IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO.54 OF 2019
IN
COMMERCIAL SUMMARY SUIT NO.1060 OF 2019

Piramal Capital and Housing Finance Limited ...Plaintiff
vs.
Anil Kumar and Others ...Defendants

Mr. Gaurav Joshi, Senior Counsel a/w. Mr. Aditya Shiralkar, Ms. Nanki G.S. i/b. Wadia Ghandy & Co., for the Plaintiff
Mr. Rohan Sawant a/w. Mr. Sochit Kumar i/b. ANP Partners, for Defendant Nos. 1 to 3.

CORAM : N.J. JAMADAR, J.
RESERVED ON : 6th MARCH, 2020
PRONOUNCED ON : 20th MARCH, 2020

JUDGMENT:

. This Commercial Summary Suit is instituted for recovery of a sum of Rs. 67,92,29,900/- along with future and additional interest @ 12.5% p.a. and default interest @ 12% p.a. on the principal sum of Rs. 60,10,45,045/- on the basis of the guarantee agreements.

2. The averments in the Plaint can be summarized as under:

a] The Plaintiff is a public limited company incorporated under the provisions of the Companies Act, 2013. The Plaintiff is the successor in interest of Piramal Finance Limited (original lender) which came to be amalgamated with the Plaintiff, then known as Piramal Housing Finance Limited, by merger order dated 6th April, 2018 passed by the National Company Law Tribunal, Mumbai Bench under the provisions of section 230 to 232 of the Companies Act, 2013. The Defendants are promoters of two companies namely S.K. Elite Industries India Limited and S.K. Wheels Private Limited (the borrower companies).

b] At the request of the Defendants, post deliberations and negotiations, the original lender had sanctioned the term loan facility to the borrower company to the tune of Rs. 63 Crores. A sanction letter incorporating the terms and conditions of the loan came to be issued on 12th July, 2017. On the acceptance of the aforesaid terms and conditions of the sanction letter by the borrower companies a facility agreement came to be executed between the original lender and the borrower companies on 21st August, 2017. The loan was to be repaid in 180 monthly installments (EMI) over 15 years period. It was to carry interest @ 12.5% with stipulation of additional 12% p.a. interest in the event of default. One of the clauses (clause 15) authorized the lender, in the event of default, to accelerate the facility and demand the outstanding amounts immediately and also invoke guarantees provided by any of the security providers. The defendants executed three personal guarantees, on 21st August, 2017, and unconditionally and irrevocably guaranteed discharge of the obligations under the facility agreement.

c] In pursuance of the aforesaid agreement, the original lender disbursed the sum of Rs. 15 Crores to S.K. Wheels Private Limited and Rs. 47 Crores to S.K. Elite Industries India Limited on 29th August, 2017.

d] In accordance with the terms of the agreement, on 5th November, 2018 the borrower companies were liable to pay an amount of Rs. 79,58,244/- towards the EMI. However, the borrower companies committed default. Thus, the event of default occurred. The Plaintiff addressed a demand by letter dated 8th March, 2019 calling upon the borrower companies and Defendants to pay the overdue amount. A legal notice followed, on 4th April, 2019. As the Defendants failed to discharge their liability, the Plaintiff was constrained to invoke the guarantee agreements and institute a suit for recovery of the aforesaid amount.

3. The Defendants appeared on being served with the writ of summons. Thereupon, the Plaintiff has taken out this Summons for Judgment.

4. The Defendants have filed an affidavit in reply and sought an unconditional leave to defend the suit. The Defendants contend that

the suit is not maintainable as Summary Suit. The Plaintiff has suppressed the material facts and thus dis-entitled itself from claiming any reliefs. The Defendants have raised a legal challenge to the tenability of the suit as the facility agreement and the guarantee agreements, which constitute the basis of the Summary Suit, are not sufficiently stamped. In view of the provisions contained in section 34 of the Maharashtra Stamps Act, 1938 (the Stamps Act), the Court is precluded from acting upon the said instruments. Conversely, those instruments deserve to be impounded forthwith and sent for adjudication of the deficit stamp duty and penalty thereon. The Defendants have also endevoured to contest the liability as, in the Petition under section 7 of The Insolvency and Bankruptcy Code, 2016 (Code, 2016) filed by the BMW Financial Services, the borrower companies are undergoing corporate insolvency resolution process. The Plaintiff has lodged a claim to the tune of Rs. 15,31,56,271/- before the resolution professional, in the said proceedings. Thus, in view of the provisions contained in section 31 of the Code, 2016, the suit is not tenable. The Defendants assert that in view of the provisions of the Code, 2016 the moratorium applies to the proceedings against the guarantors as well.

