulation Act, 1949. A press release dated 26.04.2011 had been issued by the Reserve Bank of India. It has been further stated that the Defendant is engaged in illegal transactions with the

Plaintiff. The Defendant was imposed with a penalty of Rs.10 lakhs. The Plaintiff was managing the Export Packing Credit account no.10255987353 and over draft account no.10255979114 and export earning foreign currency account no.10255991245 and a foreign bill discounting no.30048732822 with the Defendant from 1987.

11. It has been further stated that the Defendant had debited the Export Packing Credit account, which is meant only for disbursement for export processing, with weekly debit of derivative losses. According to the Plaintiff, the Defendant had illegally set off derivative losses as against export bill proceeds. This, according to the Plaintiff, is unauthorised. The derivative losses were then converted into a term loan again without the knowledge of the Plaintiff. The total exposure of the Plaintiff shot up up to Rs.52 crores. There was no agreement with the Defendant for crystallizing the derivative losses into a term loan. The Plaintiff did not execute any document to acknowledge this as a debt. Thereafter, the Defendant demanded the Plaintiff to close the term loan. The Plaintiff sold the property situated at No.29, College Road, Nungambakkam, Chennai, to comply with this demand. An escrow account was opened on 12.2.2015 to receive the sale consideration. The nature of the contract left the Plaintiff running short of working capital. The Plaintiff was forced to shift the goods by air. This caused further financial hardship and loss.

12. It has been further stated by the Plaintiff that the customers also lost confidence. The derivative contract had destroyed the Plaintiff, which was at one time, a very strong Company and one of the largest shoe exporters in India. It has been further stated that the Defendant was threatening the Plaintiff that their Export Packing Credit account would be treated as Non Performing Asset (NPA) by their letter dated 27.11.2017 if the Plaintiff failed to pay Rs.69.90 lakhs immediately. Subsequently, on 30.11.2017, the Defendant issued another letter to transfer the account to Stressed Assets Management Branch and declare the same as Non Performing Asset and take action under the SARFAESI Act.

13. The present applications have been filed for injunction against the above acts. It is under these circumstances that the suit had been filed and the applications were urged to be considered by the learned counsel for the Plaintiff. In the affidavits filed in support of OA.Nos.1203 and 1204 of 201, the averments in the plaint have been repeated.

14. Primarily, the Plaintiff has sought interim injunction, restraining the Defendant from in any manner acting in terms of the contents of the letter dated 27.11.2017, wherein they have stated that the Export Packing Credit account no.10255987353, would be treated as a Non Performing Asset and for interim injunction, restraining the Defendant from transferring the account of

the Plaintiff to Stressed Assets Management Branch, by letter dated 30.11.2017, wherein the Defendant had stated that they would also take action under the SARFAESI Act.

15. Incidentally, the Plaintiff has also filed A.No.8169 of 2017, seeking leave to initiate appropriate proceedings to seek return of monies, appropriated by the Defendant and to claim damages and interest from the Defendant. That application had not been argued before this Court.

16. The Defendant had entered appearance and filed a counter. In the counter, it was stated that the suit arises out of an agreement executed on 07.11.2007, called the International Swaps and Derivative Association Master Agreement. This led to the execution of four contracts, namely, contract nos.452, 454, 456 and 458. The agreements were for a definite period of five years. They ended in December 2012. Consequently, the contracts had come to an end on completion of the life period of the contractual relationship. It has been therefore stated that the suit is barred by limitation. It has been specifically stated that the Defendant Bank is not responsible for the losses incurred in a derivative contract. It was a risk taken by the Plaintiff to earn profit. The Plaintiff, by letters dated 17.3.2011, 9.3.2017 and 10.8.2017, had admitted the business problems, namely, reduction of bulk orders from Weyco, USA, from where the Applicant was getting bulk orders up to 2015-

2016, change in demand of style of shoes from Weyco, labour payments issues, huge refund pending from Government Agencies, delayed collection from buyers, exchange fluctuations and trade difficulty in Europe and Germany.

