Pernod Ricard India Private Limited vs Khao Gali Restaurants Private Limited & ... on 23 August, 2024

Author: Jasmeet Singh

Bench: Jasmeet Singh

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
Judgment reserved o
Judgment pronounced on

+ CS(COMM) 281/2023 & I.A. 8729/2023, I.A. 8730/2023, I.A.

8731/2023
PERNOD RICARD INDIA PRIVATE LIMITED
.
Through: Mr. Rajshekhar Rao, S
Mr. Ajoy Roy and Ms.
Advs.
versus
KHAO GALI RESTAURANTS PRIVATE LIMITED& ANRS.
.....Defendants
Through: Mr. Jayant Mehta, Sr. Adv. with Mr
Aditya Ganju, Ms. Pallavi Shali, M
Shambhavi Mishra, Mr. Udit and Mr.
Honeyshya Raj, Advs.
CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

JUDGMENT

1. The present application is filed by the defendant No. 1 under Order XXXVII Rule 3 (5) of Code of Civil Procedure, 1908 (□CPC), seeking a grant of leave to defend in the Suit for Recovery filed by the plaintiff under Order XXXVII of CPC read with Commercial Courts Act, 2015 (□2015 Act).

THE FACTUAL MATRIX

2. Briefly stating the facts as per the plaint:-

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3. The plaintiff is a Private Limited Company incorporated under the Companies Act, 1956 engaged in the business of manufacturing, bottling and sale of alcoholic beverages/ products in India. The defendant no. 1 is a Private Limited Company incorporated under the Companies Act, 1956 engaged in the retail business of alcoholic beverages and defendant no. 2 is an Indian branch of the Hong Kong and Shanghai Banking Corporation Limited (□HSBC).

4. Defendant No. 1 approached the plaintiff seeking some financial assistance to participate in the bidding process as a retail license holder under the New Delhi Excise Policy 2021 - 22. In order to grant such assistance, plaintiff furnished to defendant No. 2 a corporate guarantee dated 19.07.2021, so that defendant No. 1 could obtain a loan from HSBC, defendant No. 2, and to participate in the bidding process under the Excise Policy. However, the said corporate guarantee could not be issued owing to a spelling error in the name of defendant No. 1.

5. On 27.04.2022, the plaintiff issued a new Corporate Guarantee (□corporate guarantee) guaranteeing the repayment of the funds that defendant No. 1 had availed from defendant no. 2 to the tune of Rs 50 crores. The said arrangement was made between the parties if, defendant No. 1 failed to make the repayments as agreed between the parties. Thereafter, the plaintiff also executed a Debit Authority-cum- Undertaking dated 28.04.2022 in favor of defendant no 2, permitting defendant no. 2 to debit the plaintiff s current account held with defendant No. 2 in case, defendant no. 1 fails with the repayment.

6. Subsequently, the defendant No. 1 defaulted on the repayment of the Digitally Signed By:MAYANK 11:50:41 availed amount, and a notice was issued by defendant No. 2 on 10.11.2022 to the plaintiff invoking the corporate guarantee and demanding a payment of Rs 35,92,45,016.83 along with outstanding interest amounts and other charges owed. Thereafter, defendant No. 2 auto-debited the said amount from the designated account of the plaintiff in terms of the Debit Authority-cum-Undertaking.

7. Some of the relevant clauses of the Corporate Guarantee are:-

> A. Clause 1 which states that the plaintiff unconditionally and irrevocably undertakes to repay to defendant No. 2 all sums of moneys and liabilities demanded by defendant No. 2 owing on account of dues for which the defendant No. 1 may be liable to defendant No. 2.

B. Clause 9 of the Corporate Guarantee envisaged security being taken by the plaintiff from the defendant No. 1 in respect of the guarantee given and the same being enforceable upon satisfaction of the dues owed to HSBC. C. The Master Schedule to the Corporate Guarantee clarifies that the Borrower/principal debtor is the defendant No. 1, and the Guarantor/surety is the plaintiff, in respect of the amounts availed by the defendant No. 1 from HSBC under the loan/facility agreement dated 14 December 2021 and FAL No. 214060 dated 15 December 2021, as amended from time to time.

