

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION**

**SUMMONS FOR JUDGMENT NO. 25 OF 2019
IN
COMM SUMMARY SUIT NO. 559 OF 2019**

IL & FS Financial Services Ltd. ...Plaintiff
Versus
ARM Telecom Services Limited & ors. ...Defendants

Dr. Birendra Saraf, Senior Advocate, a/w Mr. Rohan Savant,
Sachin Chandrana, Ms. Rajni Mehta, i/b Manilal Kher
Ambalal & Co., for the Plaintiff.

Dr. Veerendra Tulzapurkar, Senior Advocate, a/w Ms. Anaisha
Zachariah, Ms. Ragini Jitha, i/b Crawford Bayley & Co.,
for the Defendants.

**CORAM: N. J. JAMADAR, J.
RESERVED ON: 23rd MARCH, 2022
PRONOUNCED ON: 5th MAY, 2022**

ORDER:-

1. This commercial division summary suit is instituted for recovery of a sum of Rs.49,58,07,719/-, along with interest on the basis of written contract and negotiable instruments.

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

(a) The plaintiff is a non-banking finance company engaged in the business of financial and advisory Services. Defendant no.1 is a company incorporated under the Companies

Act, 1956. In the year 2016, defendant no.1 had approached the plaintiff for extending a Rupee Term Loan facility of Rs.37 Crores. Pursuant to the representation made by defendant no.1, the plaintiff had issued an offer letter dated 25th January, 2016 incorporating the terms and conditions of the loan facility. The defendant no.1 unconditionally accepted the offer. Thereupon a loan agreement came to be executed on 27th January, 2016. The loan agreement *inter alia* provided for the tenure of the loan, the interest on the amount to be advanced, the action to be initiated by the plaintiff in the event of default, the securities to be provided by the defendant no.1 and the guarantors.

(b) In consideration of the loan to defendant no.1, defendant no.2 executed a letter of guarantee dated 27th January, 2016 and unconditionally and irrevocably agreed to pay on demand the outstanding amount payable by defendant no.1 along with interest and other charges. Defendant no.3 also executed a letter of guarantee and unconditionally and irrevocably undertook to discharge the liability of defendant no.1. In addition, defendant no.1 executed a Demand Promissory Note dated 27th January, 2016 in favour of the plaintiff. A *pari passu* charge was created under the Memorandum of the Entry dated 27th January, 2016 in favour of

the plaintiff. Defendant no.3 also executed an agreement of pledge dated 27th January, 2016 in favour of the plaintiff and thereby pledged shares of ICOMM Tele Limited. Another agreement of pledge was executed on 19th December, 2017 by defendant no.1 and Isitva Pvt. Ltd. in favour of the plaintiff thereby pledging securities held by Isitva Fasteners Pvt. Ltd in Isitva Steel Pvt. Ltd.

(c) Upon execution of the aforesaid agreement and instruments, the plaintiff disbursed a sum of Rs.37 Crores to the defendant no.1 through HDFC Bank Ltd.

(d) Defendant no.1 failed to remit the interest which had fallen due in the month of March, 2016. A letter was addressed on 13th April, 2016 calling upon the defendant to make the due payment. As there were further defaults in payment of interest on the loan facility, the plaintiff called upon the defendant to make payment of accrued interest vide letters dated 11th May, 2016, 15th June, 2016 and 15th July, 2016. With the persistent failure and negligence on the part of defendant nos.1 and 3 to make the payment, the plaintiff was constrained to issue notice on 19th July, 2016. Since there was no compliance of the demand, the plaintiff was constrained to call upon defendant no.1 to make the payment of the entire due amount of

Rs.38,28,77,785/- and notified that in the event of default the plaintiff would be constrained to initiate requisite action. The aforesaid notice did not elicit positive response. Hence, by notice dated 29th August, 2016 the plaintiff invoked the pledge. Eventually, vide notice dated 14th December, 2018, defendant nos.2 and 3 were called upon to make payment of the then outstanding amount of Rs.48,45,20,075/-. The defendants failed to make the payment. Hence, the plaintiff was constrained to institute this suit for recovery of the aforesaid amount along with future interest.

3. Defendant nos.1 to 3 appeared in response to the writ of summons.

4. Thereupon, the plaintiff has taken out the summons for judgment.

5. An affidavit-in-reply was filed on behalf of defendant no.1 on 26th July, 2019. Defendant nos.2 and 3 have adopted the contentions in the affidavit-in-reply filed on behalf of defendant no.1. The defendants have sought an unconditional leave to defend the suit.

6. At the outset, the defendants contend that the plaintiff has not approached the Court with clean hands. The plaintiff has been undergoing serious investigation for lapses in its books

of account. Thus, the plaintiff does not deserve any relief. The tenability of the suit was also assailed on the ground that the instruments relied upon by the plaintiff, namely, loan agreement and letters of guarantee are insufficiently stamped. In view of the provisions contained in Sections 33 and 34 of the Maharashtra Stamps Act, 1958, those insufficiently stamped instruments are required to be impounded. Till the stamp-duty and requisite penalty thereon, if any, is paid those instruments cannot be acted upon. Therefore, those instruments cannot furnish a foundation for a claim in the summary suit.