17. It has been further stated in the counter that the Plaintiff had admitted productivity loss and labour issues by letter dated 10.3.2017. They were due to a sum of Rs.8.81 crores. There was a delay in receipt of refund from Government Agencies to a sum of Rs.5 crores. By letter dated, 17.3.2011, the Plaintiff had stated that the losses are beyond their control. By letter dated, 9.3.2017, they had stated that they had approached T.Abdul Wahid & Co for support and management participation. The Plaintiff achieved sales level of Rs.37 crores in 2016-2017. The Plaintiff also undertook to provide additional collateral security.

18. It has been further stated that the Plaintiff is avoiding payment of their dues to the Defendant. It has been further stated that on 29.9.2004, the Plaintiff passed a resolution to obtain an advance of Rs.33 crores from the Defendant by cash credit, term loan secured by hypothecation/ pledge of the entire goods, movables and other assets present and future. The working capital finance was sanctioned for Rs.33 crores on 1.10.2004. Further sums were sanctioned on 23.11.2005 and the total amount came to Rs.47 crores. Further enhancement was given on 12.2.2007, making a capital finance

arrangement to Rs.50 crores. It was under these circumstances on 7.11.2007 that the Plaintiff had entered into the International Swaps and Derivative Association Master Agreement and followed it up with four contracts.

19. It has been further stated that on 30.3.2009, the Plaintiff requested Rs.20 crores as long term loan repayable in six years. On 8.8.2009, the Plaintiff requested further facilities to maintain the working capital requirement. On 31.3.2010, further sanctions were made. On 12.5.2014, sanction on credit facilities was given. As on 27.11.2017 and 30.11.2017, there was an outstanding of Rs.25.12 crores. The Plaintiff had paid monthly interest up to August 2017. Interest from September 2017 is outstanding. The Plaintiff is categorised as Risk Grade 3. The account will be automatically declared as Non Performing Asset. It has been stated that the Plaintiff was enjoying the benefits for exporters under Export Packing Credit. However, the Plaintiff was not carrying out any exports. The Plaintiff obtained interest benefit above Rs.1.40 crores. On 30.9.2017, the Plaintiff issued certificate that Rs.19 crores was the cash credit limit and Rs.6 crores was the Letter of Credit limit. In all these letters, the Plaintiff had never mentioned about the facts or averments made in the plaint. They had stated in the letter dated 9.3.2017 and 10.3.2017 that reduction in sales, statutory dues pending and other operational reasons were the causes

for financial trouble of the Plaintiff. It has been stated that an audit was also conducted with respect to stock by M/s.Hemavathy and Company. For the year 2016-2017, a loss of Rs.26 lakhs was shown by the Plaintiff.

20. It has been further stated that the reasons given were labour problems and reduction in sales. The Defendant had requested the Plaintiff to rectify their model of working. They had issued letters on 22.8.2017, 18.9.2017, 31.10.2017, 1.11.2017, 3.11.2017, 4.11.2017, 15.11.2017, 18.11.2017 and 23.11.2017. It has therefore been stated that the letters, for which injunction is sought, namely, letters dated 27.11.2017 and 30.11.2017, had not been issued in isolation or suddenly. It has been stated that the Plaintiff had not made out any valid case for granting interim relief. They have not established a prima facie case. The Plaintiff had filed documents by pick and chose method. They did not disclose the entire facts. It has been stated that the statement of accounts are not that of the Defendant. The statements with respect to derivative transaction for the period from 2008 till 17.12.2012 are not authenticated documents. It has, therefore, been stated that the applications should be dismissed.

21. After the counter had been filed, the Plaintiff had filed an additional affidavit along with documents. This necessitated the Defendant to file an additional counter. In the additional counter, it has been

stated that the Plaintiff was directed to produce stock statements and cooperate in stock verification. It has been specifically stated that the Bank Official, Vidya had submitted an inspection report. However, when she went to the factory of the Plaintiff on 28.12.2017, the Bank vehicle was not allowed to enter into the premises. She was prevented from carrying out her regular work of stock inspection. It was stated that the Defendant had received by email stock statement from the Plaintiff for the period ending 30.11.2017. The stock statement for the period 31.10.2017 had also been received. A perusal of these two reports would disclose that the stock in hand stood depleted to an extent of Rs.12.20 crores. It has been stated that when there was an outstanding to the Bank, the Plaintiff had deliberately depleted the stock and had prevented the Official of the Defendant from conducting stock inspection.