8. Further, Clause 8 of the Corporate Guarantee reads as under:-

> □The Guarantor shall not be entitled in competition with the Bank to prove in the bankruptcy or insolvency of the Digitally Signed By:MAYANK 11:50:41 Principal or exercise any other right of surety discharging the Principal's liability in respect of the principal debt and shall not have any right to be subrogated to the Bank in respect of any proof unless and until the whole of the moneys owing to the Bank by the

> Principal shall have been completely discharged and paid and to enable the Bank to sue the Principal or prove against his estate for the whole of the estate for the whole of the moneys owing to the Bank may place any sum received from the Guarantor to a suspense account, without any obligation on its part to apply the same towards discharge of the moneys them owing.

9. It is further stated that having repaid all outstanding amounts owed by the defendant No. l as demanded by the defendant No. 2, i.e., the Debit Amount, and upon the corporate guarantee (as enforceable against the plaintiff) having been released/cancelled against the plaintiff, the plaintiff stands subrogated into the shoes of the defendant No. 2, in terms of Section 140 and Section 141 of the Indian Contract Act, 1872 ("1872 Act"). Subsequent to such payment by the plaintiff to defendant No. 2, the facilities sanctioned to the defendant No. 1 by the defendant No. 2 were cancelled, as also stated in the release letter. No payments under such facilities remain due and outstanding to defendant No. 2 as on date.

10. The plaintiff vide Demand Notice 13.01.2023, inter alia, informed the defendant No. 1 of the debit action by defendant No. 2 of the Debit Amount from the Designated Account of the plaintiff towards satisfaction/discharge of the dues owed by the defendant No. 1 to the defendant No. 2, and the subrogation of the defendant No. 2 s rights in Digitally Signed By:MAYANK 11:50:41 favour of the plaintiff upon such debit having been effected. Further, the plaintiff demanded payment of the said amounts so debited from the defendant No. 1 within seven (7) days of receipt of the said demand notice.

11. As the defendant No. 1 failed to pay the due amount, the plaintiff also made similar intimations to defendant No. 2, informing it of, inter alia, the subrogation of rights of the creditor in favour of the plaintiff considering the repayment default by the defendant No. 1 and discharge of obligations under the corporate guarantee by the plaintiff. In light of the same, the plaintiff requested defendant No. 2 to, while recognizing such subrogation to have taken effect, provide the plaintiff with copies of the loan/financing and other transaction/security documents executed between it and the defendant No. 1 (in respect of which the corporate guarantee was furnished), towards enabling the plaintiff to secure recovery of its monies from the defendant No. 1 and take other recourse as available with it under law and in contract.

12. Vide e-mail dated 14.01.2023, the defendant No. 2 shared with the plaintiff relevant facility agreement/facility advice letters in respect of the financial assistance availed by the defendant No. 1 from the defendant No. 2 (which were secured by the corporate guarantee), towards enabling the plaintiff to exercise its legal rights.

13. The plaintiff on 04.04.2023 again served a notice to defendant No. 1 duly informing it of the plaintiffs claim towards interest on outstanding amounts due to be paid by the defendant No. 1 to the plaintiff.

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14. It is further stated that the Directorate of Enforcement (□ED) has initiated an investigation in respect of the Excise Policy by recording ECIR No. ECIR/HJU-II/14/2022, in which the plaintiff and the defendant No. 1 have been arrayed as an accused. The prosecution complaints filed by the ED under the provisions of the Prevention of Money Laundering Act, 2002 ("PMLA") inter alia, calls into question the loans sanctioned to the Defendant No. l and the corporate guarantee issued by the plaintiff for and on behalf of the defendant No. 1 to secure such loan amounts, which has been alleged to be part of a conspiracy. It has been alleged by the ED that the loan amounts and the costs incurred by the plaintiff in facilitating the issuance of the corporate guarantee are "proceeds of crime" in terms of Section 2(l)(v) read with Section 2(l)(u) of the PMLA. The plaintiff has rebutted the same before appropriate authorities and is vigorously defending itself against the allegations made.