7. On merits, the defendants contended that the purported extension of loan facility is a sham device. The real nature of transaction in question is of a structured arrangement whereby the plaintiff had advanced monies to associate companies of ICOMM and Isitva Ventures, to whom the plaintiff had advanced loans in the year 2008, and those amounts were transferred to the accounts of ICOMM or Isitva Ventures for being paid back to the plaintiff. This device was adopted to show that the accounts of the plaintiff were clean. The defendants have furnished a trail of transactions which were allegedly part of this structured arrangement. Eventually, according to the defendants, the loan amount of Rs.9 Crore advanced to U. V. Solar Power

Systems Private Limited and Isitva Fasteners became overdue. Thus, the plaintiff advanced a sum of Rs.37 Crores to defendant no.1. Out of which, a sum of Rs.9,53,17,768.20 was transferred by defendant no.1 to U. V. Solar, who, in turn, transferred the said amount to the plaintiff. Likewise, a sum of Rs.27,44,86,560/- was transferred from the account of defendant no.1 to the account of Isitva Fasteners. The defendants contend that both U. V. Solar and defendant no.1 were non-operational companies on the date on which the structured arrangements were entered into by the parties. Defendant no.1 was merely used as conduit to infuse money into Isitva Fastener and U. V. Solar.

8. Leave to defend was also sought on the count that the plaintiff invoked the pledge and sold the shares at sub-optimum price. The plaintiff made no efforts to obtain best possible price for the sale of pledged shares. Therefore, on this count also, the defendants have raised triable issues.

9. The defendants have thus sought an unconditional leave to defend the suit on the following counts;

- (i) the suit claim is based on insufficiently stamped instruments;

(ii) the purported transaction of loan is sham and it was as exercise in evergreening the loan accounts;

(iii) the plaintiff failed to realize the best price for the pledged shares and the failure to sale the shares at an opportunate time caused prejudice to the defendants.

10. In the light of the aforesaid pleadings, I have heard Dr. Saraf, the learned Senior Counsel for the plaintiff and Dr. Tuljapurkar, the learned Senior Counsel for the defendants. With the assistance of the learned Counsels for the parties, I have perused the pleadings and the material on record.

11. At the outset, Dr. Saraf urged that the defendants have raised the very same defences which have all been negated by this Court in a judgment in the plaintiff's own case; *IL & FC Financial Serviced Limited vs. SKIL Infrastructure Limited and ors. in Summons for Judgment No.30 of 2019 with connected matters.*

12. Dr. Saraf submitted that with the development in law, the defence of inadequacy of the stamp-duty has been further eroded. The defence of evergreening of loan accounts, even if taken at par, does not furnish a ground for grant of

unconditional leave to defend the suit. Nor the defence of the alleged failure on the part of the plaintiff to secure the optimum price of the pledged shares, after the invocation of pledge, carries any substance in view of the rights of the pledgee, recognized under Section 176 of the Indian Contract Act.

13. Dr. Tuljapurkar countered the submissions of Dr. Saraf by canvassing that in the very judgment of *SKIL Infrastructure* (supra), on which reliance is placed by the plaintiff, this Court in paragraph no. 93, enumerated the reasons which warranted the grant of leave to the defendants therein. Those very grounds, according to Mr. Tuljapurkar, would negate the case of the plaintiff that the defence of the defendant is moonshine or malafide. All the three grounds, adverted to above, according to Mr. Tuljapurkar, are worthy to be classified as giving rise to strong and substantial defence.

14. Dr. Tuljapurkar, in addition, urged that, indisputably, the loan is secured by mortgage of the immovable property. The plaintiff has not given up the said security. Thus, unless and until the plaintiff gives up the security, a summary suit under Order XXXVII is not tenable. On this count alone, according to Mr. Tuljapurkar, the defendants are entitled to an unconditional leave to defend the suit. Since the loan is secured, an order for

deposit of the amount as a condition for leave to defend is wholly unwarranted, submitted Mr. Tuljapurkar.

15. Before adverting to deal with the aforesaid rival submissions, it would be imperative to note that the advance of a loan of Rs.37 Crores by the plaintiff to the defendants pursuant to the loan agreement dated 27th January, 2016 is incontrovertible. In paragraph 11 of the affidavit-in-reply, there is a clear and categorical assertion that the plaintiff had advanced an amount of Rs.37 Crores to defendant no.1. What the defendants have endeavoured to demonstrate is that the real purpose of the said financial facility was to enable the other group entities of the defendants to repay the loan, which they owed to the plaintiff, as a part of a structured arrangement.

16. The fact that the defendant no.1 had availed the said loan of Rs.37 Crores from the plaintiff finds support in the contemporaneous documents as well as the correspondence addressed on behalf of defendant no.1. The said advance is reflected in the balance-sheet of defendant no.1 as of 31st March, 2016. The fact that the said amount was, in turn, advanced by defendant no.1 to its group entities Istiva Fastners Pvt. Ltd. (Rs.27,44,86,560/-) and U. V. Solar Power Systems Pvt. Ltd. (Rs.9,53,17,768/-) is also reflected against, “related party

disclosure". In the reply to the notice dated 19th August, 2016, demanding the repayment of the entire loan, defendant no.1 acknowledged the receipt of the loan and assured to address the issue of payment of interest. Lastly, in the communication dated 17th April, 2018, again the outstanding principal of Rs.31.4 Crores along with the accrued interest thereon, was acknowledged.

17. In the backdrop of aforesaid clear and explicit acknowledgment of the debt, the quality of the defences sought to be put-forth by the defendants to seek unconditional leave to defend deserves consideration. The fulcrum of the defence is that the transaction in question had an outwardly appearance of loan but, in reality, it was a device to recover the loan which had become due from the group entities, by way of a structured arrangement. The defendants have banked upon the sequence of transactions of the plaintiff with multiple group entities of defendant no.1 to bolster up the defence that the exercise was one of evergreening the loans. The plaintiff was aware of the precarious financial condition of defendant no.1 and also of the fact that group companies to whom loans were advanced were non-operational entities. Thus, the advance of huge loan

amount to defendant no.1 was in breach of prudent financial norms, which proscribe evergreening of the loans.

