

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

SUMMONS FOR JUDGMENT NO.24 OF 2020
IN
COMMERCIAL SUMMARY SUIT NO.1474 OF 2019

VISHAL
SUBHASH
PAREKAR

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VISHAL SUBHASH
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IL & FS Transportation Networks Limited (ITNL) ...Plaintiff

vs.

Kohinoor Projects Private Limited ...Defendant

Mr. Rohaan Cama a/w. Mr. Bhushan Shah, Mr. Akash Jain, Mr. Akash Mehta i/b. Mansukhlal Hiralal & Co., for the Plaintiff.

Mr. Akshay Patil a/w. Mr. Rajesh Vaidya and Ms. Devika Madekar i/b. Mandar Soman, for the Defendant.

CORAM : N. J. JAMADAR, J.

RESERVED ON : 28th NOVEMBER, 2022

PRONOUNCED ON : 3rd MAY, 2023.

ORDER :

1. This Commercial Division Summary Suit is instituted to recover a sum of Rs. 36,00,00,000/- along with a sum of Rs. 52,31,30,000/- towards interest and further interest from 25th November, 2019 till payment and/or realization.

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

a] The plaintiff is an infrastructure development company, registered under the Companies Act, 1956. The defendant is also a company incorporated under the provisions of Act, 1956.

b] In the month of October, 2009, the defendant approached the plaintiff for a short term loan of Rs. 36 Crores. Upon the representations of the defendant, the plaintiff claimed to have offered to provide to the defendant the sum of Rs. 36 Crores, as a short term loan facility, on the terms and conditions set out in the letter dated 29th October, 2009. Under the terms of the said letter, the tenure of the loan was to be one year from the date of disbursement. The loan amount was to carry interest @ 16% p.a. The tenure of the loan was to expire on 28th October, 2010.

c] The plaintiff claims, the sum of Rs. 36 Crores was disbursed to the defendants on 29th October, 2009. The defendant executed a demand promissory note dated 29th October, 2009 for the principal amount of Rs. 36 Crores. The defendant committed default in repayment. Term of loan was not extended.

d] It is the case of the plaintiff that the balance sheets filed by the defendant with the Ministry of Corporate Affairs consistently indicated that the principal amount advanced by the plaintiff was shown under the head of liabilities. Such acknowledgment is to be found in the balance sheets for the financial year 2017-18 and 2018-19. In addition, for the year 2017 the defendant had addressed to the plaintiff a communication that the defendant had availed a short term loan of Rs. 36,00,00,000/- and no interest had been paid

on the said amount. Since the amount remained outstanding, on 30th May, 2019 the plaintiff addressed a demand notice and called upon the plaintiff to pay the principal amount along with interest and other charges.

e] The defendant, in its reply dated 7th June, 2019, raised a false defence that the instant transaction was part of transactions entered into in pursuance of a joint venture agreement between IL and FS group (of which the plaintiff was a part) and Kohinoor group (of which the defendant is a part). The defendant falsely contended that the amount paid by the plaintiff was as and by way of quasi equity exposure by the plaintiff in the Kohinoor group.

f] As the defendant attempted to create a cloud of doubt regarding the transaction in question by referring to, and relying upon, unrelated transactions and documents, the plaintiff was constrained to institute the suit for recovery of the sum of Rs. 88,31,93,000/- along with further interest.

3. The defendant appeared in response to the service of writ of summons. Thereupon, the plaintiff took out a Summons for Judgment.

4. An affidavit in reply came to be filed on behalf of the defendant

seeking unconditional leave to defend the suit. The suit was stated to be barred by limitation. At any rate, it was instituted with inordinate delay and laches and on that ground alone the defendant was entitled to an unconditional leave to defend the suit. It was further contended that the plaintiff is guilty of gross suppression of material facts. Since the plaintiff has not approached the Court with clean hands, the plaintiff was not entitled to any relief.

