



O.A.No.230 of 2020 Batch

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Order reserved on	02.09.2022
Order pronounced on	01.02.2023

CORAM

The Hon'ble Mr. Justice **SENTHILKUMAR RAMAMOORTHY**

Original Application Nos.230 to 232 of 2020

and

A.Nos.1431 to 1433, 2676, 2677, 2786 to 2788, 2877, 2883, 3069, 3294, 3295 of 2020

and

A.Nos.657 to 659 of 2021

in

C.S.No.154 of 2020

63 Moons Technologies Limited,
(Formerly known as Financial Technologies (India) Ltd.
Rep. by its Authorized Signatory
Mr.D.John Dheepak,
Having its registered office at
Sakthi Tower-1, 7th Floor,
E-766, Anna Salai, Thousand Lights,
Chennai – 600 002.

... Applicant/Plaintiff

vs.

1.M/s.Wadhwan Global Capital Limited
Ground Floor, Madhava Building,
Near Family Court, Bandra(East) Mumbai,
Mumbai – 400 051 also at
10th Floor, TCG Financial Center,
BKC Road, Mumbai – 400 098.



2.Kapil Rajeshkumar Wadhawan

Former Chairman and Managing Director, DHFL,
at the relevant time, having office at
Warden House, 2nd Floor, Sir P M Road,
Fort, Mumbai-400 001 and residing at
22/23, Sea View Palace, Pali Hill,
Bandra(West), Mumbai – 400 050.

3.Dheeraj Rajeshkumar Wadhawan

Former Director, DHFL at the relevant time,
Having office at Warden House, 2nd Floor, Sir P M Road,
Fort, Mumbai-400 001 and residing at
22/23, Sea View Palace, Pali Hill,
Bandra(West), Mumbai – 400 050.

4.Harshil Mehta

Former Chief Executive Officer, DHFL
Having office at Warden House, 2nd Floor, Sir P M Road,
Fort, Mumbai-400 001.

5.Santosh Sharma

Former Chief Financial Officer, DHFL,
Having office at
Warden House, 2nd Floor, Sir P M Road,
Fort, Mumbai-400 001.

6.M/s.Credit Analysis and Research Limited,

No.O-509/C, Spencer Plaza, 5th Floor,
No.769, Anna Salai, Chennai – 600 002.

7.M/s.Brickwork Ratings India Private Limited,

2nd Floor, B wing, Swelect House,
No.5, Sir P.S.Sivasamy Salai,
Mylapore, Chennai - 600 004.

8.M/s.Chaturvedi and Shah,

Chartered Accountants, a partnership firm
registered under the provisions of the Indian



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Partnership Act, 1932, Having office at
714-715, Tulsiani Chambers,
212, Nariman Point, Mumbai – 400 021.

9.M/s.T.R.Chadha & Co LLP
5D, 5th Floor, Mount Chambers,
758, Anna Salai, Chennai – 600 002.

10.M/s.Rajendra Neeti & Associates,
A partnership firm registered under the provisions
of the Indian Partnership Act, 1932 and
having office at 144, Jolly Maker Chamber II,
Nariman Point, Mumbai – 400 021.

11.M/s.Catalyst Trusteeship Limited
(Formerly GDA Trusteeship Limited),
Ganapathy Colony, III Street,
Teynampet, Chennai – 600 018.

... Respondents/Defendants

12.M/s.Union Bank of India
No.29, Sardar Patel Road, 1st floor,
Adyar, Chennai - 600 020.

13.M/s.DOIT Talent Ventures(India) Private Limited
15 Floor, Tower-2A, One Indiabulls Centre S B Marg,
Lower Parel, Mumbai – 400 013.

14.M/s.Sunblink Real Estate Private Limited,
Office No.502, Madhava,
Plot No.C-4, E Block, BKC,
Bandra(East), Mumbai – 400 051.

15.M/s.RKW Developers Private Limited
HDIL Towers, 4th Floor Anant Kanekar Marg,
Bandra(East), Mumbai-400 051.

... Respondents



PRAYER IN O.A.No.230 of 2020: This Original Application is filed under Order XIV Rule 8 of O.S. Rules r/w Order XXXIX Rule 1 & 2 of CPC:

(a) praying to interim injunction restraining the Respondent No.1 from distributing any dividend among its shareholders and/or pay any remuneration at its increased rate to its managing director, director and senior employees, pending disposal of the main suit;

(b) To appoint a commissioner or any other fit and proper person as may be deemed fit by this Court to trace the assets of the Respondents and report the same to this Court, pending disposal of the main suit;

(c) Directing the respondents 1 to 11 to furnish security/deposit in this Court the outstanding amount of Rs.231,60,00,000/- (Rupees two hundred thirty one crores sixty lakhs only) as on 31st May 2020 i.e., principal of Rs.200,00,00,000/- and interest of Rs.31,60,00,000/- (Rupees thirty one crores sixty lakhs only) thereon till 31st May 2020 and any amount which is sufficient to secure the claim of the applicant and failing which attach the assets and properties of respondent Nos.1 to 11 which are sufficient to secure the outstanding amount of the applicant pending disposal of the main suit;

(d) Interim injunction that until the respondents Nos.1 to 11 furnish security/deposit amounts in terms of prayer clause (c) above this Court be pleased to, restrain the respondent Nos.1 to 11, by themselves, their servants, contractor and/or any other persons claiming through them or under or by a temporary order and injunction of this Court from in any manner transferring, alienating, selling, disposing of and/or dealing and



third party right or interim in any of their asset and/or properties or effect pending disposal of the main suit;

(e) Direction to the respondents 1 to 11 to disclose on oath all their assets and properties, movable and immovable, with location/address of such assets and properties and details of charges/encumbrances if any thereon including shareholding in companies and interest in partnership firms/LLPs together with bank accounts with bank statements for the last five years along with Income-tax returns with computation of income for assessment year 2013-2014 to Assessment year 2019-2020 pending disposal of the main suit;

(f) Interim injunction restraining respondents 2 to 5 from leaving India and this Court further be pleased to direct the respondents 2 to 5 to deposit their passports with this Court pending disposal of the main suit;

(g) Interim injunction restraining the respondents 2 to 5 from leaving India and this Court pleased to direct the respondents 2 to 5 to deposit their passports with this Court pending disposal of the main suit;

(h) Praying to vacate the injunction granted to the first respondent vide order dated 25.06.2020;

(i) To stay the proceedings in the present suit until hearing and final disposal of Commercial Summary Suit No.1332 of 2019 before the Bombay High Court.

(j) Praying to pass an order for rejection of the plaint against the petitioner under Order 7 Rule 11 of the CPC for non-disclosure of cause of action or pass an order for striking the petitioner's name as party defendant under Order 1 Rule 10 of the CPC;



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(k) To strike out the applicant/7th defendant from the array of parties in C.S.(Comm)No.154 of 2020; and

(l) To strike off the name of the applicant/8th defendant herein from the present suit.

Applicant : Mr.Nithyaesh Natraj &
Mr.Vaibhav R.Venkatesh

Respondents : Ms.Anbarasi Rajendran
for M/s.AAV Partners for R-1 to R-3

Mr.P.R.Raman, Senior Advocate,
for Mr.Arun C.Mohan for R-4

Mr.R.Ravindran for R-5

Mr.R.Parthasarathy
for Ms.Tanushree Aravind
and Ms.S.Reka for R-6

Mr.Rohan K.George
Mr.Pushkar for R-7

Mr.Anirudh Krishnan for R-8

Mr.Rahul Balaji for R-9



COMMON ORDER

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Background

Dewan Housing Finance Limited (DHFL) issued a prospectus dated 25.08.2016 in relation to the issuance of 10,00,00,000/- secured redeemable non-convertible debentures (NCDs) of the face value of Rs.1000/- each. 63 Moons Technologies Limited (63 Moons), a company previously known as Financial Technologies (India) Ltd. applied for allotment of NCDs pursuant to the above mentioned prospectus. Based on its applications, a first lot of 10,00,000 NCDs with a coupon rate of 9.05% and aggregate face value of Rs.100 crores; and a second lot of 10,00,000 NCDs at a coupon rate of 9.25% and aggregate face value of Rs.100 crore were allotted. In this manner, 63 Moons was allotted 20 lakh NCDs of the face value of Rs.200,00,00,000/-. Interest was required to be paid on the NCDs annually at the specified coupon rate and the date of maturity was 7 years from the date of allotment.

2. In the last week of January, 2019, the news portal, Cobrapost.com (Cobra Post), published an article revealing that a major financial scam had occurred in DHFL and that more than Rs.31,000 crores of public money was siphoned off. Thereafter, the Audit Committee of



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DHFL appointed a firm of Chartered Accountants, namely, T.P.Oswal and Associates LLP, to review the allegations made in the article by Cobra Post and report to the Committee. Around this time, on 03.02.2019, the credit rating assigned to DHFL by Credit Analysis and Research Limited (CARE) was downgraded from 'AAA' to 'AA+'. Similarly, the credit rating assigned to the NCDs by Brickwork Ratings India Private Limited (BWR) was downgraded from BWR 'AAA' to BWR 'AA +'. Meanwhile, in March, 2019, all members of the Audit Committee of DHFL resigned. In August, 2019, the joint Statutory Auditors of DHFL filed a complaint for fraud with the Ministry of Corporate Affairs. Meanwhile, DHFL committed default in servicing obligations on all NCDs issued by it. The Central Bureau of Investigation (the CBI) registered a First Information Report (FIR) No.RC 2192020 E0004 dated 07.03.2020 against two of the promoters of DHFL, namely, Kapil Rajeshkumar Wadhawan and Dheeraj Rajeshkumar Wadhawan. The Enforcement Directorate (ED) also undertook investigations. 63 Moons filed Commercial Summary suit No.1332 of 2019 before the Hon'ble Bombay High Court against DHFL for recovery of amounts due under the NCDs. However, a moratorium was imposed by the National Company Law Tribunal, Bombay on 03.12.2019 upon admitting a



petition for insolvency resolution against DHFL. Therefore, 63 Moons could not prosecute the summary suit in Bombay.