15. It is further stated that the transactions/disputes involving corporate guarantees, such as the corporate guarantee in question, fall within the ambit of "commercial dispute" as envisaged under Section 2(1)(c)(i) of 2015 Act, considering as they relate to mercantile documents.

16. The corporate guarantee in the present case is therefore a „mercantile document issued / executed by the plaintiff for the purposes of securing the interest of defendant No. 2 and hence it is stated that the dispute in question concerns the enforcement of subrogation rights of the plaintiff under the said corporate guarantee against the defendant No. l which is a purely "commercial dispute" under the 2015 Act.

17. Thus, the claim against the defendant No. 1 is of Rs. 35,88,59,676.11 Digitally Signed By:MAYANK 11:50:41 along with applicable interest, cumulatively being a sum of Rs. 37,52,62,266 ("Claim Amount") computed as on 29.03.2023.

18. The Claim Amount comprises of:

> (a) principal outstanding, being the Debit Amount, as paid by the plaintiff to defendant No. 2, i.e., INR 35,88,59,676.11,
>
> (b) monthly interest, at a floating rate of 9.71 %, 9.74%, 10.01 % and 10.33% as applicable during different periods of time (during the period from 11.11.2022 until 29.03.2023), being a sum of Rs. 1,36,77,418 as on 29.03.2023 and
>
> (c) penal interest at the rate of 2% p.a. on the outstanding amounts, being a sum of Rs. 27,25,171 /- (Twenty Seven Lakhs Twenty Five Thousand One Hundred and Seventy One Rupees) as on 29.03.2023.

Further, the plaintiff has also sought pendente lite and future interest, until the date of actual repayment by the defendant No. 1, in terms of Section 34 of CPC.

19. This Court vide Order dated 08.05.2023, issued summons to the defendant No. 1. Thereafter, an application bearing No. 12254/2023 was filed by the plaintiff seeking Summons for Judgment.

20. Vide Order dated 19.07.2023, on the said application, summons for judgment were issued to defendant No. 1.

21. Defendant No. 1 moved the present application seeking leave to defend under Order XXXVII Rule 3(5) of CPC on the following grounds:-

> Digitally Signed By:MAYANK 11:50:41 A. Re' Status claimed by the Plaintiff to maintain the present Suit:
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> In para 1 of plaint, it is stated that plaintiff is engaged in "business of manufacturing, bottling and sale of alcoholic beverages/ products in India", further in para 20 of the plaint, it is claimed to be "financer" in relation to mercantile documents. The plaintiff has taken contradictory pleas vis-a-vis its nature of business and the plaintiff on the basis of being a "financer" has sought to maintain the present suit under the 2015 Act. Such being the case, with the plaintiff having taken contradictory pleas vis-a-vis its own nature of business, the present Suit filed under the 2015 Act by the plaintiff is wholly untenable. B. Re' the premise of the present Suit for recovery - being the alleged □default on the part of Defendant No.1: The averment concerning alleged "default" committed by the defendant No. 1 have been so repeatedly taken by the plaintiff in its plaint, in Paras 6, 12 and 19. Therefore, the cause for the plaintiff to file the present suit is an alleged "default" having been committed by defendant No.1 towards repayment of the Loan amount to Defendant No.2.
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> It is averred that the aforesaid plea of alleged "default" having been committed by defendant No.1, however, is wholly erroneous, misconceived and misleading. In this respect, it is, stated:-
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> (i) Defendant No. 2 vide its email dated 28.10.2022 called upon defendant No. 1 to deposit the interest and principal funding for the month of October 2022. Pursuant to the said Digitally Signed By:MAYANK 11:50:41 email, defendant No. 1 deposited the said EMI on 01.11.2022 which was acknowledged by the defendant No. 2 in its email dated 01.11.2022.

(iii) However, without stating any basis whatsoever, defendant No. 2 vide its email dated 07.11.2022 all of a sudden came to assert that there was a "regulatory hold" on the current account of the defendant No. 1.

(iv) The aforesaid email was duly replied by the defendant No. 1 vide email dated 09.11.2022, whereby, the defendant No. 1 requested to furnish reasons for freezing the account.

