

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

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Date of decision: 1st April, 2019

+ **CS(COMM) 1249/2018, IA No.16076/2018 (u/O XXXIX R-1&2 CPC), IA No.4758/2019 (u/O XII R-6 CPC) & IA No.4759/2019 (u/S 92 r/w S-151 CPC)**

CENTRUM FINANCIAL SERVICES LIMITED..... Plaintiff

Through: Mr. Rajshekhar Rao, Ms. Chaitanya Puri, Mr. Aaditya Vijay Kumar & Mr. Divyanshu Bhandari, Advs.

Versus

TRIMAX IT INFRASTRUCTURE AND SERVICES LTD. AND ORS.

..... Defendants

Through: Mr. S.K. Goyal & Mr. A.K. Goyal, Advs. for D-1,2,3&5.
Ms. Paromita Majumdar, Mr. Sonal Kumar Singh & Mr. Rajat Dasgupta, Advs. for D-4.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff has instituted this suit against defendants no.1 to 5 viz. (i) Trimax IT Infrastructure & Services Ltd., (ii) Surya Prakash Madrecha, (iii) Chandra Prakash Mandrecha, (iv) ITI Ltd., and, (v) Standard Fiscal Markets Pvt. Ltd., for (a) recovery of Rs.11,27,58,496/- with interest *pendente lite* and future, (b) rendition of accounts, (c) mandatory injunction directing the defendant no.4 to deposit all funds in the Escrow Account alone, and, (d) permanent injunction restraining the defendants from alienating, encumbering or parting with possession of or otherwise dealing

with their properties detailed in Schedule-A to the plaint and / or from operating the bank accounts mentioned in Schedule-B to the plaint.

2. The suit came up first before this Court on 27th November, 2018 when, while issuing summons thereof vide *ex parte* ad-interim order the defendants no.1,2,3 and 5 were restrained from alienating, encumbering or parting with their properties mentioned in Schedule-A to the plaint and / or from operating the bank accounts mentioned in Schedule-B to the plaint.

3. The defendant no.4 ITI Ltd. was impleaded as a proforma party and failed to appear despite notice and was by order dated 29th January, 2019 proceeded against *ex parte*, though the counsel for the defendant no.4 is present today.

4. The right of the defendants no.1,2,3 and 5 to file written statement was closed vide order dated 29th January, 2019 upon their failing to file written statement within the prescribed time and the proceedings adjourned to today.

5. Today, the counsel for the defendants no.1,2,3 and 5 states that vide order dated 21st February, 2019 in CP (I&B) No.3457/NCLT/MB/2018 of the National Company Law Tribunal (NCLT), moratorium with respect to the defendant no.1 has come into operation.

6. The plaintiff has filed IA No.4758/2019 under Order XII Rule 6 and IA No.4759/2019 under Section 94 read with Section 151 of the CPC and which have come up today for the first time.

7. Though the proceedings in this suit, insofar as against the defendant no.1, are not to be proceeded against but the counsel for the plaintiff seeks decree forthwith against the defendants no.2,3 and 5.

8. The counsel for the defendants no.2,3 and 5 seeks adjournment to file reply to the applications aforesaid.

9. The applications filed by the plaintiff are misconceived and it is not understandable why the same were filed. On 29th January, 2019, the proceedings were adjourned to today, to consider whether the plaintiff is entitled to a summary judgment under Order VIII Rule 10 of the CPC or is to be relegated to proving its claim.

10. The counsel for the defendants no.2,3 and 5 has thus been asked to ignore the applications and to show why a decree should not be immediately passed against defendants no.2,3 and 5.

11. The counsel for the defendants no.2,3 and 5 first states that he had filed written statement as far back as on 4th February, 2019 and had also cleared the objections on 29th March, 2019 after receiving intimation on 28th March, 2019.

12. The right of the defendants no.2,3 and 5 to file written statement was closed as far back as on 29th January, 2019 and no remedies have been taken by the defendants no.2,3 and 5 thereagainst and the said order has attained finality and today such pleas are not available to the defendants no.2,3 and 5.

13. The counsel for the defendants no.2,3 and 5 then states that he has also filed an application for condonation of delay in filing written statement.

14. The application, after the right to file written statement had already been closed, is inexplicable. The remedy if any of the defendants no.2,3 and 5 was with respect to order dated 29th January, 2019 and which has not been availed of.

15. The counsel for the defendants no.2,3 and 5 then states that the said defendants have also filed an application under Section 8 of the Arbitration & Conciliation Act, 1996 as there is an arbitration clause in the contract between the parties. It is stated that the said application was also filed as far back as on 4th February, 2019.

16. No such application also has come on record till now and there being no application, it is not open to the defendants to today avoid the decree if any under Order VIII Rule 10 by taking such pleas.

17. It has been held in *State Bank of India Vs. V. Ramakrishnan* 2018 SCC OnLine SC 963 that moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 can have no manner of application to personal guarantors of a corporate debtor. Thus, the moratorium qua defendant no.1 does not come in the way of proceeding with the suit against the defendants no.2,3 and 5 if found to be the guarantors in their personal capacity.

