
(2023) 08 BOM CK 0076

In the Bombay High Court

Case No : Summons For Judgment No.4 Of 2021 In Commercial Summary Suit
No.317 Of 2020

India Realty Excellence Fund II LLP

APPELLANT

Vs

Gautam Jagdish Ahuja And Others

RESPONDENT

Date of Decision : 29-08-2023

Acts Referred:

Code Of Civil Procedure, 1908 — Order 37 Rule 6 (a)

Citation : (2023) 08 BOM CK 0076

Hon'ble Judges : Kamal Khata, J

Bench : Single Bench

Advocate : Rohaan Cama, Saloni Shah

Final Decision : Disposed Of

Judgement

Kamal Khata, J

1. The present Suit is filed in its Commercial Division under Order XXXVII of the Code of Civil Procedure. The plaintiff seeks an order and decree against the defendants to jointly and severally pay to the plaintiff a sum of Rs 15,80,00,000/- along with IRR @ 20% per annum on Rs.15,80,00,000/- from 31st March 2018 till 31st July 2020, amounting to Rs. 24,19,35,000/- along with further IRR @ 20% per annum from 1st August 2020 till payment and a realization thereof.

2. The plaintiff further seeks an amount of Rs. 17,07,256/- as interest @ 2% per month on the amount of Rs. 22,58,50,000/- from 16th March 2020 till 31st July 2020 and further interest of 2% per month on the amount of Rs 22,58,50,000/- from 1st August 2020 till payment and a realization thereof. As per the particulars of claim. (Exhibit N to the Plaint).

Brief Facts

3. The plaintiff is a limited liability partnership and is registered with the Security

and Exchange Board of India as category-II Alternative Investment Fund under the SEBI (Alternative Investment Funds) Regulations 2012. The Defendant nos.1 and 2 are promoters of Sai Ashray Developers Pvt. Ltd. ('the Company') and Gajanana Land & Developers Pvt. Ltd. ('Primary Obligor'). The defendant no.1 is a director on the board of the Company.

4. By the present suit the Plaintiff seeks seeking a judgment and a decree jointly and severally against the defendants as guarantors under the deeds of guarantee dated 21st March 2018 executed by the defendants respectively in favour of the plaintiff.

5. The plaintiff's under a Debenture Subscription Agreement ('DSA') dated 31st January 2014 and an addendum thereto dated November 2014 subscribed to and held an aggregate of 86 secured, optionally convertible, cumulative, redeemable debentures of face value Rs.1,00,00,000/- issued and allotted by the company aggregating to a sum of Rs.86,00,00,000/- ('Subscription Amount'). A Debenture Trust Deed ('DTD') was executed to secure the payments under the DSA on 4th February 2014.

6. On the due date the Company failed to make payment upon request for redemption of the Debentures by the Plaintiff. On 21st March 2018 the Plaintiff and the Defendants arrived at an understanding and executed a Settlement Agreement. It was recorded in Recital D, Clause 1.2 (f) and (g) in the Settlement Agreement that ECL Finance Limited had agreed to lend the sum of Rs 72,00,00,000/- which would be utilized entirely to redeem the debentures held by the plaintiff. The Plaintiff's condition under the agreement was that the Primary Obligor and Defendants would pay on the Difference amount of Rs 15,80,00,000/- an IRR of 20% from the date on which Rs 72,00,00,000/- is paid till the Plaintiff converts the Difference amount of ₹ 15,80,00,000/- into equity shares in accordance with clause 7 or 1.2 (b) of the Settlement Agreement.

7. Based on the covenants and promises recorded in the Settlement Deed, the defendants executed unconditional and irrevocable Deeds of Guarantee dated 21st March 2018 in favour of the plaintiff. It is stated that the terms of both the Deeds of Guarantee are identical to each other. Pursuant to the Settlement Agreement, the plaintiff was paid the Refinancing Amount by the Company on 31st March 2018.

8. As per the Settlement Agreement, the Defendant no.1 provided a cheque bearing no.472432 drawn on Cosmos Bank, Vile Parle Branch, Mumbai for the amount of Rs.15,80,00,000/-. The Primary Obligor also issued a demand promissory note dated 21 st March 2018 for an amount of Rs. 15,80,00,000/-. In addition to the aforesaid, a Debenture Trust Deed ('GDTD') was executed between the Primary Obligor, Defendants, and Plaintiffs for 5 secured redeemable and optionally convertible debentures of the Primary Obligor aggregating to Rs. 5,00,000/-. The repayment obligation under the GDTD was secured inter alia by a mortgage of 36 flats in the Prasadam Project allotted by the Company to the

Primary Obligor under an allotment letter dated 19th March 2018. It is stated that these debentures have no correlation to the present claim, which arises out of the Deeds of Guarantee and the redemption obligation of the Primary Obligor under the GDTD as they are independent.