22. This court heard the arguments advanced by Mr.N.V.Srinivasan, the learned counsel for the Plaintiff and Mr.Chevanan Mohan, the learned counsel for the Defendant.

23. The Plaintiff is a Company registered under the Companies Act. They had been incorporated in the year 1978. They are engaged in the business of manufacturing, selling and exporting of shoes and other leather products within and outside India. The Defendant is the Banker of the Plaintiff. It is not the case of the

Plaintiff that they are run by a team of novices and naive individuals, who did not know about the banking industry. As a Private Limited Company, there must be separate Departments, taking care of the affairs of the Company, relating to finance, audit and banking. They must also have a legal team advising them.

24. The entire trajectory of the Plaintiff proceeds on the basis that the Defendant had continuously induced the Plaintiff to enter into a contract on derivatives by misrepresentation and undue influence.

25. According to the Plaintiff, they were led into a trap. It is quite akin to the old Poem, "'Walk into my parlour', said the spider to a fly." According to the Plaintiff, they entered into a derivative contract in 2007. As a matter of fact, the Plaintiff had not given specific details in the plaint. The documents filed along with the plaint do not include the letters written by the Plaintiff at quite regular intervals, to the Defendant and the letters written by the Defendant to the Plaintiff at very regular intervals. The Defendant had extended, by letter dated 12.2.2007, working capital limit and they had provided credit facilities valid for a period of 36 months, up to 11.2.2010. This sanction letter had been produced by the Plaintiff along with the plaint. The Plaintiff has also filed an extract of the Resolution of the Board meeting held on 7.11.2007. This Board Resolution had been signed by the Managing Director. The Company had resolved

as follows:-

> "'RESOVED THAT the Company would hedge its foreign Exchange, Interest and other exposures through Derivative products like Currency Options, viz. USD/INR options, Currency Options, Swaps viz. Interest Rate Swaps, Currency Swaps, Currency and interest Rate Swaps, Forward Rate Agreements and other similar products being offered by the State Bank of India and do all things necessary in this regard.
>
> FURTHER RESOLVED THAT Mr.K.Shahid Mansoor, or Mr.K.Mohamed Akmal, Directors of the Company be and hereby authorised to negotiate with State Bank of India, execute documents in connection with deals, Contracts etc, in respect of the derivative products and to do all such that things that are necessary and incidental to such deals, contracts, agreements, confirmations, request letters.
>
> FURTHER RESOLVED that a certified copy of the minutes be forwarded to the State Bank of India, for their record."

26. In the plaint, it has been stated that the Defendant had induced the Plaintiff to avail various derivative facilities and that the Plaintiff had executed a standard agreement on 15.12.2017, called 'International Swaps and Derivative Association Master Agreement'. It has been specifically mentioned in the plaint that the Board of the Plaintiff had passed a resolution only to avail hedging transactions. A perusal of the extract of the minutes of the board meeting referred to above would show that the Plaintiff would hedge its foreign Exchange, Interest and other exposures through Derivative products like Currency Options, viz. USD/INR options, Currency Options, Swaps viz. Interest Rate Swaps, Currency Swaps, Currency and interest

Rate Swaps, Forward Rate Agreements and other similar products being offered by the State Bank of India and do all things necessary in this regard. Whether this resolution would also include executing the International Swaps and Derivative Association Master Agreement is a matter, which can be decided only at the time of trial. More particularly, whether all the Members of the Board were induced by the Defendant to pass the resolution extracted above is also a matter to be decided only at the time of trial.