18. In the case of ***SKIL Infrastructure*** (supra), I had an occasion to deal with an identical defence. In the said case, the defence had an added advantage of a report of Serious Fraud Investigation Office (“SFIO”), which indicated that the plaintiff had resorted to the device of evergreening of loans to show a healthy book. The consequences of non-compliance of directions issued by Reserve Bank of India (against evergreening of the loans) were considered. After placing reliance on the judgment of the Supreme Court in the case of ***B.O.I. Finance Ltd. Vs. Custodian and others***¹ the issue was determined as under:

“35. To buttress the aforesaid submission, Dr. Saraf placed a strong reliance upon the judgment of the Australian High Court in the case of ***Yango Pastoral Co Pty Ltd v. First Chicago Australia Ltd.***² In the case of ***Yango Pastoral*** (supra) the submission before the High Court of Australia was that the mortgage was rendered illegal and void by the provisions of Section 8 of the Banking Act, 1959 as the loan was advanced by a corporate entity without having an authority to carry on the banking business. The learned Judges, by separate judgments, unanimously concluded that the absence of a valid licence as granted by Section 8 of the Act does not vitiate the contract made by a body corporate in the course of carrying on a banking business in breach of the section, and the contracts of mortgage and guarantee were neither void nor unenforceable.

36. Aforesaid judgment in the case of ***Yango Pastoral*** (supra) was referred with approval by the Supreme Court in the case of ***B.O.I. Finance*** (supra), to hold that the non-compliance of directions issued by the Reserve Bank of India will not result in invalidation of the agreement

1(1997) 10 SCC 488.

2(1978) 21 ALR 585.

executed in breach thereof. The observations in paragraphs 32 to 34 read as under:

“32. It will also be useful to refer to the decision of the High Court of Australia in the case of *Yango Pastoral Co. Pty. Ltd. v. First Chicago Australia Ltd.* where Mason, J. made observations to this regard. That was a case where Section 8 of the Banking Act, 1959 prohibited a body corporate from carrying on the business of banking without a licence. The question arose whether a mortgage and guarantees given to an uncensed corporation in the course of carrying on business were void or unenforceable. The High Court unanimously held that nothing in the statute made them void and that examining the terms of the statute to determine the impact of illegality on the enforceability of the contract. At p.428, it was observed as follows:

"The weighing of considerations of public policy in this case and the decision in favour of enforcing the contract is influenced by the form of the particular legislation. In this case the Act, as I have mentioned, is to a large extent directed to aiding the Government in executing its fiscal policy rather than regulating the relationship between banker and customer per se, a feature which lends support for the view that the provision of a large recurrent penalty for offences against Section 8 is Parliament's determination of the consequences of breach of the section and as the only legal consequences thereof. There is much to be said for the view that once a statutory penalty has been provided for an offence the rule of the common law in determining the legal consequences of commission of the offence is thereby diminished-see my judgment in *Jackson Vs. Harrison*, (1978) 138 C.L.R. 438, at P. 452. See also the suggestions that the principle cannot apply to all statutory offences (*Beresford Vs. Royal Insurance Co. Ltd. in the Court of Appeal* (1937) 2 K.B. 197, at p 22, per Lord Wright ; *Marles V. Philip Trant & Sons Ltd.* (1954) 1 Q.B. 29, at p. 37, per Denning L.J, and that it would be a curious thing if the offender is to be punished twice, civilly as well as criminally (st. *John Shipping Corporation Vs. Joseph Rank Ltd.* (1957) 1 Q.B. 267, at p. 292, per Devlin J.). The main considerations from which the principle *ex turpi causa* arose can be seen in the reluctance of the courts to be instrumental in offering an

inducement to crime or removing a restraint to crime: *Beresford's Case (1938) A.C. at pp. 586; Amicable Society Vs. Bolland (1830) 4 Bligh (N.S) 194 at P. 211.*

*However, in the present case Parliament has provided a penalty which is a measure of the deterrent which it intends to operate in respect of non-compliance with Section 8. In this case it is not for the court to hold that further consequences should flow, consequences which in financial terms could well far exceed the prescribed penalty and could even conceivably lead the plaintiff to insolvency with resultant loss to innocent lenders or with resultant loss to innocent lenders or investors. In saying this I am mindful that there could be a case where the facts disclose that the plaintiff stands to gain by enforcement of rights gained through an illegal activity far more than the prescribed penalty. This circumstance might provide a sufficient foundation for attributing a different intention to the legislature. It may be that the true basis of the principle is that the court will refuse to enforce a transaction with a fraudulent or immoral purpose : *Bereford Vs. Royal Insurance Co. Ltd. (1937) 2 K.B. 197 at p. 220.* On this basis the common law principle of ex turpi causa can be given an operation consistent with , through subordinate to, the statutory intention, denying relief in those cases where a plaintiff may otherwise evade the real consequences of a breach of statutory prohibition."*

(emphasis added)

