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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Reserved on: 14th March, 2018**
Pronounced on: 03rd April, 2018

\+ **<u>CS(COMM) 763/2018 & I.A. 20441/2014</u>**

ICICI HOME FINANCE CO LTD ..... Plaintiff
Through : Mr.Gautam Singhal and Mr.Naveen Kumar, Advocates.

versus

BINOD KUMAR & ANR ..... Defendants
Through : None being *ex parte*.

CORAM:
HON'BLE MR. JUSTICE YOGESH KHANNA

<u>YOGESH KHANNA</u>, J.

1. The plaintiff has filed this suit against the defendants for recovery of ₹ 1,21,95,003/- with interest @ 24% pa for permanent injunction, infringement of trademark, passing off, damages, dilution, rendition of accounts against the defendants.

2. The plaintiff alleges to be a company incorporated under the provisions of the Companies Act, 1956 having its registered office at ICICI Towers, Bandra Kurla Complex, Bandra (East), Mumbai – 400051 and its Branch Office at 2nd Floor, Videocon Tower, Jhandewalan Extn., New Delhi. It is engaged in the business of providing finance facilities to its customers for the purchase/ construction against the mortgage immovable property. Mr.Sandeep Sharma is authorised to institute this

suit. The defendants are the purchasers and have availed the loan to the tune of ₹ 50,80,850/- under its Home Loan Scheme vide loan agreement bearing No.NHDEL00000731824 against the mortgage of their built up property bearing House No.290, Block A-I, Sushant Lok Phase - II, Gurugram – 122001 (hereinafter referred as 'mortgaged property').

3. It is alleged defendants approached the plaintiff company at their branch office at Jhandawalen Extension, New Delhi - 110055 in the month of April/May 2008 and required loan facility from the plaintiff for the purchase of mortgaged property. The credit facility application form was filled up by the defendants and on their assurances the plaintiff agreed to grant finance facilities to them. The defendants executed credit facility application form dated 13.05.2008 containing all the terms and conditions of the loan. A total sum of ₹ 50,80,850/- was disbursed to the defendants on 15.05.2008 by the plaintiff company from its office at Jhandawalen Extension, New Delhi – 110055 for the purchase of the mortgaged house. The loan disbursement memo is also annexed with the plaint.

4. The said loan of ₹ 50,80,850/- was initially repayable with the prevalent interest @ 14% per annum in 120 Equated Monthly Installments (EMIs)of ₹ 78,889/- each in terms of the aforesaid loan agreement. The said EMIs were payable till 10.12.2020. It was a floating rate of interest which was subject to change from time to time which may be adjusted in the tenure and/ or the EMIs amount. All the original title documents of mortgaged property are in possession of the plaintiff viz the sale deed dated 16.05.2008 in favour of the defendant No.1; the

agreement to sell and copy of the agreement for fittings and fixtures; copy of the sale deed dated 01.06.2006 in favour of the seller and previous complete chain of title documents.

5. The defendants failed to discharge their liability in time and defaulted in making regular payments of the EMIs and have been extremely irregular. The plaintiff thus terminated the loan agreement and recalled the entire loan amount and the loan was classified by the plaintiff bank as a Non Performing Asset (NPA) in accordance with the relevant regulations and guidelines issued by the Reserve Bank of India from time to time.

6. The plaintiff in exercise of its right got issued notice dated 16.07.2010 under Section 13 (2) of the SARFAESI Act, 2002 to the defendant No.1 and called upon him to make payment of ₹ 68,48,614/- as per the statement of account dated 16.07.2010. However, the defendants failed to make the payment and per statement of account dated 07.03.2014 the defendants are liable to pay the suit amount of ₹ 1,21,95,003/- which they failed to pay despite repeated requests and demands hence the plaintiff filed the suit for recovery of suit amount of ₹ 1,21,95,003/- with simple interest @ 24% pa from 07.03.2014 till date of realization.

