IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 27.11.2023

Pronounced on : 05.12.2023

CORAM:

THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

Application No.3941 of 2023 in
C.S.(Comm.Div.)No.251 of 2022

Prathap. B .. Applicant/3rd defendant

vs.

1.Neelam Brahmbhatt
and others .. Respondents

For Applicant : Mr.A.K.Sriram, Sr. Counsel
for Mr.Dwarakesh Prabhakaran

For Respondents : Mr.Sharath Chandran
for Ms.Aditi Ashok

ORDER

This application has been filed by the third defendant in the suit seeking unconditional leave to defend the suit and also permit him to file written statement.

2.The suit has been filed as a summary suit seeking recovery of a sum of Rs.10,83,99,250/- together with interest at the rate of 12% per annum on Rs.8,56,00,000/- from 06.06.2022 till the date of realization. The respondent Nos.1 to 4 are the plaintiffs in the suit.

3.The plaintiffs claim that they had lent money to Mr.Pramod V.Naik who was the Managing Director of the fourth defendant Company on various dates as disclosed in paragraph No.12 of the plaint for the benefit of the fourth defendant company. The plaintiffs claim that they came to know about Mr.Pramod V.Naik through the third plaintiff. According to the plaintiffs, when the said amount was lent to Mr.Pramod V.Naik, the fourth defendant company did not have any assets at that point of time and was reeling under financial crisis. According to the plaintiffs, Mr.Pramod V.Naik and the defendants 2 and 3 stood as personal guarantors and the 4th defendant stood as Corporate Guarantor for the due repayment of the loan by Mr.Pramod V.Naik. According to the plaintiffs, loans were given by the respective plaintiffs only to bailout the fourth defendant company from its precarious financial position. The plaintiffs have filed documents along with the plaint for the purpose of proving that the loan amounts have not been repaid by Mr.Pramod V.Naik, the borrower, who passed away on 03.03.2020.

4.According to the plaintiffs, Mr.Pramod V.Naik has not fulfilled any of the contractual obligations as per the loan agreements and personal guarantee executed by him. According to the plaintiffs, in terms of the loan agreements, during the period between September, 2019, and March, 2020, Mr.Pramod V.Naik paid only a portion of the interest accrued on each of the loans and has not paid any portion of the principal amount. According to the plaintiffs, the interest payable under the respective loan agreements is either 3% or 7.5%. The details of the loan documents and the amount of loan disbursed by each of the plaintiffs are disclosed in paragraph No.12 of the plaint. As seen from the same, promissory notes, loan agreement, corporate guarantee, personal guarantee, letter of general lien and set off have been executed by the respective defendants to secure the loan amounts repayable to the respective plaintiffs. The details of the same are set out hereunder:-

Plaintiff Name	Neelam Brahmbhatt	Devendra Brahmbhatt	Darshan Khakhar	Kunal Patel	Harshada Brahmbhatt
Amount	2 Crore	25 Lakhs	20 Lakhs	2 Crore and 35 lakhs	3 Crore 76 Lakhs
Promissory note	18.02.2019 and 20.02.2019	27.09.2018	04.09.2018	06.08.2018 and 06.12.2018	11.07.2018, 27.03.2019, 17.04.2019, 10.01.2020
Loan Agreement	08.04.2019	09.01.2019	10.01.2019	06.08.2018and 03.01.2019	11.07.2018, 27.03.2019, 17.04.2019, 10.01.2020
Corporate Guarantee given by D4 - Kkrowten	08.04.2019	09.01.2019	10.01.2019	06.08.2018 03.01.2019	11.07.2018, 08.04.2019, 06.05.2019, 10.01.2020
Personal Guarantee	Given by D2 and D3	Given by D2 and D3	Given by D2 and D3	Given by D2 and D3	Given by D2 and D3
Security cheques	Given by Pramod Naik and D2 to D4	Given by Pramod Naik and D2 to D4	Given by Pramod Naik and D2 to D4	Given by Pramod Naik and D2 to D4	Given by Pramod Naik and D2 to D4
Letter of general lien and set off	08.04.2019	09.01.2019	09.01.2019	06.08.2018 03.01.2019	11.07.2018, 08.04.2019, 06.05.2019, 10.01.2020
Principal Amount repaid	NIL	NIL	NIL	NIL	NIL

5.The first defendant is the wife of Mr.Pramod V.Naik, the borrower. According to the plaintiffs, the entire loan amount was agreed to be repaid after one year from the date of signing the loan documents and the third plaintiff, who is the Power of Attorney holder for the plaintiffs 1, 2, 4 & 5, had the right to have access to the documents and books of accounts of Mr.Pramod V.Naik, pending repayment of the loans.

