IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :04.10.2021	Pronounced on:06.10.2021

Coram:

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

A.No.2730 of 2020
in
C.S.No.318 of 2020

NORTHERN ARC CAPITAL LIMITED
Rep.by its Authorised Signatory,
Having office at
10th Floor, Phase I,
IIT Madras Research Park,
Kanagam Village, Taramani,
Chennai 600 113. .. Applicant/Plaintiff

/versus/

1.SAMBANDH FINSERVE PRIVATE LIMITED,
Represented by its Director,
DCB-820/821/822,
8th Floor, DLF Cyber City,
Chandaka Industrial Estate, Patia,
Chandrasekhapur, Bhubaneswar 751 024.

2.Mr.Deepak Kindo

3.Mr.Livinus Kindo .. Respondents/Defendants

Prayer:- Application has been filed under order XIV, Rule 8 of O.S. Rules read with, Order 38, Rule 5 of Code of Civil Procedure, 1908 and Section 151 of C.P.C., praying to issue a direction to the respondents No.1-3 to deposit in this Hon'ble Court, the outstanding amount of Rs.36,94,43,077/- as principle and interest of Rs.1,22,02,704/- (as on 02.11.2020) and any amounts, which is sufficient to secure the claims of the Applicant and failing which, attach the assets and properties of respondents Nos.1-3, which are sufficient to secure the outstanding amount of the Applicant, pending disposal of the main suit.

For Applicant :Mr.Anirudh Krishnan

For Respondents :Mr.Supriyo Ranjan Mahaptra for R1
Mr.Prashant Rajagopal for R2

ORDER

(This case has been heard through Video Conferencing)

The sole plaintiff has instituted the suit for recovery of money against defendants 1 to 3 payable jointly and severally.

2.The plaintiff is a Non-Banking Finance Company (in short "NBFC"). The first defendant is a Micro Level Finance Company. The first defendant has borrowed term loan from the plaintiff. The second and third defendants are the Director/Chief Executive Officer and Director-cum-Chairman of the first defendant's company. The defendants failed to repay the loan and it is specifically alleged in the plaint that, the second defendant fraudulently diverted the funds of the first defendant company and had misappropriated the first defendant's fund, which has led to default in repayment after September 2020. On the date of filing the suit, the defendants owe a sum of Rs.38,16,45,781/- with interest. It is alleged that the second defendant had committed gross fraud by inflating the assets under management by showing fictitious disbursement, withdrawal and deposits as collections. He has unjustly enriched himself causing wrongful loss to the first defendant company. Due to complete and object failure of the corporate governance and financial collapse, the corporate veil to be lifted and defendants 2 and 3 are to be held personally liable for the default of the first defendant. Even otherwise, as guarantor for the loan advanced, the second defendant is jointly and severally liable to discharge the suit claim. The defendants have admitted the liability on several occasions and also admitted findings of fraud by the Forensic Auditors in its preliminary report dated 13.10.2020. The chance of defendants 2 and 3 fleeing away the country is imminent. Hence, this application to direct defendants 2 and 3 is filed to furnish security or bank guarantee equal to the suit claim.

3.Pending application, the third defendant, who is the father of the second defendant, died. The first defendant company is under liquidation. Administrator is appointed to take over the assets and liabilities.

4.The 1st and 2nd defendants have filed the counter stating that the application under Order XXXVIII, Rule 5 of C.P.C., is not maintainable, since the principal borrow is taken over by the Administrator. The plaintiff is one among 39 lenders to the first defendant. The Joint Lenders Forum (in short "JLF") had been constituted and the plaintiff as member of the Joint Lenders Forum has to work out remedy through the equitable distribution of the first defendant's assets. The suit as well as the application under Order XXXVIII, Rule 5 of the Code of Civil Procedure are not maintainable and also abuse of law.

5.The learned counsel appearing for the second defendant submitted that, the the second defendant was wrongly penalised and he has been falsely accused of misappropriating the 1st defendant fund which is baseless. He has no property within the jurisdiction of this Court. The Facility Agreement confers exclusive jurisdiction to the Courts in Mumbai. In violation of the Agreement, this suit is filed in Chennai invoking the Clause of Personal Guarantee. No case is made out by the plaintiff that the second defendant is likely to dispose the property. Hence, the application is liable to be dismissed.

6.Heard the learned counsels and perused the documents relied.

7.The power under Order XXXVIII, Rule 5 of the Civil Procedure Code, has to be sparingly used. Only, when there is sufficient reason to believe that the defendant is about to dispose his property, Attachment or Order to furnish security shall be ordered. In ***W.Pappammal vs. I.Chidambaram reported in [1984 Mad 70],*** this Court has held that

> "*6. The essential requirements for invoking the power of court to effect an attachment under 0. 38, R. 5 (1), C.P.C., are that the Court must be satisfied that the defendant is about to dispose of the whole or any part of his or her property, or the defendant is about to remove the whole or any part of his or her property from the local limits of the jurisdiction of the court and the defendant is intending so to do with a view to cause obstruction or delay the execution of any decree that may be pawed*

> *against him or her. it is incumbent that the plaintiff should state precisely the grounds on which the belief or apprehension is entertained that the defendant is likely to dispose of or remove the property. t may even be necessary in some cases to give the source of information and belief. A mere mechanical repetition of the provisions in the Code or the language therein without any basic strata of truth underlying the allegation or vague and general allegations that the defendant is about to dispose of the property or remove it beyond the jurisdiction of the court totally unsupported by particulars would not be sufficient compliance with the first part of 0. 38, R. 5 (1), C. P. C."*

8.Applying the above principle, this Court holds that, the second defendant, who stood as guarantor for the term loan availed in the name of the first defendant, cannot be segregated or delinked from the first defendant company, which is now under restructuring. Whether the second defendant mismanaged the company and whether he has appropriated the company fund, has to prove through the investigation, which is under progress or through trial in this suit.

9.To order Attachment Before Judgment or to furnish security equal to the suit claim, the second defendant though found in bad light and unacceptable antecedents, these are all not reasons to allow the application under Order

XXXVIII, Rule 5 of the Civil Procedure Code. Since the affidavit filed along with the application does not disclose adequate reasons for ordering furnish security that the property available now with the defendant will be disposed or removed from the local limits to cause obstruction or delay the execution of the decree.

10. For the said reasons, this application is dismissed. No order as to costs.

06.10.2021

Index:yes/no
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DR.G.JAYACHANDRAN,J.

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Pre-delivery Order made in
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