33. The aforesaid principles will clearly be applicable in the present case as well. The non-compliance of the directions issued by the Reserve Bank may result in prosecution/or levy of penalty under Section 46, but it cannot result in invalidation of any contract by the bank with the third party. If the contention of the Custodian is accepted it will result in invalidation of agreements by the banks, even where the third parties may not be aware of the directions which are being violated. To give an example if the Reserve Bank by confidential circulars fixes the limit in excess of which the banks cannot give any loan but, without informing the third party, the bank while exceeding its limit gives a loan which is then utilised by the bank's customer. It will be inequitable and improper to hold that as the directions of the Reserve Bank had not been complied with by the bank, the grant of loan

cannot be regarded as valid and, as a consequence thereof, the customer must return the amount received even though he may have utilised the same in his business. Yet another instance may be where the bank advances loan by charging interest at a rate lower than the minimum which may have been fixed by the Reserve Bank, in a direction issued under Section 36 (1)(a). As far as the customer is concerned, it may not be aware of the direction fixing them minimum rate of interest. Can it be said, in such a case, that the advance of loan itself was illegal or that the bank would be entitled to receive the higher rate of interest ? In our opinion it will be wholly unjust and inequitable to hold that such transactions entered into by the bank with a customer, which transactions are otherwise not invalid, can be regarded as void because the bank did not follow the directions or instructions issued by the Reserve Bank of India.

34. The instructions which were issued by the said circulars were meant to be complied with by the banking companies only and did not purport to, nor could they, be binding on the third parties. This being so, even if the appellant banks had been prohibited from entering into the buy-back arrangements in question, that by itself, would not invalidate the contracts though the infringement of the said directions may lead to action being taken under Section 46 of the Act. (emphasis supplied)

37. Reliance was also placed on the judgment of the Supreme Court in the case of *Canara Bank and others vs. Standard Chartered Bank*³. In the said case also, a defence was sought to be advanced that the transaction therein was contrary to the circulars of the Reserve Bank and opposed to public policy. The Supreme court after referring to its earlier judgment in the case of *B.O.I. Finance* (supra) observed that the instructions issued by the Reserve Bank of India were meant to be complied with only by the banking companies and could not be regarded as binding on the other parties. There was no evidence raised or sought to be raised in the said case which could possibly have led the Court to the conclusion that the transaction was opposed to public policy.

38. The exposition of the aforesaid legal position indicates that non-observance of the directives or the circulars of the Reserve Bank of India by the banking companies, though

they are statutorily enjoined to observe, does not necessarily lead to invalidation of the underlying transactions. The judgment of the High Court of Australia in the case of *Yango Pastoral* (supra) which was referred to in the case of *B.O.I. Finance* (supra), with approval, was in the backdrop of the direct breach of a statutory provision. There was a prohibition against carrying on the banking business without an express authority of the Reserve Bank. Yet, the Court held that despite absence of a requisite licence to carry on banking business, the transaction is not void or unenforceable.

39. In the case at hand, the infraction on the part of the plaintiff, is comparatively minor. What is found by SFIO is that the plaintiff went on to advance loan to other group companies so that the earlier loan could be repaid and the financial statements of the plaintiff could be shown in better health.”

19. The aforesaid reasoning applies with equal force to the facts of the case at hand.

20. Moreover, it is pertinent to note the purpose for which the defendant had availed the loan. The funds provided under the facility were to be utilised for long term working capital requirements and/or refinance and/or general corporate purposes, acceptable to the plaintiff. The aforesaid purpose does not exclude the financing by defendant no.1 to its group entities.

21. On the basis of the material on record, a legitimate inference can be drawn that the plaintiff indulged in imprudent and risky financial business. However, the non-observance of prudent lending norms does not necessarily imply that the very transaction is void. The contention that defendant no.1 was

made to avail the loan, unwillingly, which is now sought to be suggested, did not find mention in any of the pre-suit correspondence emanating from defendant no.1. I, therefore, find it rather difficult to accede to the submission on behalf of the defendants that the plaintiff's resort to the practice of "structured arrangement" or "evergreening of loans", furnishes a ground for unconditional leave to defend the suit.

22. The ground of non-invocation of pledged shares at an opportunate time so that the pledged shares could fetch optimum price, is rested on the premise that around the time the plaintiff sold the pledged shares at the rate of Rs.5.18 per share, the lenders of ICOMM Tele Limited had, pursuant to the strategic debts restricting scheme, converted a portion of their debt into the equity at Rs.10 per share. Thus, according to the defendants, it becomes evident that the plaintiff had not made requisite efforts to obtain best possible price for the pledged shares.

23. Dr. Saraf the learned Counsel for the plaintiff was justified in canvassing a submission that the defendants have not placed on record any material to substantiate the aforesaid claim. Even otherwise, according to Dr. Saraf, the aforesaid ground does not furnish a sustainable defence for grant of an unconditional leave

to defend the suit. In view of the provisions contained in Section 176 of the Indian Contract Act, the pledgee is not bound to take recourse to the securities. Nor the pledgee can be blamed for not invoking the securities at a particular point of time. Thus, the defence of non-invoking the pledged shares at a time the share commanded the highest price, does not raise a triable issue, urged Dr. Saraf.

24. Reverting to the facts of the case, it is imperative to note that the defendants do not claim that the plaintiff did not exercise the power of sale, despite a specific request having been made by the defendants to sell the shares. In fact, no grievance seems to have been raised, at any point of time, regarding the sale of pledge shares, till the affidavit-in-reply came to be filed. The claim that optimum price was not fetched is based on the alleged conversion of debt into equity under strategic debt restructuring. It is not the case of the defendants that at the relevant point of time, the market price of the shares was in the higher range. Restructuring of the debt, under strategic debt restructuring scheme, can hardly be compared with the sale of a shares at market price. A liberal valuation, under a strategic debt restructuring scheme, therefore, cannot be the barometer for determination of the market price of the shares. More often

than not the conversion of a portion of debt into equity is a measure of adjustment, arrived at post negotiations, rather than an unhinged purchase of shares in the market. I am therefore not persuaded to agree with the submission on behalf of the defendants that the plaintiff failed to secure the best price for the pledged shares and, on this count, the defendants are entitled to an unconditional leave to defend the suit.