5. The defendant contended that the plaintiff deliberately suppressed the fact that there was a joint venture agreement and understanding between IL & FS and companies/entities managed and controlled by it i.e. IL & FS group, on the one part, and the companies/ entities managed and/or controlled by the deponent, Director of the defendant i.e. Kohinoor group, on the other part. The plaintiff was stated to be a part of IL & FS group.

6. According to the defendant, the real transactions between IL & FS group and Kohinoor group, evidenced by a number of documents, were materially distinct from the transaction asserted in the plaint. IL & FS group and Kohinoor group had a joint venture agreement and understanding for the acquisition of the plot of land with structures of Kohinoor Mill-3 for implementation of a

development project thereon namely Kohinoor Square project.

7. A Consortium Agreement dated 20th July, 2005 was entered into by and between Kohinoor and IL & FS group was for acquisition of the Kohinoor Mill-3 and execution and implementation of the Kohinoor Square project. Pursuant to the said agreement Kohinoor CTNL Infrastructure Company (KCTNL) was incorporated as a Joint Venture Company and special purpose vehicle. The plaintiff, a IL & FS group company, and the defendant, a Kohinoor group company, subscribed to the equity share capital of KCTNL as per the First Shareholders Agreement. Later on, the plaintiff sold its share holding in KCTNL to the defendant and as per the Second Shareholders Agreement and Second Supplemental Shareholders Agreement, IFIN Realty Trust and IIRF India VII Limited, two other IL & FS group entities, subscribed to the equity and preference share capital of KCTNL so that upon such subscription the Kohinoor group and IL & FS group held the share capital in the ratio of 60:40.

8. The defendant contends the plaintiff deliberately suppressed the fact that all amounts given to Kohinoor group by IL & FS group were meant for financing the Kohinoor Square Project and the amounts given, either directly or routed through Kohinoor group

companies, were in the nature of quasi equity participation though they were shown as loans and advances. The said money brought in by IL & FS group was treated as an exposure in the Kohinoor Square project. Drawing heavily upon a Memorandum of Understanding (MOU) dated 20th January, 2016 the defendant contends that the repayment towards quasi equity participation in the form of loans from the IL & FS in KCTNL, was to be made out of the sale proceeds of Kohinoor Square project.

9. The defendant further contended that by an order dated 21st February, 2018 passed by National Company Law Tribunal, KCTNL underwent corporate insolvency resolution process. In accordance with the resolution plan, the share capital held by Kohinoor group in KCTNL was reduced to 1.2% of the equity shareholding and that of the IL & FS group to 18.8% equity shareholding, to be held by IIRF India Realty VII Limited. The loan purportedly advanced by the plaintiff being in the nature of quasi equity participation for the Kohinoor Square project, the plaintiff is not entitled to recover the same as a loan simplicitor. Therefore, the defendant is entitled to an unconditional leave to defend the suit.

10. An affidavit in rejoinder came to be filed controverting the

contentions in the affidavit in reply. The plaintiff asserts the transactions referred to in the affidavit in reply have no relevance whatsoever to the suit claim. According to the plaintiff the defendant had unnecessarily referred to those transactions to create a cloud of purported triable issue, when, in fact, the defendant has no defence whatsoever to the plaintiff's claim. The plaintiff asserts MOU dated 20th January, 2016 was of non binding character. None of the parties to the MOU was under obligation or liability to the other with respect to or arising out of or in connection with any matter contemplated under the MOU. At any rate, the validity period of said MOU was for one year from the date of MOU unless earlier terminated. The plaintiff asserts the transactions referred to in the MOU did not fructify and accordingly the MOU stood terminated.

11. In the affidavit in sur-rejoinder, the defendant controverts the contentions in the affidavit in re-joinder and reiterates that the amount paid by the IL & FS group was not towards the loan but by way of quasi equity.

12. I have heard Mr. Rohaan Cama, the learned counsel for the plaintiff and Mr. Akshay Patil, learned counsel for the defendant at

some length. I have also perused the pleadings and material on record.