27. However, the Plaintiff claims that the Defendant without authority approached the Board, compelled the Plaintiff to sign the International Swaps and Derivative Association Master Agreement through misrepresentations. This is also a fact which can be decided only at the time of trial on the analysis of oral and documentary evidence to be adduced by both parties.

28. Prima facie, at this stage of the proceedings, what is available is the resolution of the Board Meeting of the Plaintiff. A perusal of the resolution reveals that K.Shahid Mansoor or K.Mohamed Akmal, who were both the Directors of the Company, were authorised to negotiate with the Defendant and execute documents in connection with deals, contracts, etc. in respect of derivative products. Whether this authority was extended to executing the International Swaps and Derivative Association Master Agreement is also a matter to

be decided at the time of trial.

29. Whether the signatory to the International Swaps and Derivative Association Master Agreement was misled into signing the said agreement or whether the Board as a collective unit was misled into authorising the two Directors to enter into such agreement is again a matter of trial. However, the Plaintiff proceeds on the basis that it was the Defendant and the Defendant alone who was responsible for the Plaintiff to enter into this International Swaps and Derivative Association Master Agreement. Since trial has to be conducted on all these issues, this court is reserving its opinion and not expressing the same at this stage when only the interlocutory applications are being decided.

30. However, subsequent to the resolution of the Board, the Plaintiff did enter into the International Swaps and Derivative Association Master Agreement. This was on 15.12.2007. It must also be pointed out before examining the agreement that one of the Directors, who had been authorised to deal with the Defendant, namely, K.Shahid Mansoor, had apparently been elevated as Managing Director and is actually the signatory to the plaint. Consequently, the signatory to the plaint should lead oral evidence on oath to inform the circumstances surrounding which the Board had passed the resolution mentioned above on 7.11.2007 and whether at every stage there had been continuous misrepresentation and

as to why he did not raise any demur at such misrepresentations.

31. As pointed out, it would be too far fetched for this Court to infer that the Directors of the Plaintiff are so naive that they could be induced to enter into the contract with the Defendant. As pointed out in the plaint, the Plaintiff was incorporated in 1978 and even according to the Plaintiff, the Company had profited significantly in terms of foreign exchange by way of export of leather goods. Naivety would not lead to significant profit in terms of foreign exchange by export of leather goods. This requires not just skill, not just experience, but more particularly, business acumen. The Plaintiff would not have become the Company which they had if they were to be so easily misled by misrepresentations as claimed in the plaint.

32. The agreement, dated 15.11.2007 has also been produced as document to the plaint. The letter, dated 15.12.2007 issued by the Defendant Bank has also been produced along with the plaint. There is a reference to an earlier, letter dated 20.11.2007. As a matter of fact, the Defendant had produced the agreement dated 7.11.2007, which is termed as an annexure to the master agreement. This had also been signed by the Plaintiff and the Defendant. This was the date of the Board resolution. The Plaintiff has produced, as stated above, letter dated 15.12.2007 issued by the AGM and Relationship Manager of the Defendant Bank.

It is as follows:-

> "Pleas refer our letter LIBC/RM/I/240 dated 20.11.2007 advising you the derivative limits fixed for the above two companies. We had also forwarded the copies of the approved notes along with the above letter for your reference and records. Now the companies have requested us to allow them to book derivative deals for their exports in both the companies to hedge their forex receivables.
>
> We had a detailed discussion with the Company on the risks involved in the derivative transactions and the Company in turn had discussion with the officials of our RTMU, Chennai also on this count.
>
> The Company is fully convinced and has executed the following documents for doing the derivative deals.
>
> 1. Request letter - enclosed
> 2. Board Resolution }
> 3. ISDA Master Agreement } Kept with us
> 4. Risk disclosure statement }
> 5. Opinion of counsel of the customer }
>
> We request you to do the needful as requested by both the companies."

33. This letter is followed by the International Swaps Dealers Association.Inc. Master Agreement, also called, ISDA Agreement. This has again been signed by the Plaintiff in each and every page. Thereafter, four derivative contracts dated 17.12.2007 have also been produced as documents with the plaint. It is seen that they are all signed by both the Plaintiff and the Defendant. The following declaration had also been given by the Plaintiff:-

1. The risks in the above structure have been explained in detail and this transaction is being undertaken to hedge our/my own balance sheet risks.