5. On facts, however, the Defendants do not profess to contest the

factum of advancing of the loan facility to the tune of Rs. 62 Crores to the borrower companies and the execution of the guarantee agreements by the Defendants. AS regards default in repayment, the Defendants assert that on account of grave hardship due to unfavorable and unfortunate economic circumstances the borrower companies faced financial crisis and thus there was default.

6. An affidavit in rejoinder is filed on behalf of the Plaintiff. It is contended that the resolution process in Company Petition No. 4301 of 2018 against one of the borrower companies, namely S.K. Wheels Private Limited is still under way. No part of the dues has yet been realized by the Plaintiff. The liability of the Defendants as guarantors is independent of the liability of the borrower companies. Section 31 of the Code, 2016 does not envisage any bar to proceed against the guarantors.

7. In the backdrop of the aforesaid pleadings, I heard Mr. Gaurav Joshi, learned Senior Counsel for the Plaintiff and Mr. Rohan Sawant learned counsel for Defendant Nos. 1 to 3. Perused the material on record.

8. To start with it would be necessary to note that there is no dispute about the jural relationship between the parties. It is

incontestable that the original lender has advanced Rs. 62 Crores to the borrower companies, of which the Defendants are the promoters. Nor there is any controversy over the fact that the said sum came to be advanced pursuant to the terms and conditions incorporated in the sanction letter and facility agreement. The facts that the Defendants stood guarantors to the loan and the said personal guarantees constitute one of the securities (clause g) in the Schedule II appended to the facility agreement dated 21st August, 2017 are indisputable.

9. Indubitably, the Defendant Nos. 1 to 3 executed the guarantee agreement on 21st August, 2017 and undertook inter alia as under:

> 4. In pursuance of the Facility Agreement and in consideration of the Lender agreeing to grant the Facility to the Borrowers, the Guarantor hereby unconditionally and irrevocably guarantees as primary obligor and not merely as a surely, to the Lender, the due and timely discharge by the borrowers of the secured obligations under the Facility Documents and hereby further agrees and undertakes that the Guarantor shall, in the event of the Borrowers failing to perform any of the secured obligations, or any part thereof, in respect of the Facility or on the happening of / occurrence of any Event of Default under the Facility Agreement and/or any of the other Facility Documents, pay and make good the amounts required to discharge the secured obligations (in whole or in part as may be demanded by the Lender) without dispute, protest, delay or demur in accordance with the terms of this Guarantee. The obligations of the Guarantor under this Guarantee shall be discharged and released on the Final Settlement Date.
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> ….. ….. …...
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> 22. The liability of the Guarantor hereunder shall be

> to the extent of the Facility Amount granted to the Borrowers under the Facility Agreement not being less than INR 62 Crores, plus all interest, costs, charges, expenses and all other monies payable by the Borrowers to the Lender under the Facility Agreement.

10. In the light of the aforesaid undisputed facts, the nature of the defence sought to be raised on behalf of the Defendants to seek an unconditional leave to defend the suit is required to be appreciated. Though a strenuous effort was made on behalf of the Defendants to draw home the point that unconditional leave deserves to be granted on account of the fact that the facility agreement and the guarantee agreement are not sufficiently stamped, and the bar under section 34 of the Stamp Act, 1958, comes into play, yet in view of the developments during the pendency of the suit, the said ground of defence looses significance.

11. During the pendency of the suit, the Plaintiff submitted the agreements executed by the Defendants for adjudication to the competent authority. The Collector of Stamps, by a demand notice dated 28th February, 2020 called upon the Plaintiff to pay a sum of Rs. 10,01,600/- towards deficit stamp duty and Rs. 20,400/- towards the penalty. The Plaintiff accordingly paid the deficit stamp duty and penalty. Copies of the demand notice and challans were tendered for the perusal of the Court. An affidavit in support of the

said claim is also sworn by Ms. Anuja Pondse-Pandit, the authorized representative of the Plaintiff. In view of the aforesaid development, the clause (a) of the proviso to section 34, comes into play where under on payment of the deficit stamp duty and penalty, the instrument becomes admissible and the bar agaisnt acting upon such instrument, under the principal provision of the section, gets eclipsed.