The suit and the interim applications

3. In these facts and circumstances, 63 Moons instituted the present suit seeking a judgment and decree against the first to eleventh defendants, jointly and severally, for a sum of Rs.231,60,00,000/-, which consists of Rs.200,00,00,000/- as principal and Rs.31,60,00,000/- as interest at 24% per annum until 31.05.2020 along with further interest at 24% per annum from 01.06.2020 till the date of repayment. The first defendant is a limited company, which promoted DHFL. The second and third defendants are the former Chairman and Managing Director and former Director of DHFL, respectively. The fourth defendant is the former Chief Executive Officer (CEO) of DHFL. The fifth defendant is the former Chief Financial Officer (CFO) of DHFL. The sixth and seventh defendants are the credit rating agencies (CRAs) which rated the relevant NCDs. The eighth defendant was the Statutory Auditor from the financial year 2016-2017 to the financial year 2017-2018. The ninth and tenth defendants were the statutory auditors up to the financial year 2015-2016. The eleventh defendant is the Debenture Trustee.



4. In the above mentioned suit, 63 Moons filed applications seeking interim relief by way of interim injunction, appointment of commissioner, disclosure of assets, provision of security, etc. By order dated 24.06.2020, all the respondents were restrained from alienating, encumbering or dealing with any of their assets pending further orders and the first defendant was restrained from declaring and disbursing dividend. Applications were filed by the defendants to vacate the said interim orders. The said interim orders are in force as on date. In addition, the defendants filed applications to revoke leave, reject or return the plaint, strike off their names from the array of parties, stay the suit or dismiss the plaintiff's applications. All the interim applications are dealt with and disposed of by this common order.

5. Before dealing with the applications for grant of injunction or to furnish security, including the applications to vacate orders passed in such applications, the applications to reject or return the plaint or to strike off a party from the array of parties are dealt with.

6. Application No.2676 of 2020 was filed by the ninth defendant to reject the plaint. Application No.2786 of 2020 was filed by the eighth defendant to reject the plaint. Application No.2877 of 2020 was filed by the



seventh defendant to delete the name of the said defendant from the array of parties. Application No.2788 of 2020 was filed by the eighth defendant to strike off the name of the said defendant from the array of parties. Application No.3069 of 2020 was filed by the seventh defendant to reject the plaint. Application No.657 of 2021 was filed by the fourth defendant to reject the plaint. Application No.658 of 2021 was filed by the sixth defendant to strike off its name from the plaint and Application No.659 of 2021 was filed by the sixth defendant to reject the plaint. In all these applications, common considerations arise. Therefore, these applications are dealt with and disposed of jointly.

The counsel

7. Oral submissions on behalf of the applicant/plaintiff were made by Mr.Nithyaesh Nataraj, learned counsel; on behalf of the first to third defendants by Ms.Anbarasi Rajendran for M/s.AAV Partners, learned counsel; on behalf of the fourth defendant by Mr.P.R.Raman, learned senior advocate, assisted by Mr.Arun C.Mohan; on behalf of the fifth defendant by Mr.R.Ravindran, learned counsel; on behalf of the sixth defendant by Mr.R.Parthasarathy, learned counsel; on behalf of the seventh defendant by Mr.Rohan K George, learned counsel; on behalf of the eighth defendant by



Mr.Anirudh Krishnan, learned counsel; and on behalf of the ninth defendant by Mr.Rahul Balaji, learned counsel. Although Mr.Akhil Bhansali and Mr.K.M.Aasim Shehzad, learned counsel, entered appearance for the eleventh defendant, they did not appear or make submissions when the matter was heard. The cause list discloses that their vakalat was returned. Written submissions were provided by the plaintiff, fourth and sixth to ninth defendants.

Contentions in the applications to reject the plaint or strike off parties

8. In support of the applications to reject the plaint, the following contentions were raised by learned counsel for the respective applicant:

(i) The suit claim arises out of the prospectus issued by DHFL in relation to the issuance and allotment of NCDs. Upon default by DHFL in fulfilling its payment obligations under the NCDs, 63 Moons filed Summary Suit No.1332 of 2019 before the Bombay High Court. The said suit was for recovery of amounts due and payable by DHFL under the NCDs. The cause of action for the said suit and the present suit is identical. The plaintiff did not apply for or obtain leave in Commercial Summary Suit No.1332 of 2019



for filing the present suit on the same cause of action. Therefore, the present suit is barred under Order II Rule 2 CPC.

(ii) The NCDs were issued by DHFL. Without joining DHFL as a party, the suit does not disclose a cause of action. Therefore, the plaint is liable to be rejected on the basis of statements made in the plaint.

(iii) The ninth defendant was the Statutory Auditor until the financial year 2015-2016. The prospectus was issued on 25.08.2016, which is after the 9th defendant resigned as statutory auditor. Therefore, the ninth defendant is liable to be deleted from the array of parties. The fourth and eighth defendants also resigned in February, 2019 and August, 2019, respectively, and, therefore, should not have been joined as parties in the suit filed in 2020.

9. These contentions were countered by learned counsel for the plaintiff on the following grounds:

(i) Commercial Summary Suit No.1332 of 2019 was filed before the Bombay High Court for non payment of amounts due and payable under the NCDs by DHFL. Therefore, the Bombay suit was for recovery of debts due and payable by DHFL. In contrast, the present suit is for payment of



compensation by the defendants to the plaintiff for losses caused due to misstatements in the prospectus and negligence in the performance of statutory obligations by the defendants. Consequently, the present suit is an action to recover compensation and not for a debt due. The causes of action for the two suits are distinct. Hence, it is not necessary to apply for leave under sub-rule 3 of Order II Rule 2 of the Code of Civil Procedure, 1908 (the CPC) before instituting the suit before this Court.

(ii) DHFL is not a necessary party to this suit. The relief claimed in the suit may be granted even in the absence of DHFL inasmuch as the defendants herein failed to discharge their statutory and common law duties *qua* debenture holders such as the plaintiff and made misstatements in the prospectus.

(iii) Financial statements of DHFL, which were audited by the ninth and tenth defendants, were referred to and relied upon in the prospectus. Therefore, the said defendants are liable and cannot be deleted from the array of parties. As regards the other defendants, they played a central role in the issuance of the prospectus, either as experts or as senior officers of DHFL. Therefore, notwithstanding their resignation, they cannot be absolved of liability.



(iv) The Division Bench of this Court examined the scope of the summary suit in the Bombay High Court vis-a-vis the present suit and concluded that the cause of action for the present suit is distinct and that DHFL is not a necessary party. The judgment of the Division Bench is binding as on date and the special leave petitions challenging such judgment were dismissed. Therefore, it is not open to the respective applicant to seek rejection of the plaint or deletion of the applicant from the array of parties.

Discussion, analysis and conclusion on applications to reject the plaint and strike off parties

10. The respective applicant seeks rejection of plaint on the ground that the plaint does not disclose a cause of action and on the ground that the suit appears from the statements in the plaint to be barred by law. The main basis on which it was contended that the suit is barred by law is that the cause of action for the present suit and the suit before the Bombay High Court is identical. In order to test the validity of this contention, the plaint in the suit filed by 63 Moons before the Bombay High Court should be examined. On perusal thereof, it is evident that it is a suit to recover a debt due under the NCDs issued and allotted to 63 Moons. In *Iron and*



Hardware (India) Co. v. Shamlal and Brothers, ILR Bom739, a Division

Bench of the Bombay High Court dealt extensively with the question as to what constitutes a debt due. The Court concluded that there should be an obligation at present although the discharge of the obligation may take place subsequently. In any action to recover a debt due, therefore, there should be a subsisting obligation to be performed by the defendant for the plaintiff. As regards the Bombay suit, DHFL was under a subsisting obligation to make payments to debenture holders as per the terms of allotment under the prospectus. Therefore, 63 Moons sued DHFL for a debt due under the contract between 63 Moons and DHFL. In contrast to an action for recovery of a debt due, in an action for damages, there is no debt due and payable by the defendants to the plaintiff at the time of institution of the action. The plaintiff's right, at that juncture, is merely the right to make the claim. Such claim is required to be proved by the plaintiff and only upon issuance of a decree by the Court, the claim transforms into a debt. As regards the present suit, 63 Moons is claiming compensation from the defendants for losses allegedly caused to 63 Moons by the actions or inactions of the defendants. Although the plaintiff endeavoured to label the action as an action for compensation and not an action for damages, it is in



essence an action for damages. In an action for damages, at least three essential elements should be established by the plaintiff. The first element is to establish that the defendants were either under a statutory or common law obligation to not make misstatements or protect the interest of an investor like the plaintiff, and that the defendants failed to fulfil the said obligation. Upon establishing the first element, the plaintiff should establish that the failure to fulfil obligations resulted in a loss to the plaintiff and that the defendants are liable to compensate the plaintiff for such loss. As the third and final element, it is incumbent on the plaintiff to prove the extent of loss since the claim is for unliquidated damages. Thus, it is clear that the cause of action for the suit is distinct from the cause of action for the summary suit in Bombay.