2. The size and tenor of the above transaction is not in excess of the underlying exposure in our balance sheet.

3. It is certified that no prior hedge over existed on the exposure (Only in case of import equivalent exposure exceeding one year).

Agreed with the terms and conditions above and in conformity with the declaration made above."

34. The Defendant has correspondingly produced the letters issued by the Plaintiff, dated 15.12.2007 and 17.12.2007, wherein the Plaintiff has stated as follows:-

"With reference to our Letter FSL/Accts./C107035, dated 29.10.2007, you have fixed us derivative limit for doing the derivative deals."

35. The learned counsel for the Plaintiff, pointing out this letter, has stated that it was the Defendant, who had fixed the derivative limit and this was in violation of the fiduciary relationship. However, in the letter dated 17.12.2017, the Plaintiff addressed as follows:-

"Pleas finalize the derivative deals for the below mentioned quote for 1,00,000;2,00,000 USD per week.

The details of the deals are as under:-

1st year	-	42.24 & above
2nd year	-	41.25 & above

3rd year	-	40.25 & above
4th year	-	39.40 & above
5th year	-	39.40 & above”

36. This letter reveals that the Plaintiff had been consciously participating in the derivative deals and had also fixed the quotations per week. These letters indicate that both the Plaintiff and the Defendant were under constant discussion. The stray letter by the Plaintiff to the Defendant, stating “you have fixed us derivative limit”, cannot be read deep down and the circumstances surrounding the same would have to be explained during the course of trial.

37. The learned counsel for the Defendant had produced a letter from the Plaintiff to the Defendant dated 30.3.2009, requesting sanction of term loan. In the said letter, the Plaintiff had written as follows:-

> “We have entered into derivative contract (USD/INR) for five year during December 2007 and in the current year we have incurred loss of around Rs.10 crores. This year also we are incurring loss due to this derivative deal.
>
> Besides we have incurred loss of 5 crores due to lesser realization of exports on account of locking our forex rates by means of forward contract.
>
> Our current working capital have been severely affected resulting in disruption of our production and export schedules.
>
> Kindly sanction Rs.20 crores as long term loan repayable in 6 years with a monotorium of 9 months from the date of disbursement long term loan will ease our working capital requirement and we will improve our performance in the coming years. We have already got high value order from C.J.Clarks U.K for the year 2009-

> 2010. Further we are in touch with other customers who can give good margin. Hence, we are confident of earning good profit from 2009-2010 onwards.
>
> We also request to give the term loan @ reduced rate of interest 2 10% so that it will help us to tide over the situation.”

38. It is seen that in the year 2009, the Plaintiff was aware that they were incurring loss due to the derivative deal. The sequence of events show that the Plaintiff had entered into the derivative market on authorisation of the Board of Directors. The facts claimed in the plaint that the Defendant misled the Plaintiff to enter into such derivative deals by misrepresentations is a fact which has to be established during the trial.

39. The learned counsel for the Plaintiff put the blame on the Defendant for having led the Plaintiff into entering into the derivative contract. Further, he has charged the Defendant that they have violated the Reserve Bank of India regulations. In this connection, the learned counsel pointed out Section 35A of the Banking Regulation Act, in which directions were issued for proper Management and stated that a Banking Company shall be bound by the same. The learned counsel also pointed out Section 47A, which is a penal provision giving power to the Reserve Bank of India to impose penalty and Section 46 which refers to Section 35.

40. In this connection, the learned counsel for the Plaintiff has also relied on **AIR 2001 SC**

3095 (Central Bank of India Vs. Ravindra and others) wherein in paragraph 55, it was held as follows:-

> "55. ... Reserve Bank of India directives have not only statutory flavour, any contravention thereof or any default in compliance therewith is punishable under sub section (4) of Section 46 of Banking Regulation Act, 1949. The Court can act on assumption that transactions or dealings have taken place and accounts maintained by banks in conformity with Reserve Bank of India directives."