9. On 31st March 2018 the Plaintiff was paid the amount of Rs72,00,00,000/- by the Company. In April/May 2018 a Memorandum of Satisfaction of Charge was issued by the Registrar of Companies with respect to the release of the securities granted in favour of the Plaintiff. A Deed of Reconveyance was also executed between the parties with respect to the release of the securities under the DTD and Addendum to the DTD.

10. On 7th February 2019 the Plaintiff called upon the Company, Primary Obligor and Defendants to provide evidence of their ability to repay the amounts under the Settlement Deed by 30th September 2019. Despite email dated 20th February 2019 and sharing of details of Chembur Project by the consultant of the Primary Obligor/Defendants by email in or around March/April 2019 the Defendants failed to make the payment to the Plaintiff by 30th September 2019 as per clause 1.2(e) of the Settlement

11. On 27th January 2020 the Plaintiff called upon the Primary Obligor and the Defendants to fulfill their obligations jointly and/or severally and pay the difference amount of Rs. 15,80,00,000/- along with IRR @ 20% p.a. till payment and/or realization within 7 days of the date of receipt of the notice. In view of the failure to fulfill their obligation, on 16th March 2020 the Plaintiff invoked the Deeds of Guarantee and called upon the Defendants to jointly and/or severally pay Rs 15,80,00,000/- along with IRR @20% p.a. from 31st March 2018 till payment and/or realization. It is stated that despite receipt of the demand notice, the defendants failed and neglected to make the payment of the Difference Amount and/or any part thereof to the plaintiff till the date of filing of the suit and even neglected to respond to the said demand notice issued by the plaintiff.

12. The plaintiff filed the present suit based on the deeds of guarantee on 14th August 2020. On 22nd January 2021 Plaintiff filed a Summons for Judgement. On 5th March 2021 the Defendants filed their leave to defend and affidavit in reply to the Summons for Judgement.

13. On 24th June 2022 the Defendants were adjudged insolvent.

14. The cheque provided by the defendant no.1 was dishonored with the remark "funds insufficient" when deposited by the plaintiff. It is stated that the Deeds of Guarantee executed by the defendants in favor of the plaintiff are unconditional and irrevocable and the defendants are jointly and severally bound and liable for the payment of the difference amount. The plaintiffs have accordingly filed a suit on 12th August 2020 to recover a sum of Rs. 15,80,00,000/- along with IRR at the rate 20% per annum from 31st March 2018 till 31st July 2020 amounting to Rs.24,19,35,000/- along with further IRR @ 20% per annum from 1st August

2020 till payment and a realization thereof and interest at the rate of 2% per month on the amount of Rs.22,58,50,000/-from 16th March 2020 till June 31st July 21st 2020 amounting to Rs. 17,07,256/- along with further interest of 2% per month on the amount of Rs. 22,58,50,000/- from 1st August 2020 till payment and realization thereof.

15. The learned counsel for the plaintiff submitted that the defendants have been adjudged to be insolvents by an order dated 24 th June 2022 after filing of the present suit. It is submitted that they have filed a reply to the summons for judgement taken out by the plaintiff. The learned counsel for the plaintiffs took me through the reply to submit that the defendants admitted the liability and had every intention to comply with the terms of exit.

He fairly pointed out the response of the defendants to submit that they blamed the plaintiff to arrange for finance and consequently, the defendant could not proceed with the development of the project. It is submitted that, had the plaintiff participated in the project, Gajanan would have allotted equity shares to the plaintiff in the agreed Settlement Deed. He submitted that apart from this contention, there is no plausible defense which the defendant has. The learned counsel drew my attention to the affidavit in rejoinder to submit that the reliance on the clause of arbitration contained in the Settlement Agreement was unmeritorious and baseless as the suit was filed on the basis of the Deeds of Guarantees executed by the defendants in favor of the plaintiff and not under the Settlement Agreement. He vehemently urged that the deeds of guarantee did not contain any arbitration clause and that the Deeds of Guarantee specifically provide for an exclusive jurisdiction of the courts at Mumbai to try this dispute.