25. This propels me to the third ground of the instruments being not adequately stamped. According to the defendants, on the Loan Agreement and Letters of guarantee stamp duty of only Rs.200/- each, has been paid. However, under Article 5(h)(a)(iv) of the Maharashtra Stamps Act, 1958 ("the Stamps Act"), the Loan Agreement and the Letters of Guarantee are amenable to the stamp-duty of 0.2% of the amount covered by the agreement. Consequently, in view of the provisions contained in Sections 33 and 34 of the Stamps Act those instruments cannot be acted upon and are required to be impounded under Section 37 of the Stamps Act.

26. On the aspect of the payment of the stamp duty, on the instruments in question, *prima faice*, the defence appears to be sustainable. The question that, however, wrenches to fore is

whether inadequacy of stamp-duty can be a ground to grant an unconditional leave to defend the suit.

27. In the case of ***SKIL Infrastructure*** (supra) I considered the challenge based on insufficiently stamped instruments in a greater detail. After adverting to the rival submissions in the said case, which, by and large, proceeded on the lines as canvassed in this case, and various pronouncements of this Court as well as of the Supreme Court in the cases of ***SMS Tea Estates Pvt. Ltd. vs. Chandmari Tea Co. Pvt. Ltd.***⁴ and ***Garware Wall Ropes Ltd. vs. Coastal Marine Constructions and Engineering Ltd.***⁵, the legal positions was enunciated as under:

“78. In ***Garware*** (supra), the Supreme court was principally dealing with the question as to whether the decision in ***SMS Tea*** (supra) has also been done away by the expression, “notwithstanding any judgment, decree or order of any Court”, contained in Section 11(6A).

79. In paragraph 26, the Supreme Court, after adverting to the provisions of the Amendment Act, 2015, concluded that introduction of Section 11(6A), does not in any manner deal with or get over the basis of the judgment in ***SMS Tea*** (supra) and the said judgment continues to apply even after the amendment of Section 11 (6A). The Supreme Court, *inter alia*, observed that the Supreme Court or the High Court when impounding an unstamped or insufficiently stamped document which contains an arbitration clause is only giving effect to the provisions of a mandatory enactment which, no doubt, is to protect the revenue.

80. Undoubtedly, the Supreme Court, in paragraphs 27 to 29, considered the enforceability of an agreement contained in an unstamped or insufficiently stamped instrument through the prism of the provisions contained in the Indian Contract Act and ruled that even on a plain reading of Section 11(6A) when read with Section 7(2) of the Act, 1996

⁴(2011) 14 SC 66.

⁵2019 SCC Online SC 515.

and Section 2(h) of the Contract Act, makes it clear that an arbitration clause in the agreement would not exist when it is not enforceable by law. The Supreme Court further observed that the said aspect is also a factor that **SMS Tea** (supra) has not in any manner been touched by the amendment of Section 11(6-A).

81. In my considered view, and understanding of the aforesaid judgment, the principal question considered and determined by the Supreme Court is the continued applicability of the judgment in the case of **SMS Tea** (supra) that the question of an inadequate stamp-duty on an instrument containing an arbitration clause has to be determined by the Court at the hearing of an application under Section 11 of the Act, 1996 and the said aspect cannot be relegated to be determined by the Arbitral Tribunal, as was held by the learned Single Judge in the case of **Coastal Marine** (supra) and the Full Bench of this Court in the case of **Gautam Landscapes** (supra).

82. It is trite that a decision is an authority for what it decides and not what can logically be deducted therefrom. A profitable reference in this context can be made to the decision of the Constitution Bench in the case of **Union of India vs. Chajju Ram (dead) By LRs. and others**⁶, wherein the Supreme Court in paragraph 23 has observed thus:

“23. It is now well settled that a decision is an authority for what it decides and not what can logically be deducted therefrom. It is equally well settled that a little difference in facts or additional facts may lead to a different conclusion.”

83. The aspect of insufficiency of stamp-duty and the bar incorporated by the provisions of Section 34 of the Stamp Act, 1958, is required to be considered in the backdrop of the special procedure prescribed in Order XXXVII of the Code for expeditious resolution of disputes based on negotiable instrument and written contracts etc. Indisputably, adjudication of deficit stamp-duty is within the province of the authorities under the Stamp Act, 1958. The adjudication orders are amenable to appeals and revisions. Can the Court stay its hands off and not consider the aspect of grant of leave till the question of proper stamp-duty is finally adjudicated?

84. An answer to aforesaid question warrants a harmonious construction of the provisions contained in Section 34 of the Stamp Act and the provisions contained in Order XXXVII of the Code. Even in the case of **Garware** (supra) the Supreme Court adverted to the principle of harmonious construction. The Supreme Court thus observed in paragraph 37 as under:

6(2003) 5 SCC 568.

“37. One reasonable way of harmonising the provisions contained in Section 33 and 34 of the Maharashtra Stamp Act, which is a general statute insofar as it relates to safeguarding revenue, and Section 11(13) of the 1996 Act, which applies specifically to speedy resolution of disputes by appointment of an arbitrator expeditiously, is by declaring that while proceeding with the Section 11 application, the High Court must impound the instrument which has not borne stamp duty and hand it over to the authority under the Maharashtra Stamp Act, who will then decide issues qua payment of stamp duty and penalty (if any) as expeditiously as possible, and preferably within a period of 45 days from the date on which the authority receives the instrument. As soon as stamp duty and penalty (if any) are paid on the instrument, any of the parties can bring the instrument to the notice of the High Court, which will then proceed to expeditiously hear and dispose of the Section 11 application. This will also ensure that once a Section 11 application is allowed and an arbitrator is appointed, the arbitrator can then proceed to decide the dispute within the time-frame provided by Section 29-A of the 1996 Act.”