41. The learned counsel for the Plaintiff has stated that the RBI Circulars combined with the fundamental regulations have the mandate of law and are binding and it is mandatory on the Defendant Bank to follow the same.

42. In the present case, according to the learned counsel for the Plaintiff, there was an obligation on the Defendant to inform the Plaintiff with respect to risks involved in derivative contracts. The documents produced by the Defendant, particularly, the four contracts dated 17.12.2007, indicate that the risks involved had been informed to the Plaintiff. This Court cannot go further on that aspect since the Plaintiff would have to enter into the witness box and explain the circumstances surrounding the initial period of entering into the derivative agreement and contract.

43. The learned counsel for the Plaintiff then pointed out the irregularity in debiting the packing credit accounts vis-a-vis over draft facilities. According

to the learned counsel, the statements produced by the Plaintiff have been downloaded from the website. It is also pointed out that the Defendant had not produced a counter statement. These statements have been seriously disputed by the learned counsel for the Defendant. According to the learned counsel for the Defendant, the statements produced are not authentic and at any rate, they will have to decided during the time of trial. The learned counsel for the Plaintiff has relied on the circulars, which have been filed along with the plaint in this regard.

44. The learned counsel for the Plaintiff pointed out that the packing accounts are meant to maintain the export/credit and debit/credit and a report has to be furnished to the Reserve Bank of India with respect to Letter of Credit and other documents. They cannot be mixed with other accounts. They cannot be mixed particularly with the derivative accounts, which is wholly dealing with foreign exchange. The learned counsel stated that debiting the export credit account for losses in the derivative account cannot be permitted. He also relied on the accounts statement which had been produced. He pointed out the various instances in which the accounts have been debited towards derivative account.

45. In this connection, the learned counsel relied on the judgement of the Delhi High Court reported in **Manu/DE/4011/2011 (M/s.Richa Industries Limited and others**

Vs. ICICI Bank Limited and another) . As a matter of fact, in the said judgement, the Delhi High Court had thought it fit to refer the issues to trial and has also found that the Plaintiff, who found fault with the transactions should have immediately approached the Court at the time when the transactions were in the current year. It was also found that the Plaintiff waited all along the time till recovery proceedings had been launched before the Debt Recovery Tribunal.

46. In the present case, even though the proceedings had not been launched before the Debt Recovery Tribunal, again quite similarly, the Plaintiff had come to court after a considerable period of time. In this connection, the contention of the learned counsel for the Defendant that the derivative contracts commenced in the year 2007 and the period of the contract ended in the year 2012 assumes significance. The suit had been instituted in the year 2017, five years subsequent to the conclusion of the contract.

47. It is also seen that during the said period of five years, when the contract was in pendency and also during a subsequent period of five years, after conclusion of the contract, the Plaintiff have not raised any question regarding the conduct of the Defendant. They suddenly wokeb up in the year 2017 and had thought it fit to re-examine the accounts. This would necessarily require the Defendant to answer any charge based on accounts, which

are nearly about a decade old and that requires a trial to be conducted.

48. With respect to the issue of limitation, the learned counsel for the Plaintiff has relied on **AIR 1962 Mad 301 (Bitla Rajalingam and Sons and another Vs. C.P.V.Kotiah Chetti and Co. and others)** wherein it was stated that when the account is a running account, the issue of limitation would not be attracted. However, in the present case, it has to be mentioned that the account is not a running account since the derivative account had been closed in 2012 itself.

49. The learned counsel for the Plaintiff commented upon the arbitral structure of the derivative transaction, which was violative of the Reserve Bank of India norms. He deprecated the apprising of a Dollar in terms of hedging. This is a fact on which this Court cannot at this stage express its opinion.