6.The plaintiffs claim that the defendants have breached their contractual obligations and security cheques issued by Mr.Pramod V.Naik and other defendants have also been dishonoured and the same is the subject matter of Section 138 proceedings instituted under the Negotiable Instruments Act. It is further contended by the plaintiffs that the fourth defendant does not own any assets as seen from the Auditor's Report for the financial year ending 31.03.2018. The defendants 2 and 3 are the directors of the fourth defendant company, for whom, the money was borrowed by Mr.Pramod V.Naik, the then Managing Director of the fourth respondent Company.

7.According to the plaintiffs, the total loan amount given by the plaintiffs to Mr.Pramod V.Naik for the benefit of the fourth defendant company is Rs.8,56,00,000/-. Since the defendants committed default in the repayment of the loan and failed to pay the interest, the plaintiffs claim that they had sent email to the defendants 2 to 4 on 29.04.2020 calling upon them to pay jointly and severally the principal amount of Rs.8,56,00,000/- together with interest as agreed upon. According to the plaintiffs, since the loan amounts were not repaid as per the respective contracts, the plaintiffs have filed this suit as a summary suit under Order VII of the Original Side Rules read with Order XXXVII of Civil Procedure Code. According to the plaintiffs, being a liquidated sum of money based on the promissory notes, personal guarantee letters and other loan documents, summary suit filed by them against the defendants is maintainable. According to them, the loan agreements read with promissory notes, Corporate Guarantee, Personal Guarantee and letter of general lien and set off executed by the respective defendants constitute valid and binding agreements between the plaintiffs and the defendants. The plaintiffs claim that they have invested their hard-earned savings, which run to several crores, and they would be irreparably prejudiced if a decree is not passed summarily for the amount claimed in the suit.

8.The defendants, excepting for defendant No.3, have not filed any leave to defend application to defend the suit.

9.The present application has been filed by the third defendant seeking unconditional leave to defend the suit and permit him to file written statement, on the following grounds:-

(a)The applicant/third defendant is a chartered accountant by profession. According to him, the amount disclosed in the plaint was never lent to the applicant/third defendant as claimed in the plaint. No proof of disbursement has been produced to prove that the plaintiffs had in fact disbursed the loan to the borrowers.

(b)The signatures obtained from the applicant/third defendant by the plaintiffs were obtained through coercion and the applicant/third defendant never signed the guarantee documents voluntarily.

(c)The loan agreements are fabricated documents and some of them will reveal that the agreement has come into existence even before the date of stamp papers. Hence, the loan agreements alleged to have been executed by the third defendant are fabricated documents.

(d)In some of the loan contracts, the signature of the plaintiffs are not found, hence, the loan contracts and personal guarantee letters are fabricated documents, which were never executed by the applicant/third defendant.

(e)The applicant/third defendant never stood as personal guarantor for the repayment of the loan by Mr.Pramod V.Naik or the fourth defendant company.

(f)There are several triable issues involved in the suit and hence, unconditional leave to defend the suit and permission to file written statement ought to be granted to the 3rd defendant.

10.The third respondent/third plaintiff, who is the Power of Attorney holder of the plaintiffs 1, 2, 4 & 5 has filed a counter affidavit in the present application, stoutly denying that there are triable issues involved in the suit.

11.According to the plaintiffs, since the suit claim is being based only on the loan agreements and personal guarantee deeds, corporate guarantee executed by the respective defendants, there are no triable issues involved in the suit. They would also state that the cheques issued by the defendants towards repayment of the loan have also got dishonoured. According to them, the defences raised by the applicant/third defendant in this application seeking for unconditional leave to defend the suit are sham and nominal and it is moonshine. Being a Director of the fourth defendant Company and having stood as a personal guarantor, the applicant/third defendant is jointly and severally liable to pay the suit claim which is a liquidated debt along with other defendants. The suit claim being a liquidated debt and the claim being based on loan contracts/guarantee deeds, the suit filed as a summary suit under Order VII of the Original Side Rules is maintainable.

12.Heard Mr.A.K.Sriram, learned Senior Counsel for Mr.Dwarakesh Prabhakaran, learned counsel for the applicant and Mr.Sharath Chandran, learned counsel for Ms.Aditi Ashok, learned counsel for the respondents.