12. The learned counsel for the Defendants however endeavoured to advance two submissions which can be stated to be in the nature of barnacles attached to the hull of the controversy. One, the original documents have not been placed on the record of the Court and, thus, the judgment in summary suit cannot be passed till the original documents are placed on record. To bolster of this submission a strong reliance was placed on the judgment of the Supreme Court in the case of **Neebha Kapoor vs. Jayantilal Khandwala and Others**[1] . In the said case, Supreme Court had inter alia observed as under:

> 11. <u>For the purpose of obtaining a summary judgment in terms of Order 37 of the Code, ordinarily the original documents must be produced. Original documents are not available. Appellant, therefore, is obligated to prove the loss of documents.</u> Only because a suit has been entertained as a summary suit, the same by itself may not be a ground for passing of a judgment on mere asking. We have noticed the fact situation

1 (2008) 3 Supreme Court Cases 770.

> obtaining herein. The High Court was of the opinion that it is a case where unconditional leave should be granted. The question as to whether the defence of the respondents is moonshine or not was not a matter which required consideration of the High Court at that stage. A decree could not have been granted on the basis of even photostat copies of the documents. [See Food Corporation of India v. Dena Bank, Indore and another AIR 2004 MP 158] Presumption in regard to a negotiable instrument or a bill of exchange in terms of Section 118 of the Act is also an evidence. It is true that a presumption can be raised that a bill of exchange was correctly stamped as provided for under Clause (f) of Sub-section (2) of Section 128 of the Code but a decree is to be passed by a court of law upon application of mind.
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> (Emphasis supplied)

13. The aforesaid pronouncement is of no assistance to the Defendants as in the said case the question of proof of loss of documents, which constituted the foundation of the claim in the summary suit, was in issue. In the case at hand, the fact that the original documents were sent for adjudication and the Plaintiff had prayed deficit stamp duty and penalty is established by placing on record documents of unimpeachable evidentiary value. To add to this, the execution of those instruments is incontrovertible. Thus, I am not persuaded to accede to the submission on behalf of the Defendants.

14. The second ground of challenge was nested on the fact that the competent authority has not adjudicated the stamp duty on the instrument in question, namely the personal guarantees, as the

principal document. A stamp duty of Rs. 100/- only was levied on the instruments. The deeds of guarantee, according to the learned counsel for the Defendants, constituted the principal instruments and not the facility agreement and deed of mortgage.

15. The aforesaid submission is required to be stated to be repelled. The fact remains that the Plaintiff had submitted the instruments for adjudication and the competent authority adjudicated the stamp duty. A defence of error in adjudication of the deficit stamp duty is not the one to be availed of by the Defendants. Even otherwise, in view of the provisions contained in section 4 of the Stamps Act, 1958 where several instruments are employed for completing the transaction, the principal instrument only shall be chargeable with the duty prescribed in Schedule I and each of the others instruments shall be chargeable with a duty of Rs. 100/- instead of the duty, if any, prescribed for it in that Schedule. The reliance placed on behalf of the Plaintiff, in this context, on the judgment of the Supreme Court in the case of **The Madras Refineries Limited vs. The Chief Controlling Revenue Authority, Board of Revenue, Madras**[2] appears to be well founded.

16. This propels me to the second defence of the proceedings being

2 (1977) 2 Supreme Court Cases 308.

not tenable against the guarantors in view of the insolvency resolution proceedings initiated against one of the borrower companies, before N.C.L.T, under the Code, 2016. Placing reliance upon the provisions of section 31 of the Code, 2016, the learned counsel for the Defendants would urge that once the Adjudicating Authority approves a resolution plan, it binds the corporate debtor, its employees, members, creditors and guarantors and other stake holders. The moratorium prescribed in section 14 of the Code, 2016 against institution and continuation of the proceedings against the corporate debtor, in such a scenario, according to the learned counsel for the the Defendants, applies to the proceedings against the personal guarantors as well. Thus, in view of the pendency of the insolvency resolution proceedings against S.K. Wheels Private Limited, in Company Petition No. 4301 of 2018, the Defendants are entitled to unconditional leave to defend.