13. Mr. Cama, the learned counsel for the plaintiff urged that the documents on record indicate that there have been unequivocal acknowledgments of liability in the balance sheets of the defendant company as of 31st March, 2017 and 31st March, 2018. The defendant has, inter alia, acknowledged the debt of Rs. 36 Crores as a long term borrowing. To add to this, in the letter dated 24th May, 2017 the defendant has acknowledged in no uncertain terms that it had availed the loan of Rs. 36 Crores on 29th October, 2009, it was to carry interest @ 16% p.a. and the defendant did not make a provision for interest in its book of accounts for the financial year 2015-16 and 2016-17.

14. These documents, if considered in the light of indisputable fact that the plaintiff did advance a sum of Rs. 36 Crore to the defendant on 29th October, 2009, as evidenced by the sanction letter dated 29th October, 2009 and demand promissory note of even date, render the defence now sought to be raised on behalf of the defendant clearly sham and moonshine.

15. Mr. Cama strenuously submitted that reliance on behalf of the defendant on the Memorandum of Understanding (MOU) dated 20th January, 2016 to bolster up a case that the loan in question was part of a purported exposure of IL and FS groupin to the Kohinoor group is wholly misplaced. Mr. Cama would urge that the very recitals in the said MOU work out the retribution of the case now sought to be pressed into service on behalf of the defendant. Taking the Court through the recitals in the said MOU especially the recital D and the initial response of the defendant to the demand notice, as manifested in the reply dated 17th June, 2019 (clause 2(e)), Mr. Cama submitted that the fact that there was independent exposure in the form of loan by IL and FS group to the Kohinoor group is borne out therefrom. In any event, the MOU, according to Mr. Cama, did not bring about a binding agreement between the parties. It was in the nature of a statement of intent and since it did not materialize, no rights and obligations emanate therefrom.

16. In opposition to this Mr. Patil, the learned counsel for the defendant, stoutly submitted that the very nature of the transaction in which the plaintiff claimed to have advanced a huge sum of Rs. 36 Crores on the strength of a sanction letter, without insisting for formal agreement and adequate security, speaks

volumes. The inaction on the part of the plaintiff to recover the loan for almost 10 years cannot be explained on any hypothesis than that of the said advance being in the nature of exposure of the plaintiff representing the IL and FS group in the Kohinoor Square Project. It is inconceivable that the plaintiff would not have initiated steps when admittedly neither the principal amount was repaid nor interest was paid thereon, urged Mr. Patil.

17. Laying emphasis upon the terms of MOU, Mr. Patil would submit that the MOU is in the nature of a statement of facts. Resultantly, the fact that the transaction eventually did not materialize does not erode the sanctity of the statements contained in the MOU. Banking upon the recitals D and E of MOU, it was urged that the amounts referred to therein were documented as the loans advanced by the IL and FS group to Kohinoor Square Project. Attention of the Court was invited to Annexure II to the said MOU where bifurcation of the total exposure of IL and FS group to the Kohinoor group, in the form of equity and loan, was shown to the tune of 9550 Crores of which 680 Crores was shown as and by way of loan. Laying stress on clauses 3 and 4 of the MOU, Mr. Patil urged that the parties had agreed that the money of IL and FS group was to be repaid from the sale proceeds of the Kohinoor Square Project

and if required from another project to be taken up by Kohinoor group. It was further submitted that in the face of the material on record, it cannot be said that the defendant has not succeeded in raising triable issues. Therefore, the defendant deserves an unconditional leave to defend the suit.

18. I have given anxious consideration to the aforesaid submissions.

19. To start with, few un-controverted facts. An advance of a sum of Rs. 36 Crores by the plaintiff to the defendant on 29th October, 2009, evidenced by the letter dated 29th October, 2009 (Exhibit A) and the statement of account (Exhibit B), is incontrovertible. Secondly, the said loan was to be repaid within one year along with interest @ 16% p.a. Thirdly, the fact that the said amount has been shown as a long term borrowing in the balance sheets of the defendant as of 31st March, 2017 (Exhibit D1) and 31st March, 2018 (Exhibit D2) is incontestible. Fourthly, the fact that the defendant vide letter dated 24th May, 2017 (Exhibit E) acknowledged that a short term loan of Rs. 36 Crores was sanctioned by the plaintiff on 29th October, 2009 and interest was payable thereon @ 16% p.a. was not put in contest.