13.Learned Senior counsel for the applicant/third defendant drew the attention of this Court to the various documents filed by the plaintiffs along with the plaint and in particular, drew the attention of this Court to the loan contracts/guarantee deeds executed by the respective defendants/borrowers/guarantors and would submit that in some of the loan contracts, though the signature of the borrower is found, the plaintiffs have not signed those contracts and hence, the said loan contracts are not enforceable in law. He would also point out that in respect of some of the contracts, the date of the agreement is prior to the date of the stamp paper, which, according to him, will prove that the documents have been fabricated by the plaintiffs for the purpose of instituting the suit.

14.He would also submit that personal guarantee alleged to have been executed by the third defendant under a personal guarantee deed is also a fabricated document. He would also submit that Letter of Undertaking alleged to have been given by the applicant/third defendant on 16.07.2022 is also a fabricated document. Learned Senior counsel further submits that as seen from the respective power of attorney executed by the respective plaintiffs in favour of the third plaintiff, a suspicion arises over its valid execution. He would also submit that in one of the power of attorneys, the executant is a permanent resident of Zimbabwe, however, the power of attorney has been notarized and executed at Texas, USA. According to him, the loan documents, through which the plaintiffs seek recovery of money, are all fabricated documents and hence, the veracity of the same can be adjudicated only after the trial. According to him, there are several triable issues involved in the suit and therefore, only after the trial, the suit can be adjudicated on merits and in accordance with law. Therefore, the learned Senior counsel appearing for the applicant/third defendant seeks unconditional leave for the third defendant to defend the suit and further seeks permission of this Court for the third defendant to file his written statement.

15.On the contrary, the learned counsel for the plaintiffs would reiterate the contents of the plaint and would submit that the applicant/third defendant being the guarantor to the loan transaction as evidenced by the personal guarantee deeds executed by him as well as the letter of undertaking dated 16.07.2022 also executed by him undertaking to pay the outstanding loan amount in instalments, this application filed, seeking unconditional leave to defend, is not maintainable. In particular, he drew the attention of this Court to the letter of undertaking dated 16.07.2022 given by the applicant/third defendant pursuant to the letter of demand sent by the plaintiffs under which the applicant/third defendant has undertaken to pay an amount of Rs.7,25,69,250/- within a period of 12 months in 12 equal instalments as per the repayment schedule disclosed in the letter of undertaking.

16.Learned counsel for the plaintiffs would submit that being a guarantor to the loan transaction and having admitted his liability through his letter of undertaking dated 16.07.2022, the applicant/third defendant is jointly and severally liable to pay the outstanding loan amount along with the other defendants. He would also submit that frivolous grounds have been raised by the applicant/third defendant in this leave to defend application. He would further submit that being a liquidated and an undisputed debt, based on loan documents, guarantees and the letter of undertaking dated 16.07.2022, the question of granting unconditional leave to defend for the applicant/third defendant to defend the suit will not arise.

17.Learned counsel for the plaintiffs also drew the attention of this Court to a Judgment of the Honourable Supreme Court in the case of ***Housing Development and Finance Corporation Vs. Gautam Kumar Nag and Others*** reported in ***2012 (5) SCC 604*** and would submit that the applicant/third defendant cannot also seek the aid of Section 139 of the Contract Act, 1872 since the liability of the guarantor is equal and coextensive with that of the borrower.

18.Learned counsel for the plaintiffs also drew the attention of this Court to a Single Bench Judgment of the Bombay High Court in the case of ***Bharat Huddanna Shetty Vs. Ahuja Properties and Developers and Others*** reported in ***2021 SCC Online Bom 13984*** and would submit that it is clear from the said decision that the Commercial Courts Act, 2015 has not obliterated Order 37 of C.P.C. Hence, he would submit that the summary suit filed by the plaintiffs under the Commercial Courts Act, 2015 is maintainable.

19.Learned counsel for the plaintiffs also drew the attention of this Court to a Division Bench Judgment of the Bombay High Court in the case of ***Caribjet Inc. Vs. Air India Limited*** reported in ***2005 (2) Mh.L.J. 461***. Relying upon the said Judgment, the learned counsel for the plaintiffs would submit that as per the said Judgment, it is clear that only after leave was obtained under clause-12 of the Letters Patent, the plaint got admitted and entered in the Register of suits and therefore, the procedure for filing summary suit has been strictly adhered to by the plaintiffs.