7. The defendants were proceeded *ex parte* vide order 20.11.2015. The *ex parte* evidence was recorded by way of filing of an affidavit of PW1 Sh.Sandeep Sharma, an authorised representative of the plaintiff, who reiterated the facts as stated in the plaint and proved power of attorney as *Ex.PW1/A*; credit facility application form as *Ex.PW1/B*; the

sale deed dated 16.05.2008 as *Ex.PW1/C*; agreement to sell dated 13.05.2008 as *Ex.PW1/D*; the agreement for fitting and fixtures dated 13.05.2008 as *Ex.PW1/E*; the sale deed dated 01.06.2006 as *Ex.PW1/F*; sale deed dated 10.07.2003 as *Ex.PW1/G*; the sale deed dated 10.01.1996 as *Ex.PW1/H*; possession letter dated 12.02.1996 as *Ex.PW1/I*; the transfer certificate dated 08.08.1995 as *Ex.PW1/J*; flat buyer agreement dated 08.08.1995 as *Ex.PW1/K*; title survey report dated 01.05.2008 as *Ex.PW1/L*; legal notice dated 16.07.2010 as *Ex.PW1/N*; and statement of account dated 16.07.2010 duly certified as *Ex.PW1/O*.

8. The present suit has been filed on 13.10.2014. The loan agreement *Ex.PW1/B* was entered into between the parties on 13.05.2008. The said agreement provides for 120 EMIs to the tune of ₹ 78,889/- each and the loan was payable till 10.12.2020 through EMIs. The loan amount was since secured by mortgage of the property and since the original title documents are in possession of the plaintiff so considering the terms and conditions of the loan and it being a secured one through mortgage, so as per provisions contained in Article 62 of the Limitation Act, the suit of the plaintiff is well within limitation.

9. The Article 62 of the Limitation Act notes:-

*"**62**. To enforce payment of money secured by a mortgage or otherwise charged upon immovable property."*	*12 years*	*from when the money sued for becomes due*

10. Further, the Division Bench of this Court in *M P Mansinghka vs Industrial Finance Corporation of India* AIR 2007 Delhi 81 on the issue of limitation notes:-

"2.The liability of the Director has to be ascertained not from the date when he tendered resignation or from the date when he had revoked the personal guarantee as was offered by him but from the date when the loan was advanced and the loan agreement was executed unless the creditor itself consents or approves to any subsequent arrangement. Admittedly, the loan was advanced in the year 1991 and, therefore, the said resignation dated 20.1.1997 from the Board of Directors could not have absolved the petitioner from his liability and he continued to remain jointly and severally liable along-with the company and its other Director i.e. respondent Nos.2 and 3 herein. As far as other contention of the petitioner is concerned that since the loan was advanced in the year 1991 and, therefore, the period of limitation came to an end within 3 years period, has also no force as the petitioner had given his personal guarantee by mortgaging immovable property in the year 1991 and the limitation for enforcing the claim involving mortgaged property is 12 years and not 3 years as per Article 62 of the Limitation Act. We, therefore, do not agree with the contention of the petitioner that since the loan was granted in the year 1991 and on document of acknowledgement of debt was filed on record, therefore, the period of 12 years could not have been taken into consideration for the limitation period. The loan was advanced in the year 1991, loan agreement was also executed in the year 1991, Deed of Guarantee by mortgaging immovable property was executed in 1991 and taking 12 years period of limitation, the same would be over only by 2003. In the present case original application was filed in the year 2000 which was numbered in the year 2001, therefore, taking the said period of 12 years the

original application filed by respondent No. 1 was well within limitation and not barred by time."

11. Hence, considering the facts and circumstances of the case where the defendants chose not to appear and contest the suit of the plaintiff coupled with testimony of the plaintiff's witness having gone un-rebutted on all counts including limitation; the suit of the plaintiff is hereby decreed against the defendants for an amount of ₹ 1,21,95,003/- with interest @ 12% pa from 07.03.2014 till the date of the realization. The costs of the suit is also awarded in favour of the plaintiff. Both the defendants are liable to pay the decreetal amount jointly and/or severally being the principal borrower and guarantor. Decree sheet be drawn.

I.A. 20441/2014

12. In view of above order since the subject property is outside the territorial jurisdiction of this Court, the application is dismissed.

YOGESH KHANNA, J

APRIL 03, 2018

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