11. In OSA (CAD) Nos.24 to 27 of 2021, *63 Moons Technologies Limited v. Brickwork Ratings India Private Limited*, Judgment dated 23.09.2021, which was part of a batch of cases (***Hindustan Unilever***), the Division Bench of this Court dealt with the cause of action in the Bombay suit vis-a-vis the cause of action for the present suit. Paragraphs 157 to 159 of the judgment of the Division Bench are particularly relevant. Therefore, the said paragraphs are set out below:



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"157. There is no doubt, as the plaintiff suggests, that the trial court completely failed to construe the nature of the suit that the plaintiff herein instituted before the Bombay High Court. It is also evident that the trial court misread Section 35 of the Act of 2013 in holding that a suit under such provision "should be filed against the company and every other individual whom the plaintiff claims to be responsible for the reports made in the prospectus." The finding in such regard is clearly exceptionable. On a plain reading of the provision, it is apparent that the liability of the company and the several other persons indicated in Section 35(1) of the Act of 2013 are joint and several. That is apparent from the ordinary reading of sub-section (1) and, in any event, by virtue of sub-section (3) of Section 35 of the Act of 2013 in its use of the words "every person referred to in sub-section (1) shall be personally responsible ...". Thus, the fact that DHFL was not a party to this suit was of little consequence and the trial court erred in founding its opinion on such flawed and irrelevant consideration. Since insolvency proceedings had been commenced against DHFL by the time the suit was instituted, DHFL could not have been impleaded as a party by virtue of Section 14 of the Code of 2016 and



the punishment attracted under Section 74(2) thereof for violation of such provision.

158. In fact, the plaintiff's Bombay suit, for all practical purposes, does not survive upon the resolution plan pertaining to DHFL being approved by the NCLT.

159. The perception by the trial court that it would be convenient for the two suits to be tried together betrays the failure to appreciate the nature of the two actions. The Bombay suit was filed under Order XXXVII of the Code as a summary action founded on the contract between the plaintiff and DHFL qua the repayment of the amount invested by way of debentures. It is trite law that a claim in damages founded on the fraudulent conduct of the defendant or defendants can scarcely be instituted under Order XXXVII of the Code.”

After noticing that the suit before this Court is an action for damages, including for breach of Section 35 of the Companies Act, 2013 (CA 2013), the Division Bench noticed that a suit under Section 35 is maintainable against all persons indicated therein and that every person is personally responsible for the violation of Section 35. It is also significant to notice



that the Division Bench recorded that the moratorium operates against the continued prosecution of the Bombay suit and that the Bombay suit does not survive for all practical purposes upon the resolution plan pertaining to DHFL being approved by the NCLT. Upon being carried in appeal, the judgment of the Division Bench was not interfered with by the Hon'ble Supreme Court in the order dated 10.10.2022 in a batch of Special Leave Petitions, where the first case was SLP No. 2626 of 2022.

12. Thus, there is no doubt that the cause of action for the present suit is distinct from the cause of action on which the summary suit against DHFL was filed in Bombay. Since the causes of action are distinct, the bar under Order II Rule 2 CPC is not attracted. This is evident from the language of Order II Rule 2(1), which is set out below:

***"2.Suit to include the whole claim.-(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make **in respect of the cause of action**; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court."**(emphasis added)*

In order to establish that a suit is barred under Order II Rule 2, it is necessary for the applicant to establish that both suits are founded on the same cause of action. As detailed earlier, the suit in the Bombay High Court



was for recovery of a debt due and payable by DHFL to 63 Moons. Such debt was in terms of the debentures issued and allotted to 63 Moons, which created the debt and entailed repayment by DHFL to 63 Moons. By contrast, the present suit is for compensation or damages for alleged infraction of Section 35 of CA 2013, statutory and common law obligations imposed on one or more of the defendants herein. As on the date of the suit, the defendants are not under any legal liability to 63 Moons. Such liability would crystallize only if the suit were to be decreed wholly or in part. For reasons set out above, all the applications to reject or return the plaint are devoid of merit. Consequently, the said applications are liable to be rejected. Accordingly, Application Nos.2676, 2786 and 3069 of 2020 and Application Nos.657, 658 & 659 of 2021 are dismissed.

13. Turning to the applications seeking deletion of parties from the array of parties to the suit, these applications are premised on the assumption that the said parties are not necessary or proper parties to the suit. In the suit, the plaintiff seeks a money decree against all the defendants, jointly and severally. The test to decide whether a party is a necessary party is to ask the question whether an enforceable decree may be issued in the absence of such party. Given the nature of the money decree



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claimed by the plaintiff, each defendant is a necessary party and the decree prayed for cannot be issued in the absence of the defendants. While it is open to one or more of the defendants to plead and prove that such defendants are not liable for the suit claim, the defendants concerned cannot be deleted from the array of parties at this juncture. Therefore, the applications for deletion of the respective applicant from the array of parties is untenable. Consequently, the said applications are liable to be rejected. Accordingly, Application Nos.2788 and 2877 of 2020 are dismissed.

Contentions in applications for injunction and provision of security

14. The applications seeking interim injunction or orders for the provision of security, and the applications seeking to vacate orders passed in such applications remain to be considered. In support of these applications, learned counsel for 63 Moons, Mr.Nithyaesh Nataraj, submitted that the prospectus was issued on 25.08.2016 on the strength of ratings assigned by the sixth and seventh defendants, which were the CRAs. Both the CRAs assigned the highest rating offered by them to the NCDs. The eighth defendant was the statutory auditor in the financial year 2016-2017 when the NCDs were issued. By relying on the audited financial



statements for the financial year 2015-2016, which had been prepared by the

ninth and tenth defendants, he submitted that the said financial statements were re-stated and approved by the eighth defendant. The first defendant was the promoter company of DHFL, the second and third defendants were the former Chairman and Managing Director and former Director of DHFL, respectively. Therefore, he contended that the said persons are squarely responsible for the default by DHFL in fulfilling its obligations under the NCDs. Equally, he submitted that the fourth and fifth defendants, who were the former CEO and CFO of DHFL, are liable because they held key managerial positions when the prospectus was issued. The eleventh defendant is the Debenture Trustee and was enjoined with the obligation of protecting the interest of debenture holders such as the plaintiff. Since the plaintiff subscribed to and, thereafter, held 20 lakh debentures by relying upon the statements made in the prospectus and the rating assigned by the CRAs, he submitted that all the defendants are liable. He also pointed out that until the Cobra Post article, neither of the rating agencies downgraded the ratings. Such ratings were downgraded for the first time in February 2019 and the default occurred a few months later in the same year.



15. Learned counsel referred to the loans extended by DHFL to sham entities. He pointed out that the ninth defendant was the auditor of several group companies to which funds were diverted such as RKW Developers, Sun Blink and Cloud Mind. By referring extensively to the forensic audit report of Grant Thornton, he pointed out that the gross misappropriation of public money is established by the said report. In particular, he pointed out that the report records that the money ostensibly disbursed against 2.6 lakh home loan accounts were actually siphoned off to off-balance sheet loan accounts, which came to be referred to as the Bandra books. For the same purpose, he also relied upon the report submitted by the CBI and the ED in pending criminal proceedings.

16. According to learned counsel, the facts speak for themselves and such large scale diversion of funds could not have occurred without the complicity of the defendants herein. As a result, the plaintiff lost the entire investment of Rs.200,00,00,000/-. Therefore, the defendants are liable to be restrained from dealing with their assets and/or directed to provide security for the suit claim. In support of these contentions, he referred to and relied upon the following judgments:



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(1) *N.Narayanan v. Adjudicating Officer, Securities and Exchange Board of India, 2013 (2) SCC 152.*

(2) *Indian Mineral and Chemicals Co. and Ors. v. Deutsche Bank, AIR 2004 SC 3615.*

(3) *Isha Distribution House Pvt. Ltd. v. Aditya Birla Nuvo Ltd and Ors., AIR 210 SC 1413.*

(4) *The State of Maharashtra v. Sarvodaya Industries, Akola, 1974 SCC Online Bom 21.*

(5) *Raju Das & others v. Sushil Kumar Das & Ors, (1991) 1 Gauhati Law Reports 367.*

(6) *Adams v. Thrift, (1915) 2 Ch. 21 (1915)*

(7) *V.Natarajan v. Securities and Exchange Board of India SEBI Bhavan, 2011 SCC Online SAT 75.*

(8) *Securities and Exchange Board of India v. Kishore R.Ajmera, (2016) 6 SCC 368.*

(9) *B.P.Achala Anand v. S.Appi Reddy and another (2005) 3 SCC 313.*

(10) *PGF Limited and others v. Union of India and another, (2015) 13 SCC 50.*



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(11) Securities and Exchange Board of India v. Kaniyalal

Baldevbhari Patel, (2017) 15 SCC 1.

(12) Securities and Exchange Commission v. Banner Fund

International, et al., Eddie R.Blackwell, Manu/UDCC/0015/2000.

(13) Securities and Exchange Commission v. Capital Gains

Research Bureau, 1962 SCC Online US 206.

(14) Securities and Exchange Board of India v. Rakhi

Trading Private Limited, (2018) 13 SCC 753.

(15) Mohanraj and Others v. Shah Brothers Ispat Pvt Ltd,

2021 SCC Online SC 152.

(16) Morgan Crucible Co. Plc v. Hill Samuel & Co Ltd.,

Court of Appeal, (1977) 2 W.L.R. 655.

(17)ABN AMRO Bank v. Bathurst Regional Council [2014]

FCA FC 65.

(18) Basis Incorporated, et al v. Max Levinson, et al, 1988

SCC OnLine US SC 45.



17. Learned counsel for the first to third defendants submitted that these applications are not maintainable because there is no debt due from the defendants to the plaintiff. By drawing reference to the judgment in *Iron and Hardware (India) Co. v. Shamlal and Brothers, 1954 ILR Bom 735* and the subsequent judgment of the Hon'ble Supreme Court in *Union of India v. Raman Iron Foundry, (1974) 2 SCC 231*, it was submitted that the defendants cannot be called upon to provide security when there is no debt due and payable as on the date of institution of the suit.