Discussion:

20.The Honourable Supreme Court in the case of ***B.L.Kashyap and Sons Limited Vs. JMS Steels and Power Corporation and Another*** reported in ***2022 (3) SCC 294*** has laid down detailed guidelines while adjudicating leave to defend application in a summary suit. The guidelines laid down by the Honourable Supreme Court in the aforesaid decision are as follows:

a)If the defendant satisfies the Court that he has substantial defence, i.e., a defence which is likely to succeed, he is entitled to unconditional leave to defend;

b)Where the defendant raises triable issues indicating a fair or bonafide defence, albeit not a positively good defence, he would be ordinarily entitled to unconditional leave to defend;

c)Where the defendant raises triable issues, but it remains doubtful if the defendant is raising the same in good faith or about genuineness of the issues, the Trial Court may impose conditions both as to time or mode of trial as well as payment into the Court or furnishing security to balance the requirements of expeditious disposal of commercial causes and of not shutting out triable issues;

d)Where the proposed defence appear to be plausible but improbable, heightened conditions may be imposed as to the time or mode of trial as also of payment into the Court or furnishing security or both, which may extend to the entire principal sum together with just and requisite interest;

e)In the case where any part of the amount claimed by the plaintiff is admitted by the defendant, leave to defend is not to be granted unless the amount so admitted is deposited by the defendant in the Court.

21.The following are the undisputed facts:

a)The second and third defendants were the Directors of the fourth defendant Company when the loan was availed from the respective plaintiffs for the benefit of the fourth defendant Company;

b)Mr.Pramod V.Naik, the borrower, is the Managing Director of the fourth defendant Company for whose benefit the loans were given by the respective plaintiffs;

c)Mr.Pramod V.Naik died on 03.03.2020 after availing the loan amounts from the respective plaintiffs for the benefit of the fourth defendant Company. The first defendant is the wife of Late Mr.Pramod V.Naik, the borrower;

d)Excepting for the 3rd defendant who has filed this leave to defend application, the other defendants have not filed any leave to defend application.

e)The cheques issued by Mr.Pramod V.Naik and other defendants which includes the applicant/third defendant also towards part repayment of the loan have been returned dishonoured and the same is the subject matter of criminal proceedings initiated by the plaintiffs against them under Section 138 of the Negotiable Instruments Act which is pending on the file of the Chief Judicial Magistrate, I Class, Khambhat, Gujarat. The case status of Section 138 Negotiable Instruments Act proceedings are also disclosed in the plaint;

f)The plaintiffs have filed promissory notes executed by Mr.Pramod V.Naik and in addition to that loan agreements, Corporate guarantee agreement, personal guarantee agreement, letter of general lien and set off, and letter of undertaking executed by the respective defendants which includes the applicant/third defendant in favour of the respective plaintiffs by way of security for the due repayment of the loan, the details of the agreements executed by the respective defendants by way of security towards the due repayment of the loan has also been disclosed in para No.12 of the plaint and the said documents have also been filed by the plaintiffs along with the suit.

g)Mr.Pramod V.Naik, the Director of the fourth defendant Company while availing the loan has certified the Board resolution dated 27.12.2018 passed by the fourth defendant Company by which the fourth defendant Company has accorded sanction for the Board of Directors for borrowing money up to Rs.15,00,00,000/-. The said Board resolution has also been filed as a document along with the plaint.

h)The plaintiffs have filed documents which includes the personal guarantee deeds, executed by the applicant/third defendant, personally guaranteeing the due repayment of the loan by Mr.Pramod V.Naik, the borrower to the respective plaintiffs. Though the execution of the said documents are disputed by the applicant/third defendant on the ground that the said documents have not been signed by the respective plaintiffs, the applicant/third defendant has not disputed the signature of the applicant/third defendant contained in the personal guarantee letters which have been filed along with the plaint.

i)The applicant/third defendant after receipt of the letter of demand from the plaintiffs by their e-mail dated 29.04.2020 has also executed a letter of undertaking dated 16.07.2022 for the due repayment of the loan to the respective plaintiffs in 12 equal instalments as per the schedule of payments disclosed in the said letter of undertaking. The signature of the applicant/third defendant as found in the letter of undertaking dated 16.07.2022, referred to supra, has also not been disputed by him.

j)Cheques allegedly issued by the respective defendants in favour of the respective plaintiffs have been returned dishonoured. Section 138 proceedings under the Negotiable Instruments Act has been initiated against the defendants before the Chief Judicial Magistrate, I Class, Khambhat, Gujarat, against the plaintiffs. The said proceeding is still pending. Prima facie, sufficient documents have been produced by the plaintiffs to establish that monies were lent for which the suit claim has been initiated.

