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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CS(OS) 393/2018, IA No.10632/2018 (u/O XXXIX R-6 CPC)**
DE LAGE LANDEN FINANCIAL SERVICES INDIA
PRIVATE LIMITED Plaintiff

Through: Ms. Pratiti Rungta, Adv. along with
Jay Prakash Singh, AR of the plaintiff.

Versus

EVAN MULTISPECIALITY HOSPITAL & RESEARCH
CENTRE PVT. LTD. & ORS. Defendants

Through: Mr. Shadwali Singh, Adv. for D-
1,2,3,4,6,9,10&11.
Mr. Piyush Singhal, Adv. for D-5&8.
Mr. Vivek Gupta, Adv. for D-7.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER
12.03.2019

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1. The plaintiff has sued the 11 defendants viz. (i) Evan Multispeciality Hospital & Research Centre Pvt. Ltd., (ii) Ravinder Kumar Sahni, (iii) Raj Bahadur Singh, (iv) Rakesh Khurana, (v) Haradesh Kumar, (vi) Pankaj Jain, (vii) Anuradha Aggarwal, (viii) Shivi Agnihotri, (ix) Pramod Kumar, (x) Saurabh Singh, and, (xi) Dr. Preeti Sharma, for a) recovery of Rs.3,00,67,309/- along with future interest; and, b) permanent injunction restraining the said defendants from dealing with and / or disposing of or encumbering or creating any third party rights and interests in the hypothecated equipment being CT injector & cathlab injector, UPS 80KVA & 120 KVA MX 16 CT system, Allura FD 10 Cathlas and Local Accessories in any manner.

2. The suit was entertained and summons thereof ordered to be issued and vide *ex parte* ad-interim order dated 10th August, 2018, the defendants restrained from alienating, encumbering or parting with possession of or disposing of the hypothecated equipment.

3. On the last date of hearing i.e. 13th February, 2019, it was informed by the counsel for the defendants no.1 to 4, 6 and 9 to 11, counsel for defendants no.5 and 8 and the counsel for defendant no.7, that vide order dated 3rd December, 2018 of the National Company Law Tribunal (NCLT), moratorium within the meaning of Section 14 of the Insolvency and Bankruptcy Code, 2016 had been declared with respect to defendant no.1.

4. The counsel for the plaintiff however, relying on ***State Bank of India Vs. V. Ramakrishnan*** 2018 SCC OnLine SC 963 and on Section 14 of the Insolvency and Bankruptcy Code as amended with effect from 6th June, 2018, contended that the moratorium had no effect on the claim of the plaintiff in this suit against the defendants no.2 to 11 in their capacity as personal guarantors of the defendant no.1. It was thus contended that the suit, insofar as against the defendants no.2 to 11, should continue.

5. It was found on 13th February, 2019, that the defendants no.2 to 11 had not filed the written statement within the prescribed time and no application seeking extension of time for filing written statement also had been filed. Accordingly, the right of the defendants no.1 to 6 and 8 to 11 to file written statement was closed.

6. Inadvertently, while so closing the right of the said defendants to file written statement, the right of the defendant no.7 to file written statement, though in the same position as the other defendants, was not closed. The counsels for the defendants no.1 to 11 do not controvert. The order dated

13th February, 2019 be thus read as also closing the right of the defendant no.7 to file written statement.

7. However, the counsel for the plaintiff, on 13th February, 2019 was not able to show whether a decree against defendants no.2 to 11 could be passed without relegating the plaintiff to evidence and sought adjournment and the hearing was adjourned to today.

8. Today, the counsel for the plaintiff has drawn attention to the copy of the Loan Agreement dated 20th June, 2015 (Page 10 of Part-III A file) whereunder the plaintiff had agreed to advance principal amount of Rs.3,78,25,000/- to the defendant no.1 on the terms and conditions contained therein and to the Deed of Personal Guarantee dated 20th June, 2015 (Page 135 of Part-III A file) executed by the defendants no.2 to 11 in favour of the plaintiff, guaranteeing payments under the Loan Agreement by the defendant no.1 to the plaintiff and agreeing to indemnify and keep indemnified the plaintiff against all losses etc. which the plaintiff may suffer by reason of the liability being not satisfied by the defendant no.1.

9. The counsel for the plaintiff has otherwise drawn attention to page 186 of Part-III A file furnishing the particulars of the claim of the plaintiff against the defendant no.1 as on 16th July, 2018 and which records the (i) principal outstanding of Rs.2,37,80,388/-; (ii) interest outstanding of Rs.15,10,795/-; (iii) default interest at 30% per annum of Rs.26,03,998/-; (iv) pre-payment / foreclosure charges at 4% on principal outstanding including GST of Rs.11,22,434/-; (v) ECS dishonour and other charges of Rs.6,445/-; (vi) TDS Certificate not received for financial years 2016-17, 2017-18 and first quarter of 2018-19 of Rs.8,13,299/-; and, (vii) legal charges of Rs.2,29,950/- i.e. total Rs.3,00,67,309/-.

10. I have enquired from the counsel for the plaintiff, the entitlement in law of the plaintiff to default interest at the rate of 30% per annum, even if so provided in the Loan Agreement and of pre-payment / foreclosure charges of Rs.11,22,434/-, again, even if provided in the agreement. Attention is invited to dicta of this Court in ***DLF Limited Vs. Punjab National Bank*** 2011 SCC OnLine Del 2465 holding the said foreclosure charges to be not recoverable.