18. Mr.P.R.Raman, learned senior counsel for the fourth defendant/former CEO, submitted that the fourth defendant resigned on 13.02.2019. He pointed out that the fourth defendant was no more than an employee of DHFL. He was not named in the prospectus. He was not a member of the audit committee or the risk management committee. Since it is an action for unliquidated damages, he contended that the defendants cannot be directed to provide security for the suit claim. Although the fourth defendant signed the financial statements up to the financial year 2017-2018, he stated that even *prima facie* fraud cannot be attributed to the fourth defendant. He referred to the judgment of the United States Court of Appeals for the Second Circuit in *Alex E. Rinehart and others v. John F.*



Akers and others, Judgment dated 15.07.2013, and pointed out that even after the collapse of Lehman Brothers, a mega financial institution, liability was not imposed in the absence of proof of culpability. He also placed reliance on the judgment of the United States Court of Appeals for the Second Circuit in *Police and Fire Retirement System of the City of Detroit v. Moody's Investors Service Inc. and others, Judgment dated 11.05.2011*, wherein the Court rejected the contention that rating agencies qualify as underwriters as per Section 11 of the US Securities Act of 1933. He also referred to the judgment relating to the scam in the National Spot Exchange Limited (NSEL) and pointed out that the plaintiff has not come to court with clean hands and is therefore not entitled to equitable relief. The list of judgments referred to and relied upon by learned senior counsel are set out below:

(1) *Kohinoor Steel Private Limited v. Pravesh Chandra*

Kapoor, 2010 SCC Online Cal 1856.

(2) *Ashwani Pan Products Pvt. Ltd v. Krishna Traders,*

2012 (128) DRJ 592.

(3) *State of Maharashtra v. 63 Moons Technologies Ltd.,*

2022 SCC Online SC 506.



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(4) *63 Moons Technologies Limited and Ors. v. The*

Administrator of Dewan Housing Finance Corporation

Limited and Ors. MANU/NL/0083/2022.

(5) *Alex E. Rinehart and others v. John F. Akers and others,*

United States Court of Appeals, Docket No. 11-4232-cv.

(6) *Moore Stephens(a firm) v. Stone Rolls Limited, [2009]*

UKHL 39.

19. Learned counsel for the fifth defendant, the former CFO, made submissions next. He pointed out that the fifth defendant resigned from DHFL on 18.03.2019. By referring to paragraph 121 of the plaint, he submitted that the plaintiff asserted that the cause of action arose on 16.09.2019 for the first time. Since the fifth defendant had resigned prior thereto, he submitted that the suit is not maintainable against the fifth defendant. His next contention was that a culpable mind is necessary to establish fraud and that in the absence of a full fledged trial, the plaintiff cannot establish culpability. Therefore, these applications are liable to be rejected. After adverting to the requirements of Orders 38 and 39 CPC, he pointed out that the suit and the present applications are liable to be



dismissed *in limine* on account of non-joinder of DHFL. In order to establish this contention, he referred to Section 35 of CA 2013 which uses the expression "the company and every person who". In view of the express language of Section 35, he contended that this action is not maintainable unless the company is joined as a party thereto.

20. Mr.Parthasarathy made submissions on behalf of the sixth defendant (CARE). By referring to the report of the US Securities and Exchange Commission (the SEC) in January,2003, he submitted that a CRA is not an auditor. *A fortiori*, a CRA is certainly not a forensic auditor. He submitted that a CRA relies on financial statements provided by the company concerned. By drawing reference to the order dated 22.09.2020 of SEBI, he pointed out that the role of a CRA was discussed therein at paragraphs 21, 23 and 85. After referring to the paragraphs of the plaint which relate to the CRAs, he contended that the plaintiff failed to discharge the burden of providing particulars of fraud as required by Order VI Rule 4 CPC. By turning to the rating agreement dated 18.06.2014, he pointed out that the rating is reviewed on quarterly basis for listed companies. For purposes of such review, he stated that capital adequacy, profitability, and the extent of non performing assets are the key considerations. He then



referred to the rationale for ratings followed by the sixth defendant over a period of time. With reference thereto, he stated that the gross and net non-performing assets (GNPA and NNPA) were at comfortable levels through 2016 and 2017. As regards the loan against property and project finance portfolios of DHFL, he stated that these portfolios were gradually increasing in proportion to the total assets under management, but the said segments had to be observed over a period of time before taking any steps for re-rating.

21. After the Cobra Post article, he submitted that DHFL was unable to raise funds because of the precipitous fall in share prices. Therefore, the CRA downgraded the rating in February, 2019 and made further downgrades through the first half of 2019 after observing asset liability mismatches. He emphasized that the CRA does not have access to the books of account and that its approach is analytical and not forensic. He reiterated that 63 Moons is a financially literate plaintiff, which is well versed in reading and comprehending financial statements. Therefore, the plaintiff cannot be excused for failing to provide requisite particulars as per Order VI Rule 4 CPC. In support of these contentions, learned counsel referred to and relied upon the following judgments:



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(1) *Sri Raja Sobhanadri Appa Rao Bahadur v. Sri Raja*

Parthasarathi Appa Rao Savai Aswa Rao Bahadur and others, (1932) 35 LW 279.

(2) *Nagubai Ammal & others v. B.Sharma Rao and Others, AIR 1956 SC 593.*

(3) *Iron and Hardware (India) Co. v. Shamlal and Brothers, 1954 ILR Bom 735.*

(4) *Kohinoor Steel Private Ltd. v. Parvesh Chandra Kapoor, AIR 2011 Cal 29.*

(5) *Bishundeo Narain and Another v. Seogeni Rai and Jagernath, AIR 1951 SC 280.*

(6) *Binendra Nath Srivastava v. Mayank Srivastava and others 1994 6 SCC 117.*

(7) *India Power Limited v. ICRA Limited, CS(OS) 128/2020 and I.A.No.3860/2020 and I.A.No.3934/2020 dated 18.08.2020.*

22. Mr.Rohan K.George, learned counsel for the seventh defendant, made submissions on behalf of the said defendant. After



adverting to the paragraphs of the plaint which referred to the seventh defendant, he contended that the ingredients of Order 38 Rule 5 CPC were not satisfied. By referring to the judgment in ***Jindal Power*** and the Credit Rating Agency Regulations, 1999(the CRA Regulations), he outlined the duties of a CRA. He thereafter referred to the rating policy of the seventh defendant. With reference to the periodical reviews conducted by the seventh defendant, he submitted that all statutory obligations under CA 2013 and the CRA Regulations were adhered to strictly by the seventh defendant. He also referred to the SEBI order on the plaintiff's role in the collapse of the NSEL to underscore the fact that the plaintiff is complicit in financial wrong doing and cannot claim equity before this Court. In support of these contentions, learned counsel referred to and relied upon the following judgments:

(1) Guna Narain Gupta v. Tiluckram Chowdhry and others,

(1887- 88) 15 IA 119.

(2) Balbir Singh Mayal and others v. Municipal Corporation of

Delhi and others, MANU/DE/1698/2009.

(3) Bhavani Stores Pvt Ltd. v. National Fertilizers Ltd, 1995

SCC Online Del 877.



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(4) *Golf Technologies (p) Ltd and Another v. Axis Bank Ltd.*

And others, 2015 SCC Online Del 9869.

(5) *HDFC Bank Limited v. Ashapura Minechem Limited,*

MANU/GJ/1686/2017.

(6) *Punjab National Bank v. J.Samsath Beevi and others 2010*

(3) CTC 310.

(7) *NCC Limited v. Sembcorp Gayatri Power Ltd and Others,*

MANU/AP/0762/2017.

(8) *S.Krishnaswamy and others v. South India Film Chamber of Commerce and others, 1967 SCC Online Mad 132.*

(9) *Svenska Handelsbanken v. Indian Charge Chrome and others, (1994) 1 SCC 502.*

(10) *Raman Tech. And Process Engg. Co. and others v. Solanki Traders, MANU/SC/8119/2007.*

(11) *Sundaram Fastners Ltd v. S.Venkatesan, MANU/TN/0783/2014.*

(12) *Premraj Mundra v. Md. Maneck Gazi and Others, MANU/WB/0033/1951.*



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(13) *Jindal Power Ltd v. ICRA Ltd CS(OS) 128/2020, Delhi*

High Court.

(14) *Almondz Global Securities Limited v. SEBI 2016 SCC*

Online SAT 59.

(15) *Imperial Corporate Finance & Services Pvt. Ltd. v. SEBI*

2004 SCC Online SAT 52.

23.Mr.Anirudh Krishnan, learned counsel, made submissions on behalf of the eight defendant, M/s.Chaturvedi and Shah. He pointed out that the eighth defendant was appointed on 21.07.2016 and resigned on 22.08.2019. By drawing reference to the judgment in *Union of India v. R.N.Rajam Iyer, 1962-77-L.W.207*, he submitted that a statutory auditor is expected to undertake enhanced scrutiny of the books of account only on notice of fraud. As regards the Bandra books, he stated that the percentage of disbursement was higher in earlier financial years and declined thereafter when the eighth defendant held office. He also pointed out that the ostensible loan accounts were duly serviced and therefore no red flags were raised. He pointed out that both Deloitte and the eighth defendant resigned in August, 2019 for the same reasons, whereas the plaintiff has chosen to



join only the eighth defendant as a defendant. By referring to the order of SEBI in the case of *Parsvnath Developers Limited*, 2019 SCC OnLine Sebi 37, he pointed out the difference between a statutory auditor and forensic auditor.

24. As regards the alleged misstatements in the prospectus, he stated that reliance was placed on the re-stated financial statement of previous years. Therefore, the eighth defendant is not responsible in respect thereof. He also pointed out that the eighth defendant was not the auditor for any of the Bandra entities. By drawing reference to Section 35 of CA 2013, he submitted that the plaintiff failed to provide any particulars of the alleged misstatement. By drawing reference to the judgment in *Moore Stephens v. Stone Rolls Limited*, (2009) UKHL 39, he submitted that the duty of care of the auditor is primarily to the company and not to the debenture holders. He concluded his submissions by referring to the judgment of the Hon'ble Supreme Court in *Raman Tech and Process Engineering Co v. Solanki Traders* (**Raman Tech**), (2008) 2 SCC 302 and pointed out that the power under Order 38 Rule 5 CPC is a drastic power which should not be exercised except where really warranted since it would



have the effect of converting an unsecured liability into a secured liability.

