

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

SUMMONS FOR JUDGMENT NO.44 OF 2019
IN
COMMERCIAL SUMMARY SUIT NO.839 OF 2019

IL & FS Financial Services Limited (IFIN)	...Applicant
<i>In the matter between</i>	
IL & FS Financial Services Limited (IFIN)	...Plaintiff
vs.	
Kohinoor Realty Management Private Limited and Others	...Defendants

Dr. Birendra Saraf, Senior Advocate a/w. Mr. Sachit Bhogle, Mr. Bhushan Shah, Mr. Akash Jain and Mr. Akash Mehta i/b. Mansukhlal Hiralal & Co., for the Plaintiff.

Mr. Akshay Patil i/b. Mr. Akshay Kamble, for Defendant No. 1.

Dr. Veerendra Tulzapurkar, Senior Advocate i/b. Mr. Mandar Soman, for Defendant Nos. 2 and 3.

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. 17,52,56,942/- along with further interest @ 14% p.a. till payment and/or realization.

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

a] The plaintiff is a non banking financial company engaged in the business of finance and advisory services. It is a 100% subsidiary of Infrastructure Leasing and Financial Services Limited (IL & FS). The defendant No. 1 is a company incorporated under the Companies Act, 1956. The defendant No. 2 is the Chairman and Managing Director of defendant No. 1. Defendant No. 3 is a Director of defendant No. 1.

b] The plaintiff asserts in or about December, 2017, the defendant No. 2, in the capacity of the promoter of defendant No. 1, had approached the plaintiff for a short term loan of Rs. 16 Crores. Based on the representations of the defendants, the plaintiff had offered to provide a short term loan facility of Rs. 16 Crores to defendant No. 1 on the terms and conditions set out in the letter dated 27th December, 2017. Under the terms of the said letter, the short term loan was to be repaid within a period of six months from the date of disbursement. The said facility was to be used for the purpose of expenses relating to Cluster Redevelopment Project at Mahim.

c] Pursuant to the terms of the said letter, the plaintiff and defendant No. 1 had entered a loan agreement dated 4th January, 2018 for extension of a short term loan of Rs. 16 Crores. Pursuant to and in accordance with the loan agreement, the plaintiff asserts,

a number of instruments were executed, namely, the defendant No. 1 executed a Deed of Undertaking I dated 16th February, 2018 followed by another Deed of Undertaking II. An irrevocable, absolute and unconditional personal guarantee vide letter dated 4th January, 2018 was executed by defendant No. 2. An agreement of first ranking *pari pasu* pledge of 100% equity shares of Kohinoor Planet Constructions Private Limited (KPCPL) dated 16th February, 2018 (Pledge Agreement) was executed by defendant No. 1, as borrower, and defendant Nos. 2 and 3, as pledger cum guarantors. Under the Pledge Agreement, defendant Nos. 2 and 3 also agreed to be jointly and severally liable as a principal debtor without exclusion/ reference to others for the payment/repayment of the dues under the loan agreement.

3. The plaintiff claimed that it disbursed the first tranche of Rs. 9,62,78,218/- to defendant No. 1 on 5th January, 2018. The second tranche of Rs. 5,35,00,000/- was disbursed on 28th June, 2018.

4. The plaintiff claimed that it repeatedly called upon the defendant No. 1 to repay the outstanding amount. Defendants failed and neglected to repay the due amount. Despite service of the last of the notices dated 21st February, 2019, the defendants neither paid

the amount nor gave any reply. Thus, the plaintiff was constrained to institute the suit for recovery of a sum of Rs. 17,52,56,942/- along with interest @ 14% p.a.

5. In response to the writ of summons the defendant Nos. 1 to 3 appeared. Thereupon, the plaintiff took out the Summons for Judgment.

6. The defendant Nos. 1 to 3 have filed separate affidavits in reply seeking an unconditional leave to defend the suit. Since the defendants No. 1 to 3 have heavily relied upon the affidavit in reply filed on behalf of defendant No. 2, it may be expedient to first note the grounds on which defendant No. 2 seeks an unconditional leave to defend the suit.

7. At the outset, the tenability of the summary suit was assailed on the ground that it pertains to the claims which are not covered by the provisions contained in Order 37, Rule 1(2) of the Code of Civil Procedure, 1908 (the Code). The tenability of the suit was assailed on the ground that the plaintiff is prosecuting the present suit without giving up the security namely the shares of Kohinoor Planet Constructions Private Limited pledged by defendant Nos. 2

and 3. The defendant No. 2 also assailed the tenability of the suit qua defendant No. 3 as defendant No. 3 is merely a pledgor of the shares held by defendant No. 3 in KPCPL. The defendant No. 3 is not personally liable for the repayment of the amount covered by suit claim.