22. Learned Senior Counsel appearing for the applicant/third defendant, based on the application filed by the third defendant would contend that the loan documents/guarantees alleged to have been executed by the applicant/third defendant are fabricated documents. Excepting for pointing out certain lacunas like some of the loan documents having not been signed by the plaintiffs, but, have been signed only by the respective defendants, no documentary evidence has been produced by the applicant/third defendant, which prima facie will create suspicion in the mind of the Court about the veracity of the loan documents and personal guarantee and corporate guarantee letters.

23.The contention of the applicant/third defendant has been categorically denied by the learned counsel for the respondents/plaintiffs. Learned counsel for the respondents/plaintiffs would further submit that the defences raised by the applicant/third defendant are sham and nominal and they are moonshine defences.

24.As seen from the documents, executed by the applicant/third defendant and other defendants, the loan has been availed from the respective plaintiffs. The details of the loan documents executed by the defendants which includes the guarantee letter are also filed as documents along with the plaint. The personal guarantee letters executed by the respective defendants which have been filed along with the plaint also makes it clear that the guarantors which include the applicant/third defendant stood as guarantors for the due repayment of the loan by Mr.Pramod V.Naik. Though the applicant/third defendant disputes that the applicant/third defendant stood as guarantor and also disputes the loan agreements and personal guarantee letters which have been filed along with the plaint, he has not produced any iota of evidence to prove his contentions. The applicant/third defendant cannot piggy back on the minor discrepancies if any found in the execution of the documents filed along with the plaint for the purpose of substantiating triable issues in the suit. When the documents filed by the plaintiffs reveal the existence of the loan and the defendants' liability, mere allegations made by the applicant/ third defendant against the plaintiffs without any supporting evidence will not suffice. If the documents filed by the plaintiffs are fabricated, any prudent person would have lodged a criminal complaint. But for the reasons best known to him, the applicant/third defendant has not lodged any criminal complaint against the plaintiffs till now. Therefore, prima facie adverse inference can be drawn that the applicant/third defendant only as an after thought has raised the contention that the documents are fabricated.

25.The applicant/third defendant was admittedly the Director when the loan was availed by Mr.Pramod V.Naik for the benefit of the fourth defendant Company from the respective plaintiffs. The applicant/third defendant has also issued a letter of undertaking dated 16.07.2022 in favour of the plaintiffs which has been typed on Rs.100/- non judicial stamp paper and duly notarized. As seen from the letter of undertaking dated 16.07.2022, the applicant/third defendant has undertaken to pay the plaintiffs a total sum of Rs.7,25,69,250/- towards repayment of the loans with interest component in 12 equal instalments. The details of the payments to be made by the applicant/third defendant is also disclosed in para No.3 of the letter of undertaking dated 16.07.2022 executed by him in favour of the plaintiffs. In the letter of undertaking dated 16.07.2022, the applicant/third defendant has also undertaken to handover original title deeds of his residential property to Mr.Darshan Khakhar, the third plaintiff, who is also one of the investors who had lent money to Mr.Pramod V.Naik for the benefit of the fourth defendant Company.

26.As per the letter of undertaking dated 16.07.2022 executed by the applicant/third defendant, the last instalment payable is on 01.10.2023. The plaintiffs have categorically stated in the counter to this application as well as in the plaint that excepting for payment of portion of interest for the first few months, they have not received any payments from the respective defendants.

27. The remaining defendants have not filed any leave to defend application to defend the suit. The defendants 2 and 4 are also guarantors to the loan transactions along with the applicant/third defendant. Being the guarantors to the transaction, they would have defended the suit if they have a valid defence that too when the suit claim is for a huge sum. However, for the reasons best known to them, the

remaining defendants excepting for the third defendant have chosen not to defend the suit. A summary suit under C.P.C. as well as under the Original Side rules can be filed to recover a liquidated debt based on contracts entered into between the parties.

28.Admittedly, in the instant case, documents have been filed along with the plaint in the form of loan contracts, guarantee letters and letter of undertaking executed by the defendants for the due repayment of the loan to the respective plaintiffs. The amount undertaken to be paid by the applicant/third defendant has also been confirmed in the letter of undertaking dated 16.07.2022 and the said amount is Rs.7,25,69,250/-. As seen from the said letter of undertaking, the applicant/third defendant has given an unconditional undertaking to pay the plaintiffs a total sum of Rs.7,25,69,250/- in 12 equal instalments over a period of 12 months.