16. I have heard the counsel of the plaintiff. I have also perused the documents and the records. The issue that was raised by this court by its order dated 5th April 2023 was that whether the matter could be preceded with ex parte when during the pendency of the suit, the defendants were adjudged the insolvents.

17. The learned counsel for the plaintiff drew my attention to the judgment in the case of IDBI Trusteeship Services Limited V/s. Hubtown Limited (2017) 1 SCC 568 : (2017) 1 SCC (Civ) 386 : 2016 SCC OnLine SC 1274 to submit that there is no impediment in proceeding with the matter and getting a decree when a defendant is adjudged insolvent during the pendency of a commercial suit.

18. The learned counsel relied upon the judgment of the Madras High Court in the case of The Official Assignee, High Court, Madras and Ors V/s. Mangalambal and Ors. 1980 SCC OnLine Mad 48 : AIR He submitted that the claim in the suit by any stretch of imagination cannot be construed to relate to in (the property) of the insolvent and therefore, the presence of the official assignee is unnecessary. He accordingly submitted that the defendant being adjudged insolvent subsequent to the filing of the suit would not necessitate the official assignee being a party to the present suit inasmuch as the claim in the suit which is of monetary nature and does not include the property of the insolvent,

therefore, would not require the presence or adding of the official assignee in this commercial suit.

19. The learned counsel relied upon the case of Om Prakash Nihalani and Anr. V/ s. S. M. S. Thakur 1980 Mad 200 3 2009 (2) Mh.L.J. page 905 to submit that the division bench of our court had concurred with the view taken by the Madras High Court in the case of Official Assignee, High Court Madras (supra). The learned counsel then relied upon the decision of decision in the case of IDBI Trusteeship Services Limited (supra) to submit that the present case was a clear case and the defendant had made out no substantial defense nor had read raised any genuine tribal issues. He therefore, urged that the leave to defend the suit should be refused and the plaintiff would be entitled to a judgment forthwith.

20. The writ of summons was duly served on the defendants on 2nd February 2021 and the affidavit proving service was filed on 16 th February 2021. They have also filed their reply to the summons for judgement. However, no one has appeared for the defendants although opportunities were granted. The matter was therefore listed for an ex parte decree.

21. I have heard the learned counsel for the plaintiff and with his assistance have also perused the averments in the plaint and documents annexed with it. The defendants are deemed to have admitted the allegations in the plaint and therefore, the plaintiff becomes entitled to a decree. The material on record indicates that the claim of the plaintiff is admitted by the defendants. The defendant is now adjudged an insolvent pursuant to an order of the court.

22. With regard to the Court's query as to whether the suit can proceed when the Defendant is adjudicated insolvent pending the suit, in view of the Division Bench judgement of this Court in the case of Om Prakash Nihalani (supra) I find no impediment in proceeding to pass a decree. The Division Bench has concurred with the view taken by the Madras High Court in the case of Official Assignee, High Court Madras & Ors. (supra). The Madras High Court held that under Cl.(d) of section 68(1) the official assignee would be a necessary party only if the suit was "relating to the property of the insolvent", and the term "relating to" cannot be taken to mean "affecting". Therefore, in my view though the Defendant has been adjudicated insolvent pending the proceeding, as it is a money decree and does not "relate to" the property of the defendant section 68(1)(d) is not attracted and the official assignee is not required to be made a necessary party.

23. In my view, the defense sought to be raised in response to the summons for judgment is frivolous and therefore leave to defend is refused. Consequently, as per Order XXXVII Rule 6 (a) of the Code of Civil Procedure, the plaintiff is entitled to a judgment forthwith.

24. Resultantly, the summons for judgement and the suit are disposed off.

25. I hereby grant a decree against the defendant nos.1 and 2 and pass the following order.

- (I) The suit stands decreed against the defendant nos. 1 and 2 in terms of prayer clause (a);
- (II) The defendants to pay the costs of the suit in the sum of the Rs. 1,00,000/-. This cost would be in addition to the deficit of the Court fees refunded.
- (III) The plaintiff would be entitled to the refund of court fees in accordance with the High Court rules.
- (IV) The decree to be drawn up and sealed expeditiously.
- (V) Leave to proceed in execution without awaiting the sealing of the decree.