8. Defendant No. 2 further contended that the suit suffers from vice of suppression of material facts and, therefore, the plaintiff is not entitled to any relief.

9. According to the defendant No.2, 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.

10. 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, IL & FS group company, and KPPL, 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 Kohinoor Group Company 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.

11. 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.

12. The defendant No. 2 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 simpliciter. Therefore, defendant No. 2 is entitled to an unconditional leave to defend suit.

13. The defendant No. 1 also seeks unconditional leave by taking the grounds which are raised by defendant No. 2. In fact, defendant No. 2 has sworn an affidavit on behalf of defendant No. 1 in the capacity of the Director of defendant No. 1.

14. Affidavit in reply on behalf of defendant No. 3 proceeds on an identical line.

15. In the affidavits in rejoinder, the plaintiff avers the transactions referred to in the affidavits in reply have no bearing on the suit. The claim in the instant suit is stated to be an independent transaction governed by an independent agreement between the parties. The transaction, according to the plaintiff, was not the subject matter of the alleged MOU as the loan agreement was executed much after the said MOU. At any rate, according to the plaintiff, the MOU clearly provides that it does not contain any binding legal duties and obligations. The parties were not obligated to consummate any transaction with reference to MOU. The plaintiff asserts, reference to the transactions and the documents in the affidavit in reply has been made with a view to create a confusion about the transaction in question and obtain leave to defend the suit which the defendants are otherwise not entitled to. Affidavits in sur-rejoinder were also filed on behalf of the defendants.

16. In the wake of the aforesaid pleadings, I have heard Dr. Birendra Saraf, learned senior advocate for the plaintiff, and Mr. Akshay Patil, learned counsel for defendant No. 1 and Dr. Veerendra Tulzapurkar, learned senior counsel for defendant Nos. 2 and 3. With the assistance of the learned counsel for the parties, I have carefully perused the material on record.

17. Dr. Saraf, the learned senior counsel for the plaintiff submitted that the plaintiff's claim is supported by documents of unimpeachable character which render the defences sought to be urged on behalf of the defendant unworthy of grant of leave to defend the suit. Laying emphasis on the loan agreement dated 4th January, 2018, the undertakings of the defendant dated 16th February, 2018, personal guarantee executed by defendant No. 2 on 4th January, 2018 and the pledge agreement dated 16th February, 2018 executed by defendant Nos. 1 to 3, Dr. Saraf would urge that advance of loan by the plaintiff to the defendant is rather incontestable. To add to this, according to Dr. Saraf, there is a clear and unequivocal acknowledgment of the liability in the balance-sheets of the defendant for the financial year 2017-18 and 2018-19. The defences now sought to be put forth by the defendants are creatures of afterthought and do not raise any triable issue. Thus a decree must follow, urged Dr. Saraf.

18. In contrast to this, Dr. Tulzapurkar, learned senior counsel for defendant Nos. 2 and 3 strenuously submitted that the defendant deserves an unconditional leave to defend the suit for deliberate suppression of facts on the part of the plaintiff. Whole body of instruments, which evidence transactions between the

Kohinoor and IL and FS Group, was suppressed by the plaintiff. Such deliberate suppression of material facts, in itself, constitutes a ground to dismiss the Summons for Judgment, urged Dr. Tulzapurkar. Taking the Court through the Consortium Agreement executed between Kohinoor Projects Private Limited, a group company of a Kohinoor Group, and Consolidated Transportation Networks Limited, the then subsidiary of IL and FS Group dated 20th July, 2005 to develop the Kohinoor Square Project, Shareholders Agreement dated 11th October, 2005, Share Subscription cum Shareholders Agreement dated 29th September, 2008 executed between Kohinoor CTNL Infrastructure Company Limited, Kohinoor Projects Private Limited, IL and FS Trust Company Limited and IIRF India Realty VII Limited and defendant No. 2 as the promoter, Supplemental Share Subscription cum Shareholders Agreement and Memorandum of Understanding dated 20th January, 2016 (MOU), Dr. Tulzapurkar would urge that the documents unmistakably indicate that there have been transactions between various entities of IL and FS and Kohinoor Group. Yet the plaintiff approached the Court as if the transaction in question was one of the ordinary transactions between a lender and creditor. Had the plaintiff approached the Court with a case that the transaction in question is distinct from the transaction

evidenced by aforesaid documents, according to Mr. Tulzapurkar different considerations would have come into play. In view of the suppression of the genesis of the jural relationship between the parties arising out of commercial transactions, over a period of time, the defence of the defendant that the advance in question is also a part of the transaction between IL and FS and Kohinoor Group cannot be brushed aside as a sham and moonshine defence. The defendant No. 2 thus deserve an opportunity to prove to the contrary, at the trial.