17. The learned senior counsel for the Plaintiff jointed the issue by canvasing a submission that the aforesaid submission sought to be advanced on behalf of the Defendants is totally misconceived. The learned counsel would urge that the issue is no longer res-integra. The Supreme Court in the case of **State Bank of India vs. V. Ramakrishnan**[3] had specifically considered this question and held

3 2018 SCC OnLine SC 963

that the moratorium under section 14 does not bar the proceedings against the corporate guarantors.

18. In the case **V. Ramakrishnan** (supra) the Supreme Court considered the following question:

Whether section 14 of the Insolvency and Bankruptcy Code, 2016 which provides for a moratorium for the limited period mentioned in the Code, on admission of an insolvency petition, would apply to a personal guarantor of a corporate debtor ?

19. After extensively adverting to the provisions contained in the Code, 2016, including section 31 of the Code, 2016 (on which reliance was sought to be placed by the learned counsel for the Defendants in this case) it was, inter alia, observed as under:

> 19. Section 14 refers to four matters that may be prohibited once the moratorium comes into effect. In each of the matters referred to, be it institution or continuation of proceedings, the transferring, encumbering or alienating of assets, action to recover security interest, or recovery of property by an owner which is in possession of the corporate debtor, what is conspicuous by its absence is any mention of the personal guarantor. Indeed, the corporate debtor and the corporate debtor alone is referred to in the said Section. <u>A plain reading of the said Section, therefore, leads to the conclusion that the moratorium referred to in Section 14 can have no manner of application to personal guarantors of a corporate debtor.</u>
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> 24. Section 31 of the Act was also strongly relied upon by the Respondents. This Section only states that

> once a Resolution Plan, as approved by the Committee of Creditors, takes effect, it shall be binding on the corporate debtor as well as the guarantor. This is for the reason that otherwise, under Section 133 of the Indian Contract Act, 1872, any change made to the debt owed by the corporate debtor, without the surety's consent, would relieve the guarantor from payment. <u>Section 31(1), in fact, makes it clear that the guarantor cannot escape payment as the Resolution Plan, which has been approved, may well include provisions as to payments to be made by such guarantor. This is perhaps the reason that Annexure VI(e) to Form 6 contained in the Rules and Regulation 36(2) referred to above, require information as to personal guarantees that have been given in relation to the debts of the corporate 23debtor. Far from supporting the stand of the Respondents, it is clear that in point of fact, Section 31 is one more factor in favour of a personal guarantor having to pay for debts due without any moratorium applying to save him.</u>

(Emphasis supplied)

20. The Supreme Court further observed that the Parliament consciously chose not to provide any moratorium along the lines of section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 in section 14 of the Code. The Court went on to further elucidate the position even in the context of the Amendment 2018 to the Code, 2016 and concluded that the personal guarantor is not insulated by the moratorium envisaged by section 14 of the Code, 2016.

21. In view of the aforesaid exposition of law, the submission on behalf of the Defendants nested in the insolvency resolution proceedings initiated against one of the borrower companies is of no

avail to the Defendants.

22. As indicated above, the transaction between the parties and the liability to pay the debt is, in a sense, beyond the pale of controversy. The defence sought to be raised by the Defendants, therefore, does not constitute either a positive defence or a fair and reasonable defence. In the backdrop of the undisputed facts and the view, which this Court is persuaded to take, the case of the Defendants is relegated to one of no defence. However, as the insolvency resolution proceedings are pending before the N.C.L.T. and in view of the provisions contained in section 31 of the Act, if the resolution plan is approved, a situation may arise where the liability of the borrowers may be scaled down. In such a eventuality, if, at this stage, leave to defend is not granted and straightway a decree is passed, the Defendants would be prejudiced. Therefore, I am persuaded to grant conditional leave to defend the suit on deposit of principal amount of Rs.60,10,45,045/- in the Court within a period of eight weeks. Hence, the following order:

ORDER

a] Leave to defend is granted to the Defendants subject to deposit of a sum of Rs.60,10,45,045/- in Court within a period of eight weeks from today.

b] If the aforesaid deposit is made within the stipulated period, this suit shall be transferred to the list of Commercial Causes and the defendant shall file written statement within a period of four weeks from the date of deposit;

c] If this conditional order of deposit is not complied with within the aforesaid stipulated period, the plaintiff shall be entitled to apply for an *ex-parte* decree against the defendants after obtaining a non-deposit certificate from the Prothonotary and Senior Master of this Court.

d] Summons for Judgment stands disposed of accordingly.

(N. J. JAMADAR, J.)