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

%   **Date of decision: 7th August, 2019.**

\+   **CS(COMM) 88/2016 & IAs No.2562/2017 (of D-3 u/O XXXVII R-5 CPC) & 5625/2017 (of D-2 u/O XXXVII R-5 CPC)**

IFCI FACTORS LTD ..... Plaintiff

Through: Mr. Anupam Srivastava with Ms. Swati Singh, Mr. Dhairya Gupta & Ms. Divya Joshi, Advs.

Versus

INNOVENTIVE INDUSTRIES LIMITED & ORS ...Defendants

Through: Mr. Shiv Kumar Suri with Mr. Shikhil Suri & Ms. Shilpa Saini, Advs.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff has instituted the suit, under Order XXXVII of the CPC, for recovery of Rs.9,85,46,482.92 paise with *pendente lite* and future interest jointly and severally from defendants No.1 to 4, namely (i) Innoventive Industries Ltd., (ii) Chandu Chavan, (iii) Ravindra Katre and (iv) Sanjay Waghulade, pleading (a) that the plaintiff is a government undertaking and a non-banking finance company; (b) the defendant no.1 is engaged in the business of manufacture of steel tubes and motor vehicle (MV) parts; (c) the defendant no.1 had entered into an agreement dated 27th August, 2009 with the plaintiff, for factoring of receivables, whereunder the plaintiff agreed to provide the domestic factoring with recourse facility to the defendant no.1, for an amount of Rs.15 crores; (d) that the defendants no. 2 to 4 executed separate Deeds of Guarantee, all dated 27th August,

2009, in favour of the plaintiff, for securing the facility granted by the plaintiff in favour of defendant no.1; (e) the liability of the defendant no.1 extended to ensuring due payment of all the amounts payable by the defendant no.1 to the plaintiff in respect of factoring of receivables under the said agreement, along with interest and other charges; (f) the liability of defendants 2 to 4 was joint and several along with defendant no.1; (g) the defendant no.1, under the agreement, raised invoices on its debtors and presented the same to the plaintiff for factoring and the plaintiff paid a sum of Rs.1,81,12,27,978/- to the defendant no.1 towards factoring; (h) a sum of Rs.7,96,36,117/- is due to the plaintiff from the defendants towards factoring charges discounts, overdue discounts, tax and other debits; and, (i) a sum of Rs.9,85,46,482.92 paisa is due and payable by the defendants to the plaintiff under the agreement and which the defendants have failed to pay in spite of notice.

2. The suit came up first before this Court on 8th February, 2016 and thereafter on 4th March, 2016 and 19th July, 2016.

3. On 19th July, 2016, it was felt that there was no need to keep pending the admission of the present suit as a suit under Order XXXVII of the CPC, awaiting the outcome of the appeal preferred to the Division Bench against ***IFCI Factors Ltd. Vs. Maven Industries Ltd. (***2015) 225 DLT 32, since the said judgment was *per incuriam*, having failed to notice the amendment of Order XXXVII of the CPC by the Factoring Regulation Act, 2011. Thus, the suit was admitted and summons for appearance ordered to be issued to the defendants.

4. The counsel for the defendants no.2 and 3 appeared on 29th November, 2016 and summons for judgment ordered to be issued to the said defendants. The order dated 28th April, 2017 records that a moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 was in operation qua defendant no.1. The order dated 19th May, 2017 records that the defendants no.2 and 3 had filed leave to defend. The counsel for the defendant no.1 also appeared on 28th April, 2017 and 19th May, 2017. The order dated 29th May, 2017 records the contention of the counsel for the defendant no.1, that the plaintiff had already lodged its claim before the Resolution Professional under the Insolvency and Bankruptcy Code. Vide the same order, the proceedings in the suit, against defendant no.1 were also stayed. Finally, the order dated 17th July, 2019 records that the defendant no.4, despite service had not entered any appearance.

5. Thus the suit, insofar as against the defendant no.4 Sanjay Waghulade, on the defendant no.4 failing to enter appearance despite service, is entitled to be decreed forthwith.