20. Consistent with the apparent tenor of the aforesaid documents, the plaintiff asserts, the advance was a loan simpliciter. For the defendant, the said advance was part of the exposure of IL and FS group in the Kohinoor group for the development of Kohinoor Square Project and the repayment thereof was to be from the sale proceeds of the said project. To this end, the defendant, as noted above, banks upon the MOU dated 20th January, 2016.

21. Before advertng to consider the submissions as regards the MOU, I deem it appropriate to consider the worth of the case with which the plaintiff has approached the Court, namely, a case of simpliciter advance and default in payment.

22. It is imperative to note that in paragraph 8 of the plaint, the plaintiff asserted in no uncertain terms that the term of the loan (one year), was not extended by the plaintiff and the defendant committed default in repayment of the principal amount and interest thereon as well. Evidently, the first demand for the repayment of the aforesaid loan seems to have been made vide communication dated 30th May, 2019. The demand proceeds on a plain premise that the loan was advanced on 29th October, 2009 and the defendant committed default and, therefore, the defendant was

liable to repay the loan along with interest and nothing more.

23. Faced with aforesaid situation, the plaintiff made an endeavour to rely upon the acknowledgment of the debt in the balance sheets to sustain enforceability of the claim. An endeavour was made on behalf of the plaintiff to draw home the point that, on the one hand, the acknowledgment of debt in the balance sheets constitutes a valid acknowledgment under section 18 of the Limitation Act, 1963 and, on the other hand, those acknowledgments constitute a clear and unequivocal admission of liability and, therefore, even if triable issues are raised, the defendant does not deserve leave to defend the suit without making the deposit of the said amount.

24. Mr. Cama placed reliance on a judgment of the Supreme Court in the case of Asset Reconstruction Company (India) Limited vs. Tulip Star Hotels Limited and Others¹ wherein the Supreme Court after adverting to the provisions contained in section 18 of the Limitation Act, 1963 and the previous pronouncements held that it is well settled that entries in books of account and/or balance sheet of a Corporate Debtor would amount to an acknowledgment under section 18 of the Limitation Act, 1963. The observations in paragraphs 85 and 86 read as under:-

1 2022 SCC OnLine SC 944.

85] It is well settled that entries in books of accounts and/or balance sheets of a Corporate Debtor would amount to an acknowledgment under Section 18 of the Limitation Act. In Bishal Jaiswal (supra) authored by Nariman, J. this Court quoted with approval the judgments, inter alia, of Calcutta High Court in Bengal Silk Mills Co. v. Ismail Golam Hossain Ariff,¹⁸ and Pandem Tea Co.¹⁹ Ltd., the judgment of the Delhi High Court in South Asia Industries (P) Ltd. v. General Krishna Shamsheer Jung Bahadur Rana²⁰ and the judgment of Karnataka High Court in Hegde Golay Ltd. v. State Bank of India²¹ and held that an acknowledgement of liability that is made in a balance sheet can amount to an acknowledgement of debt.

86] In Bengal Silk Mills Co. (supra), the Calcutta High Court held:-

“9. I am unable to agree with the reasoning of the Nagpur decision that a balance-sheet does not save limitation because it is drawn up under a duty to set out the claims made on the company and not with the intention of acknowledging liability. The balance-sheet contains admissions of liability; the agent of the company who makes and signs it intends to make those admissions. The admissions do not cease to be acknowledgements of liability merely on the ground that they were made in discharge of a statutory duty. I notice that in the Nagpur case the balance-sheet had been signed by a director and had not been passed either by the Board of Directors or by the company at its annual general meeting and it seems that the actual decision may be distinguished on the ground that the balance-sheet was not made or signed by a duly authorized agent of the company.