18. The plaintiff has instituted this suit, pleading that the (i) defendants no.2 and 3 are the joint Managing Directors of the defendant no.1; (ii) defendants had sought a rupee term loan facility to the tune of Rs.10 crores as working capital for a period of 12 months from the plaintiff, representing the same to be required to fund a project for the defendant no.4 ITI Ltd. and the defendants no.2,3 and 5 had agreed to provide personal guarantees for the amounts sought for the defendant no.1; (iii) a Facility Agreement dated 28th June, 2017 was entered into and facility to the tune of Rs.10 crores disbursed to the defendant no.1; (iv) under the said Facility Agreement dated 28th June, 2017, interest at the rate of 14% per annum was payable besides the penal / default interest; (v) the defendant no.5, by way of security for the said amount disbursed by the plaintiff to the defendant no.1,

pledged unlisted and unencumbered shares held by the defendant no.1 of Rs.10 per share and amounting to 2.5% of the total share capital of the defendant no.1 company; (vi) defendants no.2 and 3 executed an irrevocable and unconditional personal guarantee dated 28th June, 2017 in favour of the plaintiff making themselves jointly and severally liable for repayment of the said facility; (v) defendant no.5 also under the Corporate Guarantee dated 14th September, 2017 guaranteed to pay to the plaintiff on demand all monies which were due and payable; (vi) defendants, though initially deposited Rs.43,19,941/- but failed to deposit any other amounts; and, (vii) as on the date of institution of this suit, a sum of Rs.11,27,58,496/- was jointly and severally due from the defendants no.1 to 3 and 5 to the plaintiff.

19. The counsel for the plaintiff draws attention to letter dated 28th September, 2018 of defendant no.1 through defendant no.3 to the plaintiff at pages 209 and 210 of Part-III A, Volume 2 file containing acknowledgment of liability by the defendants and to page 31 onwards, being the Facility Agreement and to page 78 onwards, being the pledge agreement.

20. The counsel for the plaintiff, on enquiry whether the amount claimed in the suit has been computed with agreed interest at the rate of 14% per annum only or also taking into account any default / penal interest, states that the amount has been computed with interest at the rate of 14% per annum only and not levying any penal / default interest.

21. The plaintiff, on the basis of pleas and documents aforesaid has made out a case for forthwith decreeing the suit and no need is felt to relegate the plaintiff to leading evidence in the nature of *ex parte* evidence insofar as against defendants no.2,3 and 5.

22. Besides the arguments urged and recorded above, the only other argument of the counsel for the defendants no.1 to 3 and 5 is, that the plaintiff has transferred unto itself the shares of the defendant no.1 pledged by the defendant no.5 and has not given adjustment of the value of the said shares.

23. I have enquired from the counsel for the defendants no.2,3 and 5, the value of the shares which have been transferred.

24. The counsel for the defendants no.2,3 and 5 states he has no knowledge of the value of the shares.

25. The counsel for the defendants no.2,3 and 5 has no knowledge also of the date when the shares have been so transferred but states that it was on the date of institution of the suit.

26. However, the counsel for the defendants no.2,3 and 5 on further enquiry as to whether there is any document to show the transfer, states he does not have any.

27. On enquiry, it is stated that the pledge was in accordance with the provisions of the Depositories Act, 1996. In accordance therewith, there should have been documents available with the defendants. The defendants are appearing, without showing any documents and the only contention is, that a plea to this effect has been taken in the written statement; however, the written statement is not on record and right to file which already stands closed.

28. The counsel for the plaintiff, on specific query categorically states that the plaintiff has not transferred unto itself the shares pledged by defendant no.5 as security with the plaintiff.

29. Even if the plaintiff had security by way of such pledge, it is in the sole and absolute discretion of the plaintiff as to which security to invoke and considering that the defendant no.1 is already subject matter of NCLT, it appears that the shares of the defendant no.1, stated to be an unlisted company, would not be of any value.

30. The counsel for the defendants no.2,3 and 5 now draws attention to para no.11 of the plaint, being the territorial jurisdiction paragraph and to Clause 30 of the Facility Agreement referred to therein. It is argued, that Clause 30 is only with respect to arbitration proceedings to be held at New Delhi and is not about the Courts at Delhi having territorial jurisdiction to entertain the suit.

31. It is the plea of the plaintiff that the Facility Agreement and the other agreements were executed at Delhi and in the absence of a written statement, it is not open to the defendants to controvert territorial jurisdiction particularly when the averments in the plaint show this Court to be having territorial jurisdiction.

32. The counsel for the plaintiff also draws attention to Clause 29 of the Facility Agreement providing for jurisdiction of the Courts at Mumbai or Delhi as per the discretion of the plaintiff.

33. No other argument has been urged.

34. A decree is accordingly passed, in favour of the plaintiff and jointly and severally against the defendants no.2,3 and 5 viz. Surya Prakash Madrecha, Chandra Prakash Mandrecha and Standard Fiscal Markets Pvt. Ltd., of recovery of Rs.11,27,58,496/- with interest *pendente lite* and future at 14% per annum as agreed. The plaintiff shall also be entitled to costs of the suit with professional fee assessed at Rs.1,50,000/-.

35. The *ex parte* injunction order dated 27th November, 2018 is made absolute till the date of realization of the decretal amount.

36. As far as the suit against defendant no.1 is concerned, the same is also disposed of with liberty to the plaintiff to apply for revival as and when occasion arises.

Decree sheet be drawn up.

APRIL 01, 2019
'gsr'..

RAJIV SAHAI ENDLAW, J.