85. A useful reference, in this context, can be made to a judgment of the Supreme Court in the case of *Indian Bank vs. Maharashtra State Cooperative Marketing Federation Ltd.*⁷, wherein the principle of harmonious construction was applied in the context of the provisions contained in Order XXXVII of the Code and Section 10 of the Code which warrant the stay of the trial of the subsequent suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit. After considering the object of Section 10 of the Code and the object of the special scheme envisaged by Order XXXVII of the Code, it was, *inter alia*, held that considering the objects of both the provisions i.e. Section 10 and Order XXXVII wider interpretation of the word “trial” is not called for and the word “trial” in Section 10, in the context of summary suit, cannot be interpreted to mean the entire proceedings starting with institution of the suit by lodging a plaint. In a summary suit, the “trial” really begins after the Court or the Judge grants leave to contest the suit. Therefore, the Court or Judge dealing with the summary suit can proceed up to the stage of hearing the summons for judgment and passing the judgment in favour of the plaintiff if (a) the defendant has not applied for leave to defend and/or if such application has been made and refused or if (b) the defendant who is permitted to defend

7(1998) 5 SCC 69.

fails to comply with the conditions on which leave to defend is granted.

86. Placing heavy reliance upon the aforesaid proposition, it was urged by Dr. Saraf that at the stage of summons for judgment, it is not peremptory to defer the consideration where the instrument is either unstamped or insufficiently stamped. The said objection, in the backdrop of the nature of the summary procedure, wherein at the stage of the summons for judgment the Court has to consider the nature of the defence sought to be put-forth by the defendant, cannot be stated to be a defence in the strict sense of the term and constitutes a mere technical objection. Thus, the course adopted by the learned Single Judges, in the cases referred to above, of impounding the document and sending it for adjudication simultaneously with the passing of order of grant of leave, cannot be said to be unsustainable. Nor it would cause any prejudice to the defendants.

87. Undoubtedly, Section 34 of the Act precludes the Court from even acting upon unstamped or insufficiently stamped instrument. However, the fact that the measure is indisputably for protection of the revenue as the recovery of the stamp-duty on the instrument and penalty for its non-payment, where-ever chargeable is practicable, where the Court or authority before which the instrument is tendered holds seisin of the matter, cannot be lost sight of.

88. In a summary suit, while deciding a summons for judgment, the options which the Court exercises, equip the court to ensure that the requisite stamp-duty is recovered, wherever the instrument is either unstamped or insufficiently stamped. If the Court grants an unconditional leave to defend, the Court can very well direct that the instrument be impounded and the procedure prescribed under Section 37 of the Act be resorted to. Even when the Court grants conditional leave, the Court can issue such directions. In a case, where the Court comes to the conclusion that the defendant is not entitled to leave to defend the suit and, conversely, the plaintiff is entitled to a judgment, still, the Court would be within its right in impounding the instrument and directing the adjudication and payment of the requisite stamp-duty with penalty, if any. The compliance can be ensured by a direction that the decree shall not be drawn and executed till the deficit stamp-duty is adjudicated and paid. In none of the aforesaid contingencies, where the Court impounds the instrument, it can be said that the Court has acted upon the instrument without ensuring the compliance of the statutory requirement of payment of stamp-duty.

89. In contrast, if the consideration of the summons for judgment and the question of grant of leave to defend a summary suit is deferred till the question of stamp-duty is finally adjudicated by the authorities under the Act, the

object with which the summary procedure is envisaged may not be advanced.”

28. It would be contextually relevant to note that with further development in law, the potency of the defence based on insufficiently stamped instrument is further eroded. Doubting the correctness of the view in the case of *Garware* (supra), the Supreme Court in the case of *N. N. Global Mercantile Pvt. Ltd. vs. Indo Unique Flame Ltd. and others*⁸ has referred the matter to the Constitution Bench. The judgment of the Supreme Court in the case of *SMS Tea Estate* (supra) was also held to be not laying down the correct position in law. It was *inter alia* observed that after the document is duly stamped it becomes admissible and can very well be acted upon.

29. The observations in paragraphs 26 to 33 and 34 are instructive and hence extracted below:

“**26.** In our view, there is no legal impediment to the enforceability of the arbitration agreement, pending payment of Stamp Duty on the substantive contract. The adjudication of the rights and obligations under the Work Order or the substantive commercial contract would however not proceed before complying with the mandatory provisions of the Stamp Act.

27. The Stamp Act is a fiscal enactment for payment of stamp duty to the State on certain classes of instruments specified in the Stamp Act. Section 40 of the Indian Stamp Act, 1899 provides the procedure for instruments which have been impounded, and sub-section (1) of Section 42 requires the instrument to be endorsed after it is duly stamped by the concerned Collector. Section 42(2) provides that after the

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document is duly stamped, it shall be admissible in evidence, and may be acted upon.

28. In our view, the decision in *SMS Tea Estates* does not lay down the correct position in law on two issues i.e. (i) that an arbitration agreement in an unstamped commercial contract cannot be acted upon, or is rendered unenforceable in law; and (ii) that an arbitration agreement would be invalid where the contract or instrument is voidable at the option of a party, such as u/S. 19 of the Indian Contract Act, 1872.