29.As seen from the letter of undertaking, the applicant/third defendant has also handed over post dated signed cheques towards the instalment amounts to the third plaintiff who is the power of attorney holder for the remaining plaintiffs. The cheques issued by the applicant/

third defendant has also been returned dishonoured and Section 138 proceedings under the Negotiable Instruments Act has also been initiated in respect of the dishonoured cheques against the applicant/third defendant as well as the other defendants.

30.Along with this application, the applicant/third defendant has not filed any documentary evidence in support of his contention that he did not stand as a guarantor for the due repayment of the loan by Mr.Pramod V.Naik or by the fourth defendant Company. Admittedly, only when the applicant/third defendant was the Director of the fourth defendant Company, the loan transaction, which is the subject matter of the suit, took place. When the applicant/third defendant has not disputed the signature in the loan documents/guarantee letters and sufficient proof having been produced by the plaintiffs for lending of money by the respective plaintiffs to Mr.Pramod V.Naik on behalf of the fourth defendant, the defences raised by the learned counsel for the applicant/third defendant seeking leave to defend do not appear to be a plausible one.

31.On considering the fact that the applicant/third defendant has played the dual role of a Director of the fourth defendant Company as well as the Chartered Accountant for the said Company as the third defendant is a Chartered Accountant by profession, the benefit of doubt should be given to the applicant with regard to the contentions raised by the applicant in this application and should be left open for adjudication after trial. But, however, considering the fact that the documents *prima facie* make the applicant/third defendant also jointly and severally liable to pay the suit claim along with the other defendants, this Court is of the considered view that the applicant/third defendant must be put on terms as a condition for allowing this application by directing him to pay the admitted sum of Rs.7,25,69,250/- as undertaken by him through the letter of undertaking dated 16.07.2022, within a stipulated time as fixed by this Court and only on that condition this application seeking leave to defend filed by the applicant/third defendant can be allowed. There is also no evidence produced by the applicant/third defendant to prove that only under threat and coercion of the plaintiffs, the letter of undertaking dated 16.07.2022 was executed by him.

32.As seen from the Judgment of the Honourable Supreme Court in the case of ***B.L.Kashyap and Sons Limited Vs. JMS Steels and Power Corporation and another*** reported in ***2022 (3) SCC 294*** where guidelines were laid by the Honourable Supreme Court while adjudicating the leave to defend applications, it has been made clear that in the case where any part of the amount claimed by the plaintiffs is admitted by the defendants, leave to defend is not to be granted unless the amounts so admitted is deposited by the defendant in the Court. In the case on hand, the applicant/third defendant has himself admitted his liability through his letter of undertaking dated 16.07.2022 to the extent of Rs.7,25,69,250/- which he has agreed to pay in 12 equal instalments over a period of 12 months from the date of the letter of undertaking.

33.While that be so, this Court, after giving due consideration to the documents filed along with the plaint, is inclined to grant leave to defend to the applicant/third defendant only on condition that the applicant/third defendant deposits to the credit of the suit a sum of Rs.7,25,69,250/- within the stipulated time to be fixed by this Court.

34.Section 139 of the Contract Act, 1872 discharges the surety if the creditor does any act which is inconsistent with the rights of the surety or omits to do any act which his duty to the surety requires him to do and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

35.On a *prima facie* consideration of the materials available on record, this Court wonders as to how Section 139 of the Contract Act comes to the aid of the applicant/third defendant. The Honourable Supreme Court in the case of ***Housing Development and Finance Corporation Vs. Gautam Kumar Nag and Others*** reported in ***2012 (5) SCC 604***, relied upon by the learned counsel for the plaintiffs, also makes it clear that even if a guarantor relies upon Section 139 of the Indian Contract Act as a defence in a summary suit, the liability of guarantee in a summary suit to repay the loan along with the principal debtor cannot be avoided.

36.For the foregoing reasons, this leave to defend application filed by the applicant/third defendant is allowed on condition that the applicant/third defendant deposits to the credit of the suit a sum of Rs.7,25,69,250/- within a period of four weeks from the date of receipt of a copy of this order and on deposit of the said sum within the stipulated period, the applicant/third defendant is permitted to file his written statement within a period of two weeks thereafter and the written statement shall be taken on file only subject to the fulfilment of the condition as stipulated supra.

05.12.2023

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