11. The counsel for the plaintiff, under instructions from Mr. Jay Prakash Singh, Authorized Representative of the plaintiff states that the plaintiff, for the sake of expediency is not pressing the suit for recovery of the said sums of Rs.26,03,998/- and Rs.11,22,434/-.

12. The counsel for the defendants no.5 and 8, on being given an opportunity to argue to the limited extent permissible in law after closure of right to file written statement, has raised only two arguments. Firstly, it is contended that owing to there being a moratorium with respect to the defendant no.1, the defendants no.5 and 8 are unable to comment on the dues claimed by the plaintiff and secondly, that without proof of documents, no decree can be passed.

13. The counsel for the defendants no.1 to 4, 6 and 9 to 11 and the counsel for the defendant no.7 have not raised any independent arguments of their own and have adopted the arguments of the counsel for defendants no.5 and 8.

14. I have considered the objections of the defendants.

15. I may state that Order VIII Rule 10 of the CPC entitles the Court, when the right of the defendant to file written statement has been closed, to, if finds in the facts of the case that a decree can be passed forthwith, pass

such a decree. However, if the Court finds that the claim in the suit cannot be decreed forthwith, the Court is required to relegate the plaintiff to leading its evidence with limited cross-examination permissible to the defendants when their right to file written statement has been closed. Reference in this regard can be made to the dicta of this Court in *Nirog Pharma Pvt. Ltd. Vs. Umesh Gupta* 2016 SCC OnLine Del 5961 and *International Airport Authority of India Vs. Arvind Khanna* (1995) 33 DRJ (DB).

16. It has been held in *Satya Infrastructure Ltd. Vs. Satya Infra & Estates Pvt. Ltd.* 2013 SCC OnLine 508 that when the defendant is *ex parte* or when the defence of the defendant has been struck off, relegating the plaintiff to lead *ex parte* evidence rarely serves any purpose, with affidavit by way of examination-in-chief filed being a replica of the contents of the plaint save for change from third person to first person and of tense and exhibit marks being put on documents already filed by plaintiff.

17. The plaintiff, since the last date of hearing is also found to have by way of abundant caution filed affidavit by way of examination-in-chief of Mr. Jay Prakash Singh supra and which is found to be of the same nature save that documents, besides being referred with their date, are also referred to by putting an exhibit mark thereon.

18. The plaintiff, though nomenclatured the suit as an ordinary suit even though filed on 8th August, 2018 but the suit is otherwise found qualifying as a commercial suit within the meaning of Sections 2(c)(i) and (xiii) of the Commercial Courts Act, 2015. The Loan Agreement describes the plaintiff as a 'lender' and the defendant no.1 as a 'borrower engaged in healthcare services' which qualify as a service industry within the meaning of Sections 2(c)(i) and (xiii) supra. The Loan Agreement further recites that the

defendant no.1, as borrower, had approached the plaintiff as lender, to avail financial assistance. To the extent to which the suit is a commercial suit, the provisions of the newly introduced Chapter XA of the Delhi High Court (Original Side) Rules, 2018 entitling the Court to pass summary judgments would also apply.

19. Even otherwise, the plaintiff along with the plaint has filed documents including statement of accounts showing the amounts claimed to be due and the defendants no.2 to 11 though, having received a copy of the Loan Agreement and the statement of accounts, could have taken a stand whether the amount claimed by the plaintiff in the suit is in terms of the Loan Agreement or not, have chosen not to do so. The only inference is that the defendants no.2 to 11 have no doubt of the amounts claimed by the plaintiff to be due in terms of the Loan Agreement and for this reason, it is felt that the defendants would not be able to carryout any worthwhile limited cross-examination permissible of the witness of the plaintiff. The defendants on the contrary, as aforesaid have taken a stand that owing to the moratorium having been declared with respect to the defendant no.1 they are not in the know of anything.

20. The counsel for the defendants no.5 and 8, at this stage, after hearing the dictation aforesaid, states that the defendants no.5 and 8 are disputing the amounts claimed by the plaintiff. However, upon enquiry from the counsel for the defendants no.5 and 8, as to why the amounts claimed are wrong and / or as to which part of it is wrong, states “unless and until I see the evidence, I cannot say”.

21. The documents filed by the plaintiff along with plaint were available to the defendants and the evidence if any cannot be beyond these documents.

If from the said documents defendants no.5 and 8 have not been able to say anything with respect to the amount due, the argument raised is only a dilatory one.

22. Once the documents are not controverted and no defence taken, the Court is not required to mechanically list the suit for evidence.

23. A decree is accordingly passed, in favour of the plaintiff and jointly and severally against the defendants no.2 to 11, of recovery of Rs.2,63,40,877/- with interest *pendente lite* and future at the contractual rate of interest of 13% per annum on the principal outstanding of Rs.2,37,80,388/- till the date of realization. The plaintiff shall also be entitled to costs of suit, with professional fee assessed at Rs.1.50 lacs.

24. The suit, insofar as against the defendant no.1, is also disposed of with liberty to the plaintiff to apply for revival if the plaintiff is unable to recover the dues from the defendants no.2 to 11 and / or as and when the moratorium against the defendant no.1 is removed.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

MARCH 12, 2019

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(Corrected and released on 27th March, 2019).