19. Dr. Tulzapurkar further submitted that the plaintiff can not draw mileage from the entry in the balance-sheets for the financial year 2017-18. In the succeeding year, the defendants have clarified the said entry in the balance-sheet. Resultantly, the statement in the balance-sheet for the year 2017-18 cannot be relied upon as a clear and unequivocal acknowledgment of the liability, which only can sustain a decree.

20. As regards the liability of defendant No. 3 it was urged that defendant No. 3 being a pledgor cannot be held personally liable. The plaintiff has his remedies under section 174 of the Indian Contract Act in respect of the pledged shares. However, in the case

at hand, the plaintiff is seeking to proceed against the pledgor as a guarantor, which is impermissible in law, submitted Dr. Tulzapurkar.

21. Mr. Patil, the learned counsel for defendant No. 1 while supplementing the submissions of Dr. Tulzapurkar, made an endeavour to draw home the point that terms of MOU dated 20th January, 2016 are comprehensive enough to include the subject transaction. The MOU, according to Mr. Patil, encapsulates the course of business dealings between the IL and FS and Kohinoor group and, thus, the fact that the advance in question was made after the MOU dated 20th January, 2016 does not detract materially from the defence of the defendants.

22. To start with, it may be appropriate to note that the factum of advance of a sum of Rs. 17,52,56,942/- in two tranches of Rs. 9,62,78,218/- on 5th January, 2018 and Rs. 5,35,00,000/- on 28th June, 2018, as such, is not in contest. Nor the fact that a loan agreement came to be executed on 4th January, 2018 between the plaintiff and the defendants is in dispute. The execution of the undertaking on 16th February, 2018 by the defendant in favour of the plaintiff is also not controverted. Defendant No. 2 indisputably

executed a letter of guarantee on 4th January, 2018, unconditionally agreeing to pay the said loan amount alongwith interest and charges within 24 hours of the demand. Under the pledge agreement the defendant Nos. 1 to 3 pledged the shares they held in Kohinoor Planet Constructions Private Limited.

23. Without controverting the execution as such of all the aforesaid instruments, the defendants essentially questioned the character of the transaction between the parties. The substance of the defence is that the loan in question is a subterfuge and the real transaction was of infusion of quasi equity into Kohinoor Group, in general, and Kohinoor Square Project, in particular, with an understanding that the repayment of the said amount would be made out of the sale proceeds of the Kohinoor Square Projects and, in the event the amount could not be repaid, through the proceeds of any other project developed by the Kohinoor Group.

24. Since the defendants faced an obstacle in the nature of the admission of liability in the balance-sheet, for the financial year 2017-18, an endeavour was made to show that the entry in the said balance-sheet has since been explained. I deem it in the fitness of things to first deal with this contention.

25. In the balance-sheet as of 31st March, 2018, the sum of Rs. 9,62,78,218/- which was advanced on 5th January, 2018, was shown as a short term borrowing. In the balance-sheet as of 31st March, 2019, a sum of Rs. 14,66,02,356/- was shown as a short term borrowing owed to the plaintiff. An explanatory note came to be added thereto, to the effect that the said loans were recalled by letter dated 19th October, 2018 and, according to the management of the company, it was a quasi equity and thus the company contested the above mentioned liability and therefore no provision for any interest was made during FY 2018-19 and 2019-20. Whether this explanation is of assistance to the defendants ?

26. Dr. Saraf, learned senior counsel for the plaintiff, submitted that the aforesaid explanation which came to be added after institution of the suit is of no significance as it is self serving. Placing reliance on the judgment of the Supreme Court in the case of Asset Reconstruction Company (India) Limited vs. Tulip Star Hotels Limited and Others¹ Dr. Saraf submitted that the acknowledgment in the balance-sheet for the year 2017-18 being unequivocal and contemporaneous with the advance, deserves precedence.

1 2022 SCC OnLine SC 944.