The other judgments relied upon by learned counsel are set out below:

(1) *Bhushan Steel and Strips Limited v. Prem H Lalwani*,
(2000) 53 DRJ 483.

(2) *Renox Commercials Limited v. Inventa Technologies Private Limited*, AIE 2000 Mad 213.

(3) *Fertilizer Corporation of India Limited v. Indian Explosive Ltd.*, (2005) SCC Online Cal 622.

(4) *Gem Graphics v. Sri Sai Papers* (20130 1 LW 452.

(5) *Parsvnath Developers Ltd v. SEBI* 2019 SCC Online SEBI 37.

(6) *Berg Sons Co. Ltd and others v. Adams and others*,
(1992) BCC 661

(7) *Plan Assure PAC v. Gaelic Inns Pte. Ltd*, [2007] SGCA 41

(8) *Department of Company Law Administration, Ministry of Commerce and Industry v. R.N.Raja Iyer, Chartered Accountant and another*, (1964) 77 LW 207.



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(9) *B.Ganesh v. Superintendent of Police, Central Bureau of Investigation, Economic Offences Wing, MANU/TN/4219/2017.*

(10) *International Air Transport Association v. Smt. Aziz Fatima Hasnain and Another, AIR 1985 Del 381.*

(11) *K.Ragadoss v. Lyca Productions and others MANU/TN/1268/2020.*

25. Mr.Rahul Balaji, learned counsel for the ninth defendant, made submissions next. He submitted that the ninth defendant resigned in the year 2016. Therefore, he submitted that the suit is not maintainable against the ninth defendant in terms of Section 35 of CA 2013. He pointed out that the plaintiff is a sophisticated investor. By drawing reference to Section 147 of CA 2013, he submitted that the statute imposes liability on the auditor towards the entire body of creditors or members and not individual creditors or members. Such liability arises upon conviction under Section 147(2). Since the statute provides for liability only upon conviction, he contended that the object and purpose of the statute would be defeated if individual creditors or members are permitted to institute actions against the statutory auditor. He placed reliance on a number of judgments



on the role of an auditor, the duty of care owed by an auditor, to whom such duty is owed and the like. The following is the list of judgments he relied on:

- (1) *Caparo Industries Plc. v. V.Dickman & others*(**Caparo Industries**), (1990) 2 W.L.R. 358.
- (2) *Manchester Building Society v. Grant Thornton, UK* (**Manchester Building Society**)[2021] UKSC 20.
- (3)*Hercules Managements Ltd & Ors. v. Ernst Young & Ors* (**Hercules Managements**)[1997]2 R.C.S. 165.
- (4) *P.W.C. v. SEBI, Appeal No.6 of 2018*.
- (5) *Laxmi Raj Shetty and another v. State of Tamil Nadu* (1988) 3 SCC 319.
- (6) *Bachhaj Nahar v. Nilima Mandal and another*(**Bachhaj Nahar**), (2008) 17 SCC 491.
- (7) *The Premier Automobiles Ltd v. Kamlekar Shantaram Wadke of Bombay and others*, (1976) 1 SCC 496.
- (8) *South Delhi Municipal Corporation and another v. Today Homes and Infrastructure Private Limited and others*, (2020) 12 SCC 680.



(9) *Tri-Sure India Ltd. v. A.F.Ferguson and Co. &*

WEB COPY *others,(1987) 61 Comp Cas 548.*

He concluded his submissions by referring to the judgment of the Hon'ble Supreme Court in ***Bachhaj Nahar*** with regard to the critical role played by pleadings in civil suits. In the absence of any particulars in the plaint, he submitted that the plaintiff is not entitled to any interim relief.

26. By way of rejoinder, learned counsel for the plaintiff referred to Regulation 3 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (LODR) and pointed out that both the CEO and CFO were required to provide compliance certificates to the Debenture Trustee. As regards the Bandra books, he submitted that monies were diverted by reflecting 2.6 lakh ostensible home loan accounts in the books of DHFL. In response to the contention of the defendants with regard to the nature of the suit, he submitted that the suit is both under Section 35 of CA 2013 and under tort law. As regards Order 38 Rule 5 CPC, he submitted that interim relief is not barred even in a suit for compensation. As regards the alleged non-joinder of DHFL or any other party, he submitted that the plaintiff is *dominus litis* and that such non-joinder does not absolve the defendants of liability. Although the plaintiff is financially literate, he



submitted that the plaintiff is not an expert. As regards the NSEL dispute, he contended that the said dispute is irrelevant for purposes of the present case.

By drawing reference to Section 14 and 74(2) of the Insolvency and Bankruptcy Code, 2016 (the IBC), he submitted that it is not possible to implead DHFL and that the plaintiff would be liable to be prosecuted if DHFL were made a party. He referred to the judgment of the Division Bench in *Hindustan Lever* to substantiate the contention that the defendants are jointly and severally liable under Section 35 of CA 2013. By drawing reference to the order of SEBI(Volume 5), particularly paragraphs 15,16 and 19, he submitted that the financial statements of DHFL from the financial years 2006-2007 to 2018-2019 did not provide a true and fair account. By advertng to the obligations of CRAs, he pointed out that they noticed the exposure to risky construction finance portfolios but failed to take timely action. As a consequence, there was a precipitous increase in the GNPA and fall in the capital-to-risk weighted assets ratio(CRAR). He also submitted that the pleadings are sufficient for purposes of Sections 35 to 37 read with Sections 447, 448 of CA 2013 and that fraud in the context of the securities market does not call for the type of pleadings required in general civil proceedings.



Discussion, analysis and conclusions on interim injunction and security

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27. Upon considering the above submissions, the first question that falls for consideration is whether an application seeking interim relief in the form of interim injunction or provision of security is maintainable in the context of a suit for damages. As dilated upon earlier, an action for damages is not a suit for a debt due because there is no existing monetary obligation from the defendants to the plaintiff. Does that mean that no interim relief can be granted in an action for damages? All interim relief is granted in exercise of equitable jurisdiction by the Court and such relief may be granted, in appropriate cases, even if the relevant action is one for damages. Although this is an action for damages, a significant aspect is that the plaintiff admittedly invested in 20 lakh debentures under two separate issuances for an aggregate sum of Rs.200,00,00,000/-. The statement from the depository, National Securities Depository Limited, is on record in this regard. It is the admitted position and judicial notice may be taken of the fact that DHFL failed to fulfil its obligations towards all debentures holders, including the plaintiff. Consequently, there is no escaping the fact that the plaintiff was put to a loss of at least Rs.200,00,00,000/-. Thus, the loss incurred by the plaintiff is self evident and does not call for a trial. What



remains is the attribution of responsibility for the loss incurred by the plaintiff on account of the failure by DHFL to fulfil its obligations.

28. The plaintiff asserted that it had joined all the persons who /which played a central role in the issuance of debentures by DHFL. The persons arrayed as parties by the plaintiff may be classified into about four categories. The first to third defendants qualify as promoters of DHFL. The fourth and fifth defendants fall into a separate category because they were senior officers of DHFL, who meet the requirement for being classified as key managerial personnel under CA 2013. The two CRAs, the sixth and seventh defendants, fall into a distinct category inasmuch as they were experts whose services were utilized by DHFL for rating the relevant security. Admittedly, both the CRAs assigned the highest rating to the securities. Such ratings were downgraded for the first time in 2019 after the Cobra Post article. The eighth to tenth Defendants form a separate category. These firms were the statutory auditors of DHFL either when the prospectus was issued or in the preceding financial years. The eleventh defendant is the Debenture Trustee and was enjoined with the statutory obligation of protecting the interest of debenture holders.



The Promoters

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29. As regards the promoters(the first to third defendants), there is no disputing their responsibility for the mismanagement of DHFL and the statements made in the financial statements and prospectus of DHFL. Indeed, the second and third defendants were members of the Finance Committee of DHFL. The only contentions raised on behalf of these defendants is that there is no debt due and payable by the defendants to the plaintiff as on the date of institution of the suit. As indicated earlier, the absence of a debt due and payable by the defendants to the plaintiff, as on the date of the institution of the suit, is a material consideration in interlocutory proceedings for interim relief but is not an embargo on the right to interim relief. By earlier orders of this Court, all the defendants were restrained from alienating, encumbering or otherwise dealing with their assets. DHFL went into an insolvency resolution process and it is not possible to initiate action against the corporate entity after the resolution plan of Piramal Enterprises was accepted. These defendants are accused in criminal proceedings relating to the fraud and mismanagement of the affairs of DHFL. In the facts and circumstances, this order is fully justified as regards the first to third defendants. Consequently, the said order should



continue to operate as against the said defendants unless and until they provide security for the entire principal suit claim.

Key Managerial Personnel

30. Turning to the fourth and fifth defendants, these defendants occupied the exalted positions of CEO and CFO, respectively, until they resigned in 2019. Both these officers were responsible for issuing compliance certificates to the CRAs. The CFO was obligated to examine the books of accounts and involve himself in the preparation and finalization of the financial statements of DHFL. The CFO executed the Debenture Trust Deed on behalf of DHFL. The documents on record establish *prima facie* that large loans were extended to entities allegedly executing SRA projects by taking a charge/mortgage of development rights. These documents also *prima facie* indicate that the money disbursed against 2.6 lakhs home loan accounts were actually siphoned off to off-balance sheet loan accounts, which came to be referred to as the Bandra books. While third party experts such as the CRAs may be able to contend with a measure of justification that they were not responsible for the preparation of the books of accounts and financial statements, such defence is not available to the fourth and fifth defendants. At the interlocutory stage, it may be concluded that *prima*



facie they were both negligent and failed to fulfil their statutory obligations.