25. Mr. Cama, to lend support to the second limb of his submission, relied upon proposition 17.6 in the judgment of the Supreme Court in the case of **IDBI Trusteeship Services Limited vs. Hubtown Limited**² wherein it was enunciated that, if any part of the amount claimed by the plaintiff is admitted by the defendant to be

² (2017) 1 Supreme Court Cases 568.

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

26. First and foremost, the question as to whether purported acknowledgment of the liability in the letter dated 24th May, 2017 (Exhibit E) and the balance sheets as of 31st March, 2017 and 31st March, 2018, enure to the benefit of the plaintiff requires consideration. Evidently, the term of the loan was one year. Indisputably, neither the term of the loan was extended nor it was repaid either within the said term or thereafter. Though the plaintiff claims in the plaint that the defendant has acknowledged the debt in its balance sheets filed each year, yet, only the balance sheets for the financial year 2016-17 and 2017-18 have been placed on record. Prima facie, the issue as to whether there has been an acknowledgment of liability by the defendant before the expiry of the period prescribed for the suit is a matter for trial. The letter dated 30th May, 2017 was issued and balance sheets for the financial year 2016-17 and 2017-18 were filed after the expiry of the period of limitation if reckoned from the date of expiry of the term of the loan.

27. Even if the case of the plaintiff, as set up in the plaint is taken at par, yet, the time lag from the date of advance to the demand notice dated 30th May, 2019, deserves to be taken into account. Inaction on the part of the plaintiff for almost 10 years cannot be said to be inconsequential or immaterial. Could the financial institution, like the plaintiff, maintain a stoic silence for almost 10 years, despite default in repayment of the loan amount and interest during the term of the loan, is the question which begs answer. It also defies comprehension that the plaintiff would not have taken umbrage at the fact that no interest was provided in the books of accounts of the borrower and only the principal amount was shown in the balance sheet of the borrower even after 8 years of expiry of the term of loan. In the ordinary circumstances, had the transaction been one of loan simpliciter, as was sought to be asserted by the plaintiff, there would not have been masterly inaction for almost a decade.

28. It is in the aforesaid context, the worth of the defence sought to be put forth by the defendant that the real transaction between the parties was different than the one evidenced by the apparent tenor of the documents deserves to be appraised. As the defence rests upon the MOU dated 20th January, 2016 executed by and

between Kohinoor group and IL and FS group (over the constituents of which there is not much controversy) it may be apposite to consider the relevant clauses thereof. They read as under:-

A. KCTNL was set up with equity interest of 60:40 between Kohinoor Group and IL and FS Group and is developing a mixed use real estate project to be called as “Kohinoor Square”, Kohinoor Square comprises commercial and residential units, Kohinoor Square has saleable area 1:40 million square feet including area already sold to third parties.

B. KCTNL has entered into non-binding arrangement with Blackstone (as defined herein) (Non-Binding Arrangement) who propose to acquire specified commercial area of 0.74 million square feet for a consideration of Rs. 13,500 mn in Kohinoor Square. Subsequently, KCTNL has also received proposal from other Potential Investors to purchase the above area at aggregate consideration of Rs. 14,500 mn and is under final stage of negotiation.

C. Out of the aggregate 0.74 million square feet commercial area, KCTNL has already allocated in aggregate area of 278,789 square feet to IL & FS Group and as more particularly described in Annexure I hereto (IL & FS Group Area).

D. In addition to the above exposure, IL & FS Group has exposure in the form of Loans extended to the Kohinoor Group for the purpose of construction of Kohinoor Square. The aggregate exposure of the IL & FS Group to KCTNL is Rs. 9,550 mn as per Annexure II enclosed hereto (IL & FS Group Exposure).