27. An endeavour was made on behalf of the defendants to draw home the point that it is not the law that an erroneous admission cannot be explained. In fact, this Court has held that the statement in the balance-sheet can be explained in subsequent balance-sheet. Therefore, the statement in the balance-sheet for the year 2017-18 cannot be construed as sacrosanct. Once the defendants succeed in demonstrating that the statement in the balance-sheet was not correct, the plaintiff can not draw any mileage therefrom.

28. To bolster up the aforesaid submission, Dr. Tulzapurkar placed reliance on the judgment of the Delhi High Court in the case of Vijay Gupta and Others vs. Ashok Kumar Gupta² and Karnataka High Court in the case of Raj A. menda and Others vs. M/s. Rani Rasamani Real Estate and Others³. The circumstances, in which a decree on an admission can be justifiably passed under Order XII Rule 6 of the Code of Civil Procedure, 1908 were considered in the aforesaid judgments.

29. Mr. Patil placed a strong reliance on the judgment of the Division Bench of this Court in the case of Inteltek Automation Pvt. Ltd. vs. Indusind Bank Ltd.⁴ wherein it was enunciated that in view

2 2007 (95) DRJ 167.

3 ILR 2007 KAR 2627.

4 2011 (1) Mh.L.J. 935

of the statement in the balance-sheet that the claim for interest and principal was in dispute, a decree on admission could not have been passed on the basis of audit report which forms part of the balance-sheet. The Division Bench followed the judgment of another Division Bench of this Court in the case of **Ultramatix Systems Pvt. Ltd. vs. State Bank of India and Others**⁵ wherein it was enunciated that the statement contained in the balance sheet and profit and loss account of a company would an admission of its liability, unless subsequent balance sheets were filed to show that either the amounts have been paid or were not due and payable and/or any other material was produced to hold otherwise.

30. Mr. Patil also placed reliance on the judgment of the Supreme Court in the **Reliance Asset Reconstruction Company Limited vs. Hotel Poonja International Private Limited**⁶ wherein in the facts of the said case in view of the note appended to the balance-sheet, it was held that in view of the notes, the balance-sheet cannot be treated as an acknowledgment of the liability.

31. It is trite to sustain a decree on admission, the admission of liability ought to be clear, explicit and unequivocal. In the case at

⁵ 2007(4) Mh.L.J. 847

⁶ (2021) 7 Supreme Court Cases 352

hand, the defendants endeavoured to wriggle out of the situation brought about by an entry in the balance-sheet for the year 2017-18 by placing reliance on the explanation sought to be offered in the balance-sheet for the succeeding year. In a given situation, a party could be permitted to demonstrate that the statement in a balance-sheet is incorrect or that the liability has since ceased. However, it all turns upon the fact situation which obtains. It is imperative to note that the first tranche of loan was advanced on January, 2018. In the balance-sheet as of 31st March, 2018 the very same amount was shown as a short term borrowing. The statement in the balance-sheet as of 31st March, 2018 thus has an element of spontaneity.

32. In the wake of dispute between the parties and institution of suit on 19th April, 2019, in the balance-sheet for the succeeding year, the defendants made an attempt to explain away the position. The fact that the said explanation came to be offered after the institution of the suit cannot be lost sight of. Had it been a case that the same explanation found place in the balance-sheet as of 31st March, 2018, it would have lent an element of credence to the said version. Since the explanation was sought to be offered after the dispute arose between the parties as regards the liability to repay

the said amount, the defendants cannot be permitted to bank upon the said explanation to contend that they have a substantial defence.

33. This takes me to the core of the defence of the transaction in question being a part of the series of advances by the IL & FS Group to the Kohinoor Group as and by way of quasi equity. Edifice of this defence, in addition to Consortium Agreement and Share Subscription cum Shareholders Agreement, is principally built around the MOU dated 20th January, 2016. It may be apposite to consider the relevant clauses of the MOU dated 20th January, 2016.

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.

I. Definitions :-

... ..

(f) IL & FS Group Loans : shall mean the loans provided by IL & FS Group to Kohinoor Group.

(g) Non-Binding Agreement: shall have the same meaning as assigned to it in Recital B.

(h) Sale Proceeds : shall mean proceeds of Rs. 14,500 mn to be received by KCTNL from Blackstone or Potential investors pursuant to the Demerger Scheme.

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

(b) KCTNL shall comply with all applicable laws in connection with the utilization of Sale Proceeds, including compliance with Section 185 and section 186 of the Companies Act, 2013.

(c) Post divestment of the commercial project, KCTNL would be left with residential project, proceeds from the sale of residential project would be used for repayment of liabilities and residual equity interest.