Therefore, the interim order shall continue to operate against these defendants also until each of them provides security to the extent of 15% of the suit claim.

The CRAs

31. As regards the liability of the sixth and seventh defendants, the plaintiff asserted that they were the named experts in the prospectus. The plaintiff further contended that they had assigned the highest credit rating to the NCDs and that such credit rating was relied upon by the plaintiff in subscribing to NCDs. The plaintiff also contended that such rating was not downgraded until the Cobra Post article was published in January 2019.

32. The CRAs do not deny that they rated the NCDs or that they provided the highest rating to the NCDs. The admitted position is that they downgraded the rating for the first time in early 2019 after the Cobra Post article. The CRAs endeavoured to justify the belated downgrading on the ground that the financial statements did not disclose any red flag. Before examining the documents on record with regard to the rating reviews of the CRAs, the law on the liability of CRAs merits consideration.



The statutory matrix

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33. The principal statutory instrument by which CRAs are regulated is the CRA Regulations. Under Regulation 14, the CRA is required to enter into an agreement with each client whose securities it proposes to rate. Clause (c) and (d) of Regulation 14 mandate that the client shall co-operate with the CRA in order to enable periodic review and to arrive at and maintain a true and accurate rating of the rated securities. Regulation 15 expressly imposes a monitoring obligation and clause (1) is as under:

“15 (1) Every credit rating agency shall, during the lifetime of securities rated by it continuously monitor the rating of such securities, unless the rating is withdrawn, subject to the provisions of Regulation 16(3).”

Regulation 16 imposes the obligation on CRAs to periodically review the rating of the security in respect of which they provide the initial rating throughout the life of the relevant instrument. Clause (1) of Regulation 16 is set out below:

“ 16. (1) Every credit rating agency shall carry out periodic reviews of all published ratings during the lifetime of the securities, unless the rating is



withdrawn, subject to the provisions of regulation 16(3).”

Even if the issuer does not consent to the reviewed rating, a CRA is entitled to publish the same. Hence, in ***Jindal Power***, the Delhi High Court refused to interfere with the rating downgrade by the CRA although the issuer refused to accept the same. Likewise, in *First Leasing Company of India Ltd. v. ICRA Limited*, MANU/TN/1186/2000, this Court refused to accept that the CRA should await the audited accounts before publishing a revised rating. Such rating cannot be withdrawn as long as there are outstanding obligations under the rated instruments except in limited circumstances such as the winding up, merger or amalgamation of the issuer entity. Any infraction of the CRA Regulations would render the CRA liable to the actions set out in Part V of the SEBI (Intermediaries) Regulations, 2008 (the Intermediaries Regulations). As per Regulation 26(1) of the Intermediaries Regulations, the actions that a designated authority may recommend are *inter alia* cancellation of the certificate of registration; suspension of the certificate of registration for a specified period; prohibition of the noticee from taking up any new assignment or contract or launching a new scheme for such period as may be specified; debarment of an officer of the noticee from being employed with a registered intermediary for a specified period or



the debarment of a branch or office of the noticee from carrying out activities for a specified period. Thus, the CRA Regulations impose statutory obligations on CRAs and provide a statutory mechanism for dealing with infractions *inter alia* by the above mentioned measures being taken by the designated member of SEBI on recommendation by the designated authority. But the CRA Regulations do not deal with or regulate the liability of the CRA to investors in securities rated by it. Whether there is a duty of care and liability under common law is considered next.

Duty of care and liability under common law

34. Here, the debentures had a tenure of seven years. Consequently, the CRAs were under the continual obligation of reviewing the rating periodically. In the context of the liability of experts, the first question that arises is whether they owe a duty of care and, if so, to whom. CRAs are engaged by the issuer who pays for the services. Undoubtedly, therefore, CRAs owe a duty of care to the issuer company. Apart from the issuer, do they owe a duty of care to persons who invest in instruments rated by them? Both the sixth and seventh defendants contended that they fulfilled their duties and cannot be expected to adopt a forensic approach. In ***ABN AMRO Bank***, in the specific context of liability of credit rating



agencies, before proceeding with its analysis, the Federal Court of Australia summarised the applicable principles for ascertaining the existence of a duty of care as follows:

“573.... For the purposes of this appeal, the applicable principles may be summarised as follows. First, for there to be a duty to exercise reasonable care in making a statement or giving advice:

(1)The speaker must realise, or the circumstances must be such that the speaker ought to have realised, that the recipient of the information or advice intends to act on that information or advice in connexion with some matter of business or serious consequence; and

(2) The circumstances must be such that it is reasonable in all circumstances for the recipient to seek, or to accept, and to rely upon the utterance of the speaker....”

Thereafter, the Court considered and rejected S&P's argument that liability should not be imposed on S&P because it did not know the precise identity of the class of investors. The relevant parts of paragraph 591 and 593 of the judgment are set out below:



“591.....S&P's business included the provision of independent expert opinions on the creditworthiness of “products” and to hold itself out as doing so, amongst other things, by publicly publishing and explaining its ratings. Indeed, the only available information as to the creditworthiness of the Rembrandt notes was S&P's rating. The risk S&P assumed for reward was liability to those persons who invested in the Rembrandt notes in reliance on the rating and who then suffered loss caused by the fact that the creditworthiness of the notes was much lower than that disclosed by S&P's rating. From an allocation of risk perspective, it cannot be said that the precise identity of the recipient of the expert information was a necessary element. S&P knew the investors (described as “interested parties”) existed and authorised the distribution of the rating to them. The criteria in Tepko were and are sufficient, without more, to address that aspect of the issue.”

“593..... Here, the class was not indeterminate. It was both known and identified. It was possible to identify the class to whom the duty was owed as investors in the Rembrandt notes. This is sufficient. Liability was not indeterminate because S&P did not know the precise identity of the members of the class, the exact



number of members in the class or the exact loss. S&P knew what it needed to know. It knew the characteristics of the class. S&P knew that a characteristic of the class was that each was an investor in the Rembrandt notes. S&P also knew the foreseeable type of loss. It is the nature of loss, not the precise amount which is relevant: Perre v Apand at 221-222[107]-[108]. Here, the nature of the foreseeable loss was not in doubt. S&P knew that if S&P's opinion as to the creditworthiness of the notes was careless, investors were likely to lose the money they had invested in the notes."

Finally, the Court concluded that S&P(the CRA) and ABN Amro Bank (the issuer) were both liable in tort for negligence in relation to the issue and rating of a complex financial instrument called the Rembrandt Notes.

35. By the same token, here, a prospectus was issued in respect of NCDs. The investors in such instrument constitute a distinct class, which included the plaintiff. The rating was provided to DHFL at its request and was provided by the CRAs for the specific purpose of holding out to prospective investors that debt obligations would be duly serviced if investment is made in the NCDs. When the CRAs provided the ratings and reviewed the same, they were aware that the ratings would be relied upon by



investors. While I agree that liability cannot be extended to prospective investors as such investors are indeterminate, as regards registered debenture holders, this objection is untenable. Thus, *prima facie*, both the CRAs owed a duty of care to the plaintiff and it remains to be seen if they failed to fulfil such duty.

36. The limited information on record discloses that DHFL increased its exposure to loans against property(LAP) and project and construction finance, which are high ticket items and consequently risky. Neither of the CRAs provided a satisfactory explanation with regard to the information called for from DHFL and the conclusions drawn therefrom during the periodic review of ratings. Significantly, as per the SEBI Circular dated 30.06.2017, the issuer is required to provide a 'no default' statement on a monthly basis to the CRA in a prescribed format. These certificates were not produced by either CRA and it is unclear whether such certificates were provided by DHFL to the CRAs and, if so, until when.

37. The CRAs placed for consideration the rating reviews carried out by them and these make for interesting reading. Unlike banks, NBFCs do not have the benefit of low cost current account and savings account (CASA) funds. Therefore, it is common knowledge that one of the biggest



challenges faced by NBFCs is ensuring that sufficient liquidity is available by averting asset-liability mismatches. In the review conducted by BWR on 07.07.2016, it is stated that the liquidity position is comfortable both in the short and long term. In the next available review on 20.07.2017, BWR states that the liquidity position is comfortable for the short to medium term but that housing finance companies (HFCs) have mismatches in the long-term which need to be managed appropriately. More or less identical language is seen in the reviews that followed on 04.05.2018 and 03.09.2018. What is noticeable during the above reviews is that the specific cash flow data: projected inflow versus outflow of funds is not set out. Between 03.09.2018 and 02.02.2019, there is no review on record. The review on 03.02.2019 is after the Cobra Post article. During this review, the first downgrade is made from BWR AAA to BWR AA+. Even during this review, no specific information is provided with regard to liquidity. For the first time, during the review on 09.03.2019, while downgrading from BWR AA+ to BWR AA, specific information is set out regarding liquidity. BWR states that an inflow of Rs.6600 crore is due by way of EMI between March and May 2019 and that about Rs.4700 crore is available in the form of liquid assets. As against this, the outflow towards meeting obligations is stated to be



Rs.10300 crore. Even if 10% of the inflow did not materialise, it is clear that a default loomed large by then.