6. As far as the defendant no.1 is concerned, the counsel for the defendants no. 2 and 3 states that the NCLT has ordered liquidation of the defendant no.1 and liquidation proceedings before the Liquidator are underway and the plaintiff, though required to file claim before the Liquidator, has not filed any such claim.

7. The counsel for the plaintiff confirms and further agrees that in view of Section 33(5) of the IBC, the suit, insofar as against the defendant no.1, cannot continue and seeks disposal thereof with liberty to approach the Liquidator with the claim of the plaintiff.

8. IA No.2562/2017 and IA No.5625/2017 of defendants no. 3 and 2 respectively, for leave to defend are for consideration and the counsel for the defendants no. 2 and 3 and the counsel for the plaintiff have been heard.

9. The counsel for the defendants no. 2 and 3 has argued the leave to defend applications, without any difference between the pleas of defendants no. 2 and 3, and on enquiry states that the two applications are identical.

10. The first argument of the counsel for the defendants no. 2 and 3 is, that the present suit is not maintainable under Order XXXVII of the CPC on account of ***IFCI Factors Ltd. Vs. Maven Industries Ltd.*** supra.

11. On enquiry, it is stated that the appeal preferred thereagainst is still pending consideration.

12. However the aforesaid argument of the counsel for the defendants no.2 and 3 does not notice the reasons which prevailed in the order dated 19th July, 2016 of this Court for entertaining and admitting the suit under Order XXXVII of the CPC in spite of ***IFCI Factors Ltd. Vs. Maven Industries Ltd.*** supra. The counsel for the defendants no. 2 and 3 also agrees that the ***IFCI Factors Ltd. Vs. Maven Industries Ltd.*** supra does not take notice of the amendment to Order XXXVII of the CPC on with effect from 1st February, 2012. I have also informed the counsel for the defendants no. 2 and 3 that the said amendment is not by amendment act of the CPC, but vide Section 35 read with Schedule to the Factoring Regulation Act, to provide for the suits filed by the factor for recovery of dues with respect to transactions under the said Act, as summary suits.

13. The aforesaid also takes care of the argument of the counsel for the defendants no.2 and 3, of the present suit being not for recovery of any debt.

The said argument is again lifted from the reasoning which prevailed in ***IFCI Factors Ltd. Vs. Maven Industries Ltd.*** supra and which as aforesaid decided the maintainability of a similar suit in that case as a suit under Order XXXVII on the anvil of Order XXXVII as existed before 1st February, 2012. With effect from 1st February, 2012, a suit for recovery of receivables, instituted by any assignee of receivables is permitted to be entertained as a summary suit, if only to recover a liquidated demand in money payable by the defendants, with or without interest.

14. Though the counsel for the defendants has not argued, but I may at this stage deal with another aspect. Though I had in order dated 17th January, 2018 in CS(COMM) 1579/2016 titled ***IFCI Factors Ltd. vs. Gangotri Iron and Steel Company Ltd. & Ors.*** enquired, whether a suit provided to be tried as a summary suit by amendment aforesaid, lies only against the debtor of the person availing for the factoring facility or also against the person availing the factoring facility and guarantors of such persons, but the counsel for the plaintiff has drawn attention to the judgment dated 1st August, 2019 in CS(COMM)752/2018 titled ***IFCI Factors Ltd. Vs. Ramsarup Industries Ltd. & Ors.***, where a Coordinate Bench, after noticing ***IFCI Factors Ltd. vs. Gangotri Iron and Steel Company Ltd.*** supra has held a suit under Order XXXVII to be maintainable also against the person availing the factoring facility as well as the guarantors of such person.

15. Thus, there is no merit in the contention of the counsel for the defendants as to the maintainability of the present suit under Order XXXVII of the CPC.

16. The counsel for the defendants no. 2 and 3 has also contended that this Court does not have territorial jurisdiction to entertain the suit as no cause of action has accrued within the territorial jurisdiction of this Court. It is stated that the defendants are residents of Pune.

17. Per contra the counsel for the plaintiff has drawn attention to the Factoring Agreement dated 27th August, 2009 and to the Guarantee Deeds, also dated 27th August, 2009, and all of which are endorsed on Stamp Paper of Delhi and shown to be executed at Delhi.