... ..

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.

... ..

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

34. The crucial question that wrenches to the fore is whether the aforesaid MOU even if construed in the manner the defendants desire the Court to do, subsumes the transaction in question in its fold. Indisputably, the said MOU so far as it related to the executory part namely de-merger of KCTNL and transfer of the assets to Blackstone or any other prospective purchase did not

materialize. What the defendants can legitimately draw upon is the statement of facts contained in the said MOU. Evidently, the said MOU records the exposure of IL & FS Group into Kohinoor Group to the tune of Rs. 9550 million as of 20th January, 2016. Indisputably, the amounts in question were advanced on 5th January, 2018 and 20th June, 2018. Whether the said advances were in continuation of the same operandi, is the question.

35. On first principles, in my view, in the absence of any material show the nexus between the transactions in question and the transactions evidenced by the MOU, it would be audacious to draw an inference merely on the basis of past transactions. Attendant circumstances, undoubtedly, play a role. Those circumstances, manifested in the execution of the loan agreement, personal guarantee and pledge agreement run to the contrary. The nature of the transactions and the jural relationship brought about by these documents, is to be inferred from the contract between the parties as evidenced by those documents.

36. On a cumulative reading of the aforesaid documents, it becomes evident that the loan was advanced for the cluster development project at Mahim, Macchimar Nagar. This

disentangles the transaction from the Kohinoor Square Project, which the MOU was primarily concerned with. Secondly, the letter dated 27th December, 2017 under which the loan was sanctioned explicitly records that there were existing loan facilities to the tune of Rs. 1200 million by IFIN to Kohinoor Housing Development Project Limited. Prima facie, it appears to be a historical fact and shows the relationship between the parties. Thirdly, the borrower was not shown to be a part of the group companies which represented the Kohinoor Group in the MOU dated 20th January, 2016. The matter would be required to be stretched too far to bring each and every transaction which takes place between the entities of IL & FS and Kohinoor Group within the ambit of MOU dated 20th January, 2016, whatever be the length of time and the nature of transaction. Such construction of the contract between the Corporate entities cannot be countenanced. The intent of the parties to a commercial contract is required to be ascertained primarily from the terms of the contract.

37. I, therefore, find it difficult to accede to the submission on behalf of defendant No. 1 and 2 that they are entitled to an unconditional leave to defend the suit on the count that the transaction in question also represents quasi equity infusion by the

IL & FS Group into Kohinoor Group.

38. The defendant Nos. 1 and 2, however, deserve an opportunity to contest the suit. The defence sought to be raised by defendant Nos. 1 and 2 cannot be totally brushed aside as vexatious and sham. In the facts of the case, even if the probability of the defence may be questioned yet the defendants cannot be deprived of the opportunity to contest the suit. A conditional leave would, thus, be in order.

39. The case of defendant No. 3 stands on a different footing. Defendant No. 3 has executed a pledge agreement. The schedule appended to the pledge agreement indicates that the defendant No. 3 has pledged all the shares of Kohinoor Planet Constructions Private Limited (KPCPL). The defendant No. 3 is, however, professed to be held personally liable for the debt, on the strength of the recitals in the pledge agreement, as a guarantor.

40. Dr. Saraf placed reliance on the following covenants in the pledge agreement.

5.1 Affirmative Covenants by the Pledgor :-

During the currency of this Agreement, the Facility Agreements and until the Borrowers' Dues payable by

the Borrowers to IFIN remains outstanding, the Pledgor shall:

....

(g) be jointly and severally liable as principal debtors without exclusion/ preference to the other or others of them for the payment of the Borrowers' Dues to IFIN and IFIN shall be entitled to recover at its option the amounts due in respect thereof from the Pledgors without exercising or exhausting any other remedy/right it has against the Borrowers.

....

6.2 Remedies :-

....

(b) Sale of Pledged Securities :-

..... In case, the proceeds of sale or disposal of the Pledged Securities are not sufficient to pay/ repay the Borrowers' Dues to IFIN, the Borrowers and the Pledgors bind themselves and undertake to make good the deficit immediately on being required to do so by IFIN.

41. Dr. Saraf would urge that the aforesaid covenants would indicate that the pledge agreement does not evidence a pledge simpliciter. It also constitutes a guarantee furnished by defendant No. 3. The nomenclature of the documents is not decisive and, therefore, the defendant No. 3 can be said to have undertaken the liability to discharge the entire debt in the event of default on the part of borrower/ defendant No. 1.