E. The Aggregate Exposure of IL & FS Group and Kohinoor Group (after netting off indirect Exposure of IL & FS Group) to the Kohinoor Square is as under:

Particulars	Current Exposure	Existing Ratio	Realignment of Exposure	Excess Exposure
Kohinoor Group	4,110	30.5%	4,110	-

IL & FS Group	9,550	69.5%	2,740	6,810
	13,660	100.0%	6,850	6,810

F. KCTNL to utilise the Sale Proceeds of the project so as to realign the Exposure of IL & FS Group and Kohinoor Group in accordance with the equity interest. The realign process would require priority payment to the parties having excess exposure and its more particularly defined in Clause (5) of this MOU.

G. Kohinoor Group shall assign another Project to KCTNL in order to recoup the loss incurred by IL & FS Group in the Kohinoor Square more particularly defined under Clause (5) of this MOU.

H. KCTNL has requested IL & FS Group's co-operation to enable KCTNL to conclude the Divestment Deal (as defined herein). The parties are therefore entering into this MOU to record the non-binding understanding amongst the parties.

3. Application of Sale Proceeds on Approval of Demerger:-

(a) Immediately upon receipt by KCTNL of Sale Proceeds from Blackstone or Potential investor towards demerger of the Commercial Area from KCTNL and transfer to Blackstone or Potential Investor pursuant to the Demerger Scheme, KCTNL shall apply the sale proceeds in the following manner.

Particulars	Inflow	Outflow
Proceeds of Divestment Deal	14,500	
Utilization of the Proceeds		
Repayment of Banks Borrowing including interest		6,300
Amount set aside for Completion of Commercial Project		1,300
Payout to IFIN & ITNL towards their respective area		5,855
Part payment of IL & FS Group Loans		1,045
Total	14,500	14,500

... ..

6. Parties Intentions and Compliance :-

Except for the Confidentiality provision (Clause 3), Duration and Termination provision (Clause 5) and Miscellaneous provisions (Clause 9), this MOU is only a statement of intent and does not set forth any legally or binding duties and obligations under any applicable law with respect to either party. The parties are not obliged to consummate or complete any transaction under or with reference to this MOU.

In the event that any of the activities envisaged under this MOU fail to materialize or not achieved, none of the parties shall have any obligation or liability (as a matter of contract, tort or otherwise) to the other party with respect to or arising out of or in connection with the matters contemplated under this MOU for any direct or indirect or consequential or economic loss, damages, costs, expenses or any other claim for compensation of any other party.

7. Duration and Termination :-

This MOU shall continue for a period of 1 year from the date of this MOU unless terminated earlier by delivery of 3 (three) months' prior written notice by either Party to the other.

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Annexure II

Details of IL & FS Group Exposure

Particulars	Equity in Kohinoor Square	Kohinoor Square Property	Loan to Kohinoor Group	Total
IL & FS Group Exposure Total	2,000	5,855	1,695	9,550

29. The aforesaid recitals, apart from the intent of the parties as to the future course of action, record, inter alia, that a joint venture

company KCTNL was set up by Kohinoor group and IL & FS group to develop the Kohinoor Square Project. Out of the aggregate 0.74 million commercial area, available in Kohinoor Project, an aggregate area of 278,779 sq.ft was already allotted to IL & FS had group. In addition thereto, IL & FS group had an exposure to the tune of Rs. 9550 million (as per Annexure II above) in the form of loans extended to Kohinoor group for construction of Kohinoor Square. In proportion to the equity interest of IL & FS and Kohinoor group in KCTNL, the aggregate exposure of IL & FS group exceeded by Rs. 6810 million.

30. In the light of the aforesaid position, as it then obtained, under the MOU the Kohinoor group agreed to utilize the sale proceeds to realign the exposure and bring it along with the equity interests of Kohinoor and IL & FS group and also agreed to assign another project to KCTNL in order to recoup the loss incurred by the IL & FS group in the Kohinoor square project. The parties further agreed that in the event the de-merger went through, KCTNL would apply the sale proceeds, inter alia, to make payout to IFIN and ITNL towards respective area and part payment of IL & FS group loans.