18. The counsel for the defendants no. 2 and 3 cannot controvert.

19. Once it is so, it cannot be said that no part of cause of action accrued within the jurisdiction of this Court and this Court would not have territorial jurisdiction to entertain the suit.

20. The counsel for the defendants has also contended that there is no privity of contract between the defendants no. 2 and 3 and the plaintiff. It is contended that the defendants no. 2 and 3 are not parties to the Factoring Agreement.

21. However, on enquiry as to what was the consideration for the defendants no. 2 and 3 to furnish the guarantee in favour of the plaintiff, the counsel for the defendants no. 2 and 3 admits that the said consideration was the factoring facility provided by the plaintiff to the defendant no.1 under the Factoring Agreement. Once it is so, it is not open to defendants no. 2 and 3 to take the plea, of no privity of contract with plaintiff or of the defendant being entitled to leave to defend on the said ground.

22. The counsel for the defendants no. 2 and 3 has next contended that the defendants no.2 and 3, as guarantors, cannot be made liable without the plaintiff first making efforts for recovery from defendant no.1, which is according to the plaintiff also is the principal debtor.

23. The said argument is again contrary to the terms of the guarantee admittedly executed by the defendants no.2 and 3, whereunder the defendants no. 2 and 3 have agreed to be liable jointly and severally with the defendant no.1 and agreed to the plaintiff taking recourse to the defendants no. 2 and 3 even if owing to any law or otherwise not entitled to recourse against the defendant no.1.

24. The counsel for the plaintiff, in this regard has also drawn attention to ***State Bank of India Vs. Indexport Registered and Ors.*** (1992) 3 SCC 159 holding that a guarantor alone can be sued without even suing the principal debtor, so long as the creditor satisfies the Court that the principal debtor is in default.

25. The principal debtor in the present case, being the defendant no.1, as aforesaid, is in liquidation.

26. The last argument of the counsel for the defendants no. 2 and 3 is of limitation. It is contended that the receivables, for recovery of which the suit is filed, are of the years 2010 to 2015 and this suit filed on 21st November, 2015 is beyond time.

27. Per contra, the counsel for the plaintiff has contended that the last demand as per the statement of account filed by the plaintiff is of 31st October, 2014.

28. The counsel for the plaintiff, in this regard, has also drawn attention to Clause 12 of the identical Guarantee Deeds executed by defendants no. 2 to 4, agreeing to the guarantee being a continuous security until repayment of the balance due from the defendant no.1 under the agreement.

29. Mention in this regard may also be made of Clauses 11 to 14 of the Factoring Agreement, whereunder the provision for accrual of liability of the defendant no.1 is provided for.

30. I have also enquired from the counsel for the defendants no. 2 and 3, invoking which Article of the Schedule to the Limitation Act, the plea of bar of limitation is taken.

31. The counsel for the defendants no. 2 and 3 generally states that the limitation is of three years.

32. That is a layman's perception of the Limitation Act. The Limitation Act, in Schedule thereto, prescribes limitation for suits for different reliefs along with date of commencement of the period of limitation. Taking of the plea of bar of limitation, without reference to any specific Article of the Schedule to the Limitation Act, itself shows shallowness of the plea.

33. No merit is thus found in the said plea either.

34. No other arguments has been urged by the counsel for the defendants no. 2 and 3.

35. IA No.2562/2017 and IA No.5625/2017 for leave to defend are thus dismissed.

36. Resultantly,

(i) the suit, insofar as against the defendant no.1 namely Innoventive Industries Ltd. is disposed of with liberty to the plaintiff to avail its remedy before the Liquidator; and,

(ii) a decree is passed, in favour of the plaintiff and jointly and severally against the defendants no.2 to 4, namely Chandu Chavan, Ravindra Katre and Sanjay Waghulade, of recovery of Rs.9,85,46,482.92 paise together with interest *pendente lite* and future at 13.50% per annum in accordance with the agreement between the parties.

The plaintiff shall also be entitled to costs of the suit with professional fee assessed at Rs. 2 lakhs.

Decree sheet be prepared.

RAJIV SAHAI ENDLAW, J.

AUGUST 07, 2019
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(corrected & released on 16th August, 2019)