42. Dr. Saraf placed a strong reliance on a Division Bench judgment of this Court in the case of **II & FS Financial Services**

Limited vs. Vandana Global Limited⁷. Construing the terms of the Article II, Put Option therein, the Division Bench held that the petitioner therein irrevocably, absolutely and unconditionally agreed with and undertook to IFIN that in the event of the occurrence of an Event of Default under the Facility Agreement IFIN may, at its discretion, issue the Put Notice; and upon the receipt of the Put Notice VGL and VL shall, without demur or protest, make payment of the Exercise Price to IFIN and accept by way of assignment from IFIN the Facility along with all rights and liabilities thereunder.

43. The aforesaid decision, with respect, turns on the construction of particular instrument in the said case. It is trite a document is required to be read as a whole. To gather the real intention of the parties, the terms and stipulations in an instrument cannot be read torn out of context. Undoubtedly, the parties are free to enter into a contract which gives rise to multiple jural relationships. In a given case, an instrument of pledge may also operate as a guarantee. However, such intention of the parties must be borne out by the instrument and the attendant circumstances.

44. The pledge agreement, in the instant case, primarily deals

⁷ Company Petition No. 923/2015, Dt. 05/01/2018

with the pledged securities, the rights and obligations of the pledgor, the covenants of the pledgor and the consequences which would ensue in the event of default. The lender is empowered to sale the pledged securities.

45. On a fair reading of the pledge agreement, as a whole, I find it difficult to accede to the submission on behalf the plaintiff that the pledge agreement also constitutes a contract of guarantee. The aforesaid recitals in the agreement that the pledgors shall be jointly and severally liable as principal debtors and bind themselves and undertook to make good the deficit in case the proceeds of the sale or disposal of the pledged shares are not sufficient to discharge the debt are required to be considered in context in which the parties entered into the contract.

46. In the letter dated 27th December, 2017 under which the loan was sanctioned it was specifically mentioned that the loan was secured by (a) Demand Promissory Note (b) Personal Guarantee of defendant No. 2 and (c) First Ranking *Pari Pasu* pledge of 100% equity shares of Kohinoor Planet Constructions Private Limited in demat form together with all accretions thereon. Few things become abundantly clear. First, the loan was secured by the personal

guarantee of defendant No. 2. Second, the plaintiff had not insisted for personal guarantee by defendant No. 3. Third, the loan was agreed to be secured by pledge of 100% equity shares of KPCPL. It was nowhere in the contemplation of the parties that defendant No. 3 would also act as a guarantor. This prima facie militates against the plaintiff's claim that the pledge agreement also operated as a personal guarantee. In any event, the defendant No. 3 deserves an opportunity to contest the suit on the ground that her liability was confined to that of being a pledgor and not a guarantor.

47. The upshot of the aforesaid consideration is that the defendant No. 3 deserves an unconditional leave to defend the suit.

48. This propels me to the aspect of the conditions subject to which leave to defend is required to be granted to defendant Nos. 1 and 2. Since the advance of the sum of Rs. 14,97,78,218/- is incontestable and what the defendants contest is the character of the said amount and the funds out of which the said amount was to be repaid, in my view, the defendant Nos. 1 and 2 must be directed to deposit the said amount in the Court. Since the character of the said advance is the bone of contention, at this juncture, a direction to deposit the said amount along with interest may not be

justifiable. I am, therefore, persuaded to hold that the defendant Nos. 1 and 2 deserve leave to defend the suit subject to deposit of the principal amount of Rs. 14,97,78,218/-.

Hence, the following order:

ORDER

1] The defendant Nos. 1 and 2 are granted leave to defend the suit subject to deposit of the sum of Rs. 14,97,78,218/- in this Court within a period of six weeks from today.

2] If the aforesaid deposit is made within the stipulated period, this suit shall be transferred to the list of Commercial Causes and the defendant Nos. 1 and 2 shall file written statement within a period of six weeks from the date of deposit.

3] If this conditional order of deposit is not complied with, within the above stipulated period, the plaintiff shall be entitled to apply for an *ex-parte* decree against the defendants Nos. 1 and 2 after obtaining a non-deposit certificate from the

Prothonotary and Senior Master of this Court.

4] The defendant No. 3 is granted an unconditional leave to defend the suit.

5] The defendant No. 3 shall file the written statement within a period of eight weeks from today.

6] Summons for Judgment stands disposed in the aforesaid terms.

(N. J. JAMADAR, J.)