38. As regards reviews by CARE, in the review carried out on 06.07.2017, there is reference to delay in fixed deposit repayment for 2-14 days in April 2017. Strangely, this is not recorded in the review by BWR on 20.07.2017. In the review on 07.05.2018, CARE records that the share of LAP, SME and builder loans had increased to 39% of the total loan book as of March 2018. Up to this point, particulars of the liquidity position are not contained in the reviews. In the review on 30.11.2018, for the first time, CARE refers to the expected monthly collections of Rs.2700 crore up to March 2019 and the average outflow per month of Rs.2600 crore. This was sufficient to set alarm bells ringing. CARE has also placed on record a CRISIL rating of specific securities on 02.02.2019. In this rating, CRISIL records that DHFL raised about Rs.11,873 crore through portfolio sell-down and that this was around 75% of the incremental funding. CRISIL also recorded that the average monthly inflow was Rs.2200 crore and that the average monthly outflow was Rs.3400 crore. The writing was on the wall by this time and, in the review on 06.03.2019, CARE recorded a negative cumulative mismatch of Rs.3750 crore for March-May 2019.



39. The above discussion leads to the strong *prima facie* conclusion that both the CRAs did not provide details of the progressively weakening liquidity of DHFL in their reviews. More importantly, they did not take reasonable notice or give reasonable weight to the same and downgrade the ratings on such basis. Instead, they waited until DHFL's collapse became imminent before downgrading the ratings. By so doing, a strong *prima facie* inference may be drawn that they failed to fulfil their statutory and common law obligation to monitor and review the ratings so as to provide a true and accurate rating. For such reason, they are *prima facie* liable. Therefore, the CRAs cannot be absolved from liability.

The Auditors

40. The three firms of auditors (the eight to tenth defendants) endeavoured to absolve themselves of responsibility on the ground that they were not responsible for the financial statements, which were referred to and relied on in the prospectus. While the eighth defendant contended that the financial statements for the financial years 2011-2012 to 2015-2016 were relied upon in the prospectus and that the eighth defendant did not carry out audit during the said period, the ninth defendant contended that the prospectus was issued in the financial year 2016-2017 after the said



defendant had resigned. However, the question arises as to whether they owe a duty of care to the plaintiff.

Statutory Duty

41. Chapter IX of CA 2013 deals with the accounts of companies and Chapter X deals with audit and auditors. As per Section 134(2), the auditor's report shall be attached to every financial statement. Section 136(1), subject to the limited deviation as regards listed entities, confers on members and debenture-holders, represented by the debenture trustee, the right to receive a copy of the financial statement, including the attached auditor's report. Section 142(2) provides *inter alia* that the audit report should state that, to the best of the auditor's information and knowledge, the accounts and financial statements give a true and fair view of the state of the company's affairs as at the end of the financial year and the profit and loss and cash flow for the year. 143(3) prescribes the statements that should be contained in the audit report. Of particular relevance, are the following:

“(3) The auditor's report shall also state-

(a) whether he has sought and obtained all the information and explanations which to the best of his knowledge and belief were necessary for the



purpose of his audit and if not, the details thereof and the effect of such information on the financial statements;

(b)whether in his opinion proper books of account as required by law have been kept by the company so far as appears from his examination of those books and proper returns adequate for the purposes of his audit have been received from branches not visited by him;

(d)whether the company's balance sheet and profit and loss account dealt with in the report are in agreement with the books of account and returns;

(e)whether, in his opinion, the financial statements comply with the accounting standards;

(f)the observations or comments of the auditors on financial transactions or matters which have any adverse effect on the functioning of the company;

(h)any qualification, reservation or adverse remark relating to the maintenance of accounts and other matters connected therewith;”

Auditor's Duty of Care under common law

42. The eighth and ninth defendants relied on ***Caparo Industries*** to contend that an auditor owes a duty of care to the company whose



accounts are audited but not to an individual debenture holder. In **Caparo**

Industries, the plaintiff, Caparo Industries Plc., purchased shares of Fidelity Plc. (Fidelity) after the accounts for the financial year ended 31.03.1984 were adopted. Caparo Industries sued two directors of Fidelity and Touche Ross & Co., its auditor. In that factual context, the House of Lords held that an audit is carried out for the purpose of examining whether the financial statements and the underlying accounts represent a true and fair view of the financial status of the company. After recognising the role of proximity and fairness in fixing the duty of care, Lord Bridge of Harwich quoted with approval the following passage from Lord Denning's dissent (subsequently affirmed as stating the law correctly in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C.465) in *Candler v. Crane Christmas & Co.*[1951] 2 K.B.164:

“....Secondly, to whom do these professional people owe this duty? I will take accountants, but the same reasoning applies to the others. They owe the duty, of course, to their employer or client; and also I think to any third person to whom they show the accounts, or to whom they know their employer is going to show the accounts, so as to induce him to invest money or take some other action on them.”



In the specific factual context of the investment being made after the audit report was provided, Lord Bridge recorded the following findings:

“....The situation is entirely different where a statement is put into more or less general circulation and may foreseeably be relied on by strangers to the maker of the statement for any one of a variety of different purposes which the maker of the statement has no specific reason to anticipate. To hold the maker of the statement to be under a duty of care in respect of the accuracy of the statement to all and sundry for any purpose for which they may choose to rely on it is not only to subject him, in the classic words of Cardozo C.J. to 'liability in an indeterminate amount for an indeterminate time to an indeterminate class:' see Ultramares Corporation v. Touche (1931) 174 N.E.441, 444....”

“These considerations amply justify the conclusion that auditors of a public company's accounts owe no duty of care to members of the public at large who rely upon the accounts in deciding to buy shares in the company. If a duty of care were owed so widely, it is difficult to see any reason why it should not equally extend to all who rely on the accounts in relation to other dealings with a company as lenders or merchants extending credit to the company....”



Lord Jauchey of Tullichettle examined the provisions of the English Companies Act 1985 and recorded the the following as regards obligations *qua* accounts:

“Three matters emerge from the statutory provisions, namely: (1) that the responsibility for the preparation of accounts giving a fair and true view of the company's financial state is placed fairly and squarely on the shoulders of the directors; (2) that the role of the auditors is to provide an independent report to the members on the proper preparation of the balance sheet and profit and loss account, and as to whether those documents give a true and fair view respectively of the state of the company's affairs at the end of the financial year and of the company's profit and loss for that year . Their role is thus purely investigative rather than creative; and (3) that the company's accounts, including the auditors' report will be furnished to all members of the company as well as to debenture holders and any other persons entitled to receive notice of general meeting. The accounts will, of course, also be available to any member of the public who chooses to examine the company file in the office of the Registrar of Companies.”



43. The same principle was affirmed in **Moore Stephens** in the context of an action by a company in liquidation for fraud by its former controlling shadow director. **Moore Stephens**, however, turned largely on the *ex turpi causa* principle since the fraud was perpetrated by the former controlling shadow director of a company construed as a one-person company and the company was the plaintiff. As would be evident from the provisions of CA 2013, which were reproduced previously, the position, role and responsibilities of an auditor in India substantially mirror that in the UK. Therefore, even in the Indian context, I do not see any reason to depart substantially from the principles laid down in **Caparo Industries**. The conclusion that may be drawn thereby is that the auditor owes a duty of care to the company and all registered shareholders and debenture holders at the time of submission of the audit report and its adoption by the members.

44. Applying these principles to the fact situation, 63 Moons became a debenture holder upon subscribing to the debentures floated under the prospectus. In the case of shareholders, whose interest is ordinarily aligned with that of the company, an argument that the company should espouse the cause may be required to be dealt with by a complaining shareholder. As regards debenture holders, the argument that the debenture



trustee and not an individual debenture holder should espouse the cause could ordinarily be made. But, here, the plaintiff alleges with *prima facie* a fair measure of justification that the Debenture Trustee failed to fulfil obligations to debenture holders, including 63 Moons. Therefore, such objection is untenable.

45. The ninth and tenth defendants audited the accounts from the financial year 2011-2012 to 2015-2016, i.e. the financial years that preceded the issuance of the prospectus. As regards these defendants, on the principles discussed above, when they undertook audit, the plaintiff would not fall within the determinate class of persons who could be expected to rely on the audit reports. Moreover, it appears *prima facie* that it was not reasonably foreseeable that the audit report would be relied upon to invest in NCDs pursuant to a prospectus issued after they resigned as auditors. Thus, although *prima facie* liable to the company and the then registered shareholders, the ninth and tenth defendants, *prima facie*, do not owe a duty of care to the plaintiff. This conclusion is tentative and would be subject to evidence, if any, that these defendants were aware that their audit reports would be relied on by persons investing in these debentures pursuant to the prospectus or otherwise. By contrast, as regards the eighth defendant, who



were the statutory auditors when the prospectus was issued and continued as the statutory auditors in financial years 2016-2017 and 2017-2108, it is reasonably foreseeable and, indeed, probable that all persons who invest in the debentures would rely on the financial statements that were referred to in the prospectus. Indeed, the prospectus contains an express statement to the effect that the statutory auditor has consented to the inclusion of their name, as required under Section 26(1)(v) of CA 2013, and for being treated as an expert in terms of Section 2(38) thereof. It is also reasonably foreseeable that registered debenture holders would rely on the audited financial statements of DHFL for the following financial years for purposes of deciding on whether to stay invested in the NCDs. As regards the financial statements for the following financial years, i.e. 2016-2017 to 2017-2018, the eighth defendant carried out the audit and cannot disclaim responsibility. Whether the eighth defendant failed to exercise reasonable care should be considered next.

46. The financial statements for the previous five years were referred to in the prospectus as material documents. Therefore, they were intended to be relied upon by investors. The defence that the eighth defendant raised, in that regard, is that they did not audit the accounts in



those years. While the said contention is factually correct, the prospectus indicates that the reformatted consolidated and standalone financial statements for the above mentioned financial years were examined and approved by the eighth defendant. In fact, the material documents listed therein include the consent of the auditor for the inclusion of their name and the report on the reformatted financial statements. Clearly, some responsibility and liability should be attached to a statutory auditor who examines and approves reformatted financial statements even if the weight attached thereto is not equal to that attached to an auditor's report.