29. We hold that since the arbitration agreement is an independent agreement between the parties, and is not chargeable to payment of stamp duty, the non-payment of stamp duty on the commercial contract, would not invalidate the arbitration clause, or render it unenforceable, since it has an independent existence of its own. The view taken by the Court on the issue of separability of the arbitration clause on the registration of the substantive contract, ought to have been followed even with respect to the Stamp Act. The non-payment of stamp duty on the substantive contract would not invalidate even the main contract. It is a deficiency which is curable on the payment of the requisite Stamp Duty.

30. The second issue in *SMS Tea Estates* that a voidable contract would not be arbitrable as it affects the validity of the arbitration agreement, is in our view not the correct position in law. The allegations made by a party that the substantive contract has been obtained by coercion, fraud, or misrepresentation has to be proved by leading evidence on the issue. These issues can certainly be adjudicated through arbitration.

31. We overrule the judgment in *SMS Tea Estates* with respect to the aforesaid two issues as not laying down the correct position in law.

32. *Garware* judgment has followed the judgment in *SMS Tea Estates*. The Counsel for the Appellant has placed reliance on paragraph 22 of the judgment to contend that the arbitration clause would be non-existent in law, and unenforceable, till Stamp Duty is adjudicated and paid on the substantive contract. We hold that this finding is erroneous, and does not lay down the correct position in law. We have already held that an arbitration agreement is distinct and independent from the underlying substantive commercial contract. Once the arbitration agreement is held to have an independent existence, it can be acted upon, irrespective of the alleged invalidity of the commercial contract.

33. We notice that the judgment in *Garware Wall Ropes Limited* has been cited with approval by a co-ordinate bench

of this Court in *Vidya Drolia & Ors. v. Durga Trading Corporation*.

.....

34. We doubt the correctness of the view taken in paragraph 92 of the three-judge bench in *Vidya Drolia*. We consider it appropriate to refer the findings in paras 22 and 29 of *Garware Wall Ropes Limited*, which has been affirmed in paragraph 92 of *Vidya Drolia*, to a Constitution Bench of five judges.”

30. The aforesaid pronouncement, in my humble opinion, fortifies the view which this Court was persuaded to take in the case of ***SKIL Infrastructure*** (supra) and thus the course adopted by this Court in the said case, can be legitimately adopted in this case as well.

31. This takes me to the submission of Dr. Tuljapurkar that since the plaintiff has not given up the security it is not entitled to institute a summary suit under Order XXXVII of the Code. Inviting the attention of the Court to the averments in paragraphs 11 and 12 of the plaint wherein the plaintiff has specifically averred that the facility advanced to defendant no.1 is also secured by a mortgage recorded by Memorandum of Entry dated 27th January, 2016, and the plaintiff also craved leave under Order II Rule 2 of the Code to omit to sue in the capacity of mortgagee, Dr. Tuljapurkar would submit that the plaintiff’s claim that is has not claimed the relief which does not fall within the ambit of Order XXXVII Rule 2 of the Code is not sustainable. Since the plaintiff has obtained the leave under

Order II Rule 2, it is incumbent upon the plaintiff to give up the security, submitted Dr. Tuljapurkar.

32. Dr. Saraf, per contra, urged that the aforesaid submission is not in consonance with law. The plaintiff undoubtedly has the remedy of instituting a suit based on mortgage. However, it does not imply that the plaintiff is precluded from instituting a money claim based on written contract and balance confirmation. Dr. Saraf further submitted that the issue sought to be raised by the defendants is no longer *res integra*. This Court has consistently held that the fact that loan is secured by either pledge or mortgage does not operate as an impediment in instituting summary suit under Order XXXVII of the Code.

33. In the case of *Tata Capital Finance Services Limited vs. Deccan Chronicle Holdings Limited*⁹, a learned Single Judge explained the import of the provisions contained in Order XXXIV Rule 14 of the Code in the following words:

“37. Perusal of Order 34 Rule 14 of the CPC 1908 clearly indicates that there is no bar in filing money claim even by a mortgagee notwithstanding anything contained in Order II Rule 2. The said provision indicates that a mortgagee shall not be entitled to bring the mortgaged property to sell otherwise than by instituting a suit for sale. In the event of the claimant not satisfied with the money decree, he cannot bring the mortgaged property to sell otherwise than by instituting a suit for sale of mortgaged properties. In my view, it is for the petitioner/ claimant to decide whether to file a money claim before the arbitral tribunal and file a

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separate suit for enforcement of mortgage after complying with the provisions of Order II Rule 2.”

34. Another learned Single Judge, in the case of *Suraj Sanghi Finance Ltd. vs. Credential Finance Ltd and others*¹⁰ expressly repelled the submission that the plaintiff must give up the security before instituting a summary suit based on the written contract, where it is also secured by collateral securities. The following observations of the Court make the position explicitly clear:

“3. Even otherwise, to my mind the distinction sought to be made on behalf of the defendant is not apt. Defence available towards adjustment is distinct as to whether the suit is maintainable under Order 37. An adjustment of security perhaps could be a good defence available for granting conditional leave considering the nature of security and the amounts involved. It however, does not mean that the Summary suit cannot be filed if otherwise the other predicates of Order 37 of Civil Procedure Code are satisfied. To maintain a summary suit all that plaintiff must show is that the suit falls within the predicates of Order 37. In the instant case, the suit is based on the receipt and agreement acknowledging the intercorporate loan and is secured by collateral securities as referred to earlier. To my mind therefore, the argument advanced on behalf of the defendant that the plaintiff had securities available and they had to first proceed against securities and or release them before maintaining a suit as summary suit, is clearly devoid of merits. Also not sustainable is the argument that the security had to be given up. Under [Section 176](#) of the Indian Contract Act, plaintiff has a right to retain pledged goods, until such time defendants makes payments and then only need return of the pledged goods. The judgment of the Division Bench of this Court construing Section 176 has clearly held that a plaintiff has a right to file a suit for recovery of money without proceeding against pledged goods or other collateral securities. This right conferred on the plaintiff under Section 176 to my mind does not whittle down the right to maintain a suit as summary suit as long as plaintiff

102002 (4) Mh.L.J. 770.

satisfies the Court that the suit is based on a written agreement, acknowledgment of debt or based on the negotiable instrument. That contention therefore, has to be rejected.”

35. Without disputing the aforesaid legal position, Dr. Tuljapurkar attempted to salvage the position by asserting that, at this stage, there is no material to indicate as to what is the value of the security furnished by the defendants. According to Dr. Tuljapurkar, in that view of the matter, the aspect of the necessity of imposing conditions to grant leave to defend is required to be considered keeping in view the fact that the loan is already secured by mortgage.

36. This alternate submission, in my considered view, is of no assistance to the defendants in advancing the cause of the submission that the security must be given up before a summary suit is instituted. The aspect of the existence of the security may bear upon the conditions to be imposed, in the event the Court comes to the conclusion that a conditional leave to defend is required to be granted. But, on its own, the existence of security does not constitute an impediment in instituting a summary suit.

37. The upshot of the aforesaid consideration is that in the facts of the case, the first contention of the defendants that the

plaintiff had advanced loan to defendant no.1 as a part of the strategic arrangement cannot be said to be wholly untenable. Indubitably, the plaintiff extended the facility of Rs.37 Crores to the defendant no.1. The attendant circumstances, in which the loan was advanced, however, cannot be lost sight of. Defendant no.1's contention that the group entities to which the loans were advanced as a part of "evergreeing" device, were non-operational entities and, therefore, the aspect of the credit worthiness of the debtor bears upon the entitlement of the plaintiff to recover the outstanding, especially the interest component, warrants consideration. I find substance in the submission of Dr. Tuljapurkar that the defence based on the structured arrangement cannot be completely brushed aside as a moonshine defence.

38. However, the fact remains that there are clear and explicit admissions of liability in the sum of Rs.37 Crores, in the balance-sheet and the correspondence addressed on behalf of defendant no.1, adverted to above. The case is, thus, covered by proposition 17.6 of the judgment of the Supreme Court in the case of *IDBI Trusteeship Services Limited vs. Hubtown Limited*¹¹, which envisages that where any part of the amount

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claimed by the plaintiff is admitted by the defendants to be due from him, leave to defend the suit, (even if triable issues or substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendants in Court.

39. Dr. Tuljapurkar made a faint attempt to distinguish the aforesaid proposition by putting forth a submission that it applies only when the suit is based on admission of liability. I am afraid to accede to this submission. In the case at hand, as indicted above, there is ample material to demonstrate that the defendants had availed the loan of Rs.37 Crores.

40. This leads me to the aspect of the conditions subject to which the leave to defend is required to be granted. The particulars of the claim reveal that as of 6th February, 2019 the outstanding principal was Rs.31,40,25,314. The balance amount, out of the total claim of Rs.49,58,07,715/- represents the interest component, including a sum of Rs.1,96,70,532/- towards delayed payment interest and additional security @ 2% for document deficiency/creation of security as on 6th February, 2019. The issue of entitlement of the plaintiff, to recover the interest as claimed, is a matter which warrants consideration.

In the circumstances of the case, in my considered view, it would be appropriate to direct the defendants to deposit the principal outstanding plus a sum of Rs.4 Crore towards the interest as a condition for grant of the leave to defend the suit.

41. Hence, the following order:

: O R D E R :

- (i) Leave to defend the suit is granted to the defendants subject to deposit of a sum of Rs.35,40,25,314/- in the Court, within eight weeks from today.
- (ii) If the aforesaid deposit is made within the stipulated period, this suit shall be transferred to the list of Commercial Causes and the defendants shall file its written statement within 30 days from the date of deposit.
- (iii) If the defendants do not deposit the aforesaid amount within the said period the suit be listed for direction after ten weeks.
- (iv) The plaintiff shall tender the original Loan Agreement dated 27th January, 2016 and Letters of Guarantee dated 27th January, 2016, within a period of two weeks from today and upon the production of the original Loan Agreement and the Letters of Guarantee, those instruments shall stand impounded.

- (v) The Prothonotary and Senior Master is directed to forward all the above impounded documents to the Superintendent of Stamps / Collector of Stamps, Mumbai for adjudication. Copy of the forwarding letter be sent to the Advocate for the plaintiff and the defendants.
- (vi) The Superintendent of Stamps / Collector of Stamps, Mumbai is directed to adjudicate the stamp-duty and penalty, if any, within six weeks from the date of the receipt of the impounded documents from the Prothonotary and Senior Master, High Court, Bombay.
- (vii) Upon adjudication, the Authority shall communicate the order to the Prothonotary and Senior Master with a copy to the Advocate for the Plaintiff and Defendants.
- (viii) The plaintiff shall pay the amount of stamp-duty along with penalty, if any, to be adjudicated within two weeks of receiving the copy of the order.

The Summons for Judgment stands disposed accordingly.

[N. J. JAMADAR, J.]