31. The aforesaid being the nature of the MOU, in my view, it would be superfluous to delve into the question of the binding or non-binding nature of the clauses of the MOU. Even if it is assumed that the terms and conditions of MOU as regards the executory part were non-binding, yet the Court can not lose sight of the fact that the recitals in the MOU record the relative position of the parties as regards the exposure and liability. From this stand point, it can not be controverted that, as of the date of execution of the MOU i.e. 20th January, 2016, the total exposure of IL & FS group to the Kohinoor group was pegged at Rs. 9550 million. The question as to whether the loan in question formed part of the exposure of IL & FS group i.e. Rs. 9550 million (Annexure II), either in the form of equity or loan is essentially a matter for trial.

32. If the attendant circumstances of the case, manifested in the conduct of the plaintiff in not pursuing the recovery of the loan of Rs. 36 Crores, advanced for a short term of one year, are considered in juxtaposition with the aforesaid relationship between IL & FS and Kohinoor group, in general, and aforesaid exposure of IL & FS group in the Kohinoor group, in particular, it would be hazardous to draw an inference that the defence raised by the defendant is sham and moonshine. In substance, the inaction on the part of the

plaintiff for a decade lends credence to the defence rested in the transaction being different than the one pleaded by the plaintiff.

33. Reliance placed by Mr. Patil on the judgment of the Supreme Court in the case of Placido Francisco Pinto (D) By Lrs and Another vs. Jose Francisco Pinto and Another³ appears to be well founded. In the said case, after following the judgment in the case of Smt. Gangabai w/o. Rambilas Gilda vs. Smt. Chhabubai w/o. Pukharajji Gandhi and Roop Kumar vs. Mohan Thedani, the Supreme Court enunciated that it was open to a party to assert that there has been a different transaction altogether than what is recorded in the document and for that purpose oral evidence was admissible.

34. The admissions in the balancesheets, in the totality of the circumstances, do not deserve to be taken into account unreservedly. The defendant has succeeded in bringing material on record to show that he deserves an opportunity, to show a contrary state of affairs. Therefore, proposition 17.6 in the judgment in the case of IDBI Trusteeship Services Limited (supra) may not apply with equal force to the facts of the case at hand.

35. Lastly, the tests to be adopted in determining the question as

3 2021 SCC OnLine SC 842.

to whether leave to defend the suit is required to be granted, need to be kept in view. In the case of **B. L. Kashyap and Sons Ltd. vs. M/s. JMS Steels and Power Corporation and Another**⁴ after adverting to a number of judgments including the judgment in the case of **IDBI Trusteeship Services Limited** (supra) the Supreme Court culled out the principles in paragraph 33.3 as under:-

33.3] Therefore, while dealing with an application seeking leave to defend, it would not be a correct approach to proceed as if denying the leave is the rule or that the leave to defend is to be granted only in exceptional cases or only in cases where the defence would appear to be a meritorious one. Even in the case of raising of triable issues, with the defendant indicating his having a fair or reasonable defence, he is ordinarily entitled to unconditional leave to defend unless there be any strong reason to deny the leave. It gets perforce reiterated that even if there remains a reasonable doubt about the probability of defence, sterner or higher conditions as stated above could be imposed while granting leave but, denying the leave would be ordinarily countenanced only in such cases where the defendant fails to show any genuine triable issue and the Court finds the defence to be frivolous or vexatious.

36. If the facts of the case are appraised on the aforesaid touchstone, in my view, the defendant succeeded in raising triable issues and thus deserves an unconditional leave to defend the suit. Hence, the following order.

4 (2022) 3 Supreme Court Cases 294.

ORDER

- i] The defendant is granted an unconditional leave to defend the suit.
- ii] The defendant shall file written statement within a period of 8 weeks from today.
- iii] The Summons for Judgment stands dismissed.
- iv] Costs in cause.

(N. J. JAMADAR, J.)