47. 63 Moons has placed on record the sanction letters issued by DHFL to about ten real estate developers such as RIP Developers Pvt. Ltd., Kanitha Real Estate Pvt. Ltd., Earleen Real Estate and the like. Out of these, two sanction letters were issued in the financial year 2015-2016. The sanction letter dated 20.10.2015 in favour of RIP Developers Pvt. Ltd. (RIP Developers) shows that a project loan of Rs.725 crore was sanctioned towards a purported slum rehabilitation authority project (SRA project). The security for the loan is an exclusive charge by way of a registered mortgage over development rights! The sanction letter dated 9.05.2015 for a sum of Rs.475 crore in favour of Kanitha Real Estate (Kanitha) for a SRA project is



similarly purportedly secured by an exclusive charge over the undivided share in development rights.

48. In the documents filed by the ninth defendant, documents relating to these two loans are included. From the document relating to RIP Developers, it is evident that the loan of Rs.725 crore was disbursed in one tranche although the sanction letter provided for sanction in two tranches. The other significant aspect that may be noticed is that the loan to value (LTV) is more than 75% and this was approved by DHFL by reckoning future receivables and the aggregate share value of not only RIP Developers but also Kanitha. A third noteworthy aspect is that the title was cleared conditionally by taking approval for a deviation. The document relating to Kanitha similarly discloses that the entire loan was disbursed in one tranche, the LTV was also in excess of 75% and approval for deviation in the title report was to be taken from the Finance Committee. From the independent auditor's report, attached to both the standalone and consolidated financial statements of DHFL, it is evident that there is no qualification, reservation or adverse remark either in this respect or any other. The eighth defendant also does not state that any qualification was contained in the report on the reformatted financial statements. The grievance of the plaintiff was not, in



any case, limited to the financial statements that preceded the prospectus but extended to those that succeeded it. As regards the accounts for the financial years 2016-2017 and 2017-2018, the admitted position is that the eighth defendant carried out the audit and submitted the report. Can it be said that the audit was done without exercising reasonable care? I turn to that aspect next.

49. All the remaining eight sanction letters for SRA projects follow the same pattern of being secured by a charge/mortgage over development rights and were issued in the financial year 2016-2017. The amounts sanctioned are in the range of Rs.360-675 crore. It cannot be discerned from the balance sheet or even the relevant note thereto whether the loans were disbursed because such granular details are unavailable. Certainly, the books of account would contain the details and the auditor was duty bound to examine the same in course of audit. The eighth defendant did not assert that these loans were not disbursed or provide any explanation in relation thereto. From the independent auditor's report of the eighth defendant, attached to both the standalone and consolidated financial statements of DHFL for the financial years 2016-2017, it is evident that there is no qualification, reservation or adverse remark in this respect or in



any other. Therefore, *prima facie*, the eighth defendant owed a duty of care to 63 Moons and failed to discharge such duty while approving the reformatted financial statements and while auditing the accounts later. It was reasonably foreseeable that investors in the NCDs would rely on the financial statements. If restricted to registered debenture holders by excluding prospective investors, they would constitute a determinate and not indeterminate class. In fact, in ***Manchester Builders Society***, the UK Supreme Court held liable the auditor who provided technical accounting advice in relation to interest rate swaps as a method of hedging against mismatch arising out of the primary mortgage business of the company concerned. In contrast to ***Caparo Industries***, the auditor was held liable because advice was provided with the knowledge that it would be relied upon to avoid mismatch and thereby obviate the need for higher regulatory capital.

50. 63 Moons also placed on record the report dated 27.08.2020 of Grant Thornton. This report deals extensively with 2,50,315 fictitious home loan accounts (the Bandra books) and the actual disbursement of about Rs.11,755.79 crore to 91 entities between the financial years 2006-2007 and 2018-2019. The eighth and ninth defendants contended that an



audit is different from a forensic audit and that they were unable to discover the above fraud in course of statutory audit. Given the scale and duration of fraud, *prima facie*, the auditors cannot be absolved of responsibility. Auditors are enjoined to examine the books of account before carrying out and completing the audit. They are also empowered to call for further information if there are gaps in the books of accounts or financial statements and, indeed, even qualify their audit report. The manner in which DHFL collapsed over the period when the eighth defendant played a critical role as statutory auditor leads to the strong *prima facie* conclusion that they failed to fulfil their statutory obligations, thereby causing immense losses to investors such as the plaintiff. Therefore, they cannot be absolved from responsibility and liability.

Duty of care and liability of Debenture Trustee

51. The Debenture Trustee consented in writing to the inclusion of its name in the prospectus. The prospectus expressly provides as under:

"The Debenture Trustee will protect the interest of the NCD Holders in the event of default by us in regard to timely payment of interest and repayment



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of principal and they will take necessary action at our cost."

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A Debenture Trust Deed was executed on 06.09.2016 by and between DHFL and the Debenture Trustee, Catalyst Trusteeship Limited. Section 71 of CA 2013 and Regulation 16 of the SEBI(Debenture Trustees)Regulations, 1993 mandate that a debenture redemption reserve (DRR) should be created in the manner prescribed by a company which issues debentures. The Debenture Trust Deed provided for a first ranking *pari passu* charge over the receivables, both present and future, as security for the debenture holders. Undoubtedly, therefore, the Debenture Trustee owed a duty of care to the debenture holders, including 63 Moons, both under statute and common law. Upon service of notice, M/s Akhil Bhansali and Aazim Shehzad, learned counsel, appeared on behalf of the Debenture Trustee on 15.07.2020, but not thereafter. According to 63 Moons, the Debenture Trustee/eleventh defendant did not take action to protect the interest of debenture holders and the facts on record corroborate such contention. In fact, the communication dated 24.06.2019 from the Debenture Trustee discloses that DRR was not created either for the financial year ended



31.03.2018 or 31.03.2019. Therefore, there is a strong *prima facie* case that the Debenture Trustee was negligent and is, therefore, *prima facie* liable.

Apportionment of liability to secure claim

52. All the defendants who were represented by counsel contended with great vigour that this is an action for unliquidated damages and, therefore, the interim order in force should be discharged and that the defendants should not be called upon to provide security. They placed reliance on several judgments such as ***Raman Tech.*** While ***Raman Tech*** and other judgments underscore that the remedy under Order 38 CPC is drastic, the law does not impose an embargo on granting such relief in an action for damages. An unusual feature of this action is that the loss incurred by 63 Moons is self-evident. Equally, the causal connection between subscribing to the debentures and the loss is also undisputed. Of course, it still remains to be decided as to the extent such loss can be attributed to each defendant for breach of their respective statutory and/or common law obligations. In course of drawing conclusions on the duty of care and *prima facie* liability of the classes of defendants, I concluded that the first to third defendants are undoubtedly liable. They are parties to criminal proceedings and their assets are attached. Therefore, the order of interim injunction will continue



to operate against their assets unless they fully secure the principal claim.

Because of the order of attachment and the pending criminal proceedings, it is unlikely that these defendants will provide security. This aspect should be and is being factored while apportioning the liability to provide security so as to ensure that the suit claim is reasonably secured. As regards the fourth and fifth defendants, the key managerial personnel, I concluded that the fourth respondent was entrusted with all round managerial responsibility and was one of the persons responsible for issuing compliance certificates and that the fifth respondent was entrusted with direct responsibility in the preparation of accounts, the issuance of compliance certificates and even the execution of the Debenture Trust Deed. They are no longer in the employment of DHFL and they are not based in Chennai and it appears that they do not have assets within the jurisdiction of this Court. Similarly, as regards the CRAs, I concluded that they are *prima facie* liable. They are headquartered outside the jurisdiction of this Court and do not appear to have sufficient assets within the jurisdiction. The seventh defendant is also currently facing proceedings at the instance of SEBI in relation to its functioning as a CRA. Out of the auditors, I concluded that only the eighth defendant is *prima facie* liable. This defendant is also based outside



Chennai and may not have assets within Chennai. I also concluded that the eleventh defendant is liable. The eleventh defendant has chosen not to participate in proceedings after initially entering appearance through counsel. These facts and circumstances considered cumulatively, in context, justify the issuances of orders directing those found *prima facie* liable to provide security for the principal suit claim. At this juncture, liability to provide security for the suit claim cannot be apportioned with any degree of accuracy. Nonetheless, by taking into account the role played by the respective defendant, the obligation to provide security is apportioned for interlocutory purposes.

53. For reasons set out above, the following orders are issued:

(1) All the applications to reject or return the plaint (Application Nos.2676, 2786 and 3069 of 2020 and Application Nos.657, 658 & 659 of 2021) are dismissed.

(2) All the applications to delete a party from the array of parties(Application Nos.2788 and 2877 of 2020) are dismissed.

(3) All the applications for injunction, to vacate the injunction and to provide security are disposed of as follows:



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(i) The order of interim injunction shall continue to operate against the first to eighth and eleventh defendants until they provide security for the principal suit claim in the following proportions and manner:

(ii) the first to third defendants, jointly and severally, to the extent of 100% of the claim;

(iii) the fourth and fifth defendants, each to the extent of 15% of the claim;

(iv) the sixth and seventh defendants, each to the extent of 10% of the claim;

(v) the eighth defendant to the extent of 10% of the claim;
and

(vi) the eleventh defendant to the extent of 10% of the claim;

(vii) The securities, if provided, shall be tested by the Assistant Registrar (O.S.). If such securities are satisfactory, on application, the order of interim injunction against the party concerned shall be discharged; and



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(viii) The order of interim injunction against the ninth and
tenth defendants is vacated.

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SENTHILKUMAR RAMAMOORTHY, J.

rrg

Pre-Delivery Common Order in

Original Application

Nos.230 to 232 of 2020

and

A.Nos.1431 to 1433, 2676,

2677, 2786 to 2788, 2877,

2883, 3069, 3294, 3295 of 2020

and

A.Nos.657 to 659 of 2021

in

C.S.No.154 of 2020

01.02.2023