50. The learned counsel for the Plaintiff addressed the Court on the nature of fiduciary relationship. He insisted that there should not be any element of undue influence. Issue of undue influence is a matter of evidence. The Board of Directors had decided to enter into a contract with the Defendant with respect to the issue now projected. Whether they were all as a whole led into the contract through undue influence or misrepresentation is a matter of trial. In the plaint, all the terms available in the Contract Act, had been

mentioned, namely, undue influence, fraud and misrepresentation. The Plaintiff must take a definite stand as to which ground they choose.

51. The learned counsel for the Defendant has relied on the judgement of the Honourable Supreme Court reported in **2013 7 SCC 369 (Kotak Mahindra Bank Limited Vs. Hindustan National Glass and Industries Limited and others)** wherein in paragraph 63 it was held as follows:-

> "63. In the result, we hold that wilful defaults of parties of dues under a derivative transaction with a bank are covered by the Master Circular and this we hold not because RBI wants us to take this view, because this is our judicial interpretation of the Master Circular."

52. The learned counsel for the Defendant has also relied on the judgement of the Honourable Supreme Court made in **Civil Appeal No.1281 of 2018, dated 30.1.2018,** wherein the Honourable Supreme Court had held as follows:-

> "16. It is the solemn duty of the Court to apply the correct law without waiting for an objection to be raised by a party, especially when the law stands well settled. Any departure, if permissible, has to be for reasons discussed, of the case falling under a defined exception, duly discussed after noticing the relevant law. In financial matters grant of exparte interim orders can have a deleterious effect and it is not sufficient to say that the aggrieved has the remedy to move for vacating the interim order. Loans by financial institutions are granted from public money generated at the tax payers expense. Such loan does not become the property of the person taking the loan, but retains its character of public money given in fiduciary capacity as entrustment by the public. Timely repayment also ensures liquidity to facilitate loan to another in need, by circulation of the

> money and cannot be permitted to be blocked by frivolous litigation by those who can afford the luxury of the same.”

53. The issues raised by the Plaintiff will have to be decided at the time of trial. At this stage, this Court cannot sit in the armchair of either the Plaintiff or the Defendant and decide the course of action to be adopted, particularly, when the Plaintiff and the Defendant had banking relationship over a number of years. This Court can only adjudicate on the basis of the documents produced and examine the balance of convenience, prima facie case and relative hardship.

54. With respect to prima facie case, the Plaintiff will have to explain as to the circumstances under which collectively their Board resolved to enter into a contract with respect to the foreign exchange, interest and other exposures through derivative contracts with the Defendant Bank. If the Plaintiff were to insist that they were misled to enter into the contract, at that stage, they should have considerable explanation to give since they had been parnters in the agreement with the Defendant for a full period of five years.

55. With respect to the balance of convenience, the Defendant having extended its cooperation to the Plaintiff right from the beginning and the Plaintiff having also benefited by the limits extended by the Defendant, balance of convenience is in favour of the

Defendant. If there are outstandings due, In that, once there is a outstanding due, it is for the Plaintiff to rework and reassess its finances. They cannot point a finger at the Defendant.

56. With respect to relative hardship, I hold that the hardship of the Defendant would far outweigh the hardship which the Plaintiff would suffer in the event of an injunction being granted, since the Court's power to interfere with the Defendant's actions, particularly when the jurisdiction of the civil Court itself is under challenge, is very limited.

57. It is also seen from the International Swaps and Derivative Association Master Agreement that there was a clause to provide an early termination by giving notice of not more than 20 days. As a matter of fact, in the agreement produced by the Plaintiff, which is the International Swaps and Derivative Association Master Agreement, dated 17.12.2007, there is a specific clause that the disputes shall be referred and settled by an arbitration which shall be conducted in Mumbai. The Plaintiff has not taken recourse to any of the above, but had come to Court seeking interim reliefs. As stated above, the issues raised by the Plaintiff will have to be decided only at the time of trial. Consequently, these applications are to be dismissed.

58. In the result, these applications are dismissed. No costs.

Sd/.C.V.K.J

20.04.2018

//Certified to be a true copy//

Dated this the th day of 2018.

KY/23.04.2018 COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.