(v) No reasons whatsoever came to be furnished by defendant No. 2, which to the contrary vide its letter dated 10.11.2022 called upon defendant No. 1 to repay the entire principal amount of Rs. 35,78,01,237.41/- by 14.11.2022, failing which defendant No. 2 would take appropriate action.

(vi) The defendant No.2 vide its letter dated 10.11.2022 invoked the corporate guarantee. The said letter shows that the same was not marked to the defendant No. 1.

(vii) The aforesaid aspect of defendant No. 1 not been furnished the reasons for the account being frozen, despite the defendant No. 1 having duly deposited the EMI on 01.11.2022, was again made known to defendant No. 2 vide emails dated 22.11.2022 & 30.11.2022, and further letter dated 01.12.2022. Apart from bringing to light the aforementioned factual position, defendant No. 1 also Digitally Signed By:MAYANK 11:50:41 notified the aspect of defendant No. 2 not providing the details of the account in which the concerned EMI and the subsequent EMIs were to be deposited. It was clearly made known by defendant No. 1 to defendant No. 2 that there was no default on the part of defendant No. 1, and that it has always adhered to the repayments under the loan facility, and further intends to continue to do so upon the requisite details being furnished by defendant No. 2.

(viii) Despite all the above, and in utter disregard thereto, defendant No. 2 vide its letter dated 02.12.2022, without furnishing the reasons and information as were sought for, belatedly informed defendant No. 1 that it has already exercised its rights under the corporate guarantee and liquidated an amount of Rs. 35,88,59,676.11/-.

(ix) The aforesaid letter was duly replied by defendant No. 1 on 06.12.2022 whereby the said defendant expressed its surprise and shock to the illegitimate and malafide act of defendant No. 2 in having to, without any basis, invoked the corporate guarantee.

(x) All the aforesaid came to be duly made known by defendant No. 1 to the plaintiff in its reply dated 28.04.2023 to the plaintiff s purported Demand Notices dated 13.01.2023 and 04.04.2023. Vide the said reply, defendant No. 1 apprised the plaintiff of the malafide and illegitimate invocation of the corporate guarantee by defendant No. 2 and of there being no default on the part of defendant No. 1.

Digitally Signed By:MAYANK 11:50:41 Accordingly, defendant No. 1 called upon the plaintiff to withdraw its Demand Notice and to desist from taking any coercive steps.

In view of the above, therefore, it is stated that no default has been committed by defendant No.1 with respect to repayment of monies to defendant No. 2. Consequently, the present Suit, which is premised on an alleged "default" by defendant No. 1, is not tenable and is wholly misconceived.

C. Re' the present Suit not being tenable in view of the investigation pending before ED:

> The plaintiff in para 18 of its plaint has averred that the ED has initiated an investigation in respect of the aforementioned Excise Policy, in which the plaintiff and defendant No.1 have been arrayed as accused parties. The plaintiff has further averred that the prosecution concerning the said investigation inter-alia questions the loan sanctioned to defendant No.1 and the corporate guarantee issued by the plaintiff qua such loan.

22. Hence, as per the leave to defend, the plaintiff cannot maintain the present suit, much less in a summary form. Further, defendant No.1 has a good case on merits to defend the present proceedings, wherein triable issues arise for consideration and adjudication by this Hon ble Court.

23. Vide Order dated 21.11.2023, notice was issued in the present application to the plaintiff.

24. Plaintiff filed a reply to the present application wherein it is stated that defendant No. 1 has not denied or refuted the existence of the Digitally Signed By:MAYANK 11:50:41 documents which constitute the basis for the claim of the plaintiff, nor has it refuted or rejected the facts of it availing loans from defendant No. 2 and thereafter repayment by the plaintiff. The defendant No. 1 has never challenged the apparently illegal invocation of the corporate guarantee by the defendant No. 2 in appropriate judicial proceedings, all of which has been alleged for the very first time by the defendant No. 1 in its belated letter reply dated 28.04.2023 and in the present application.

25. It is further stated that having benefitted under the guarantee, the defendant No. 1, as the principal debtor, cannot be permitted to say that the invocation of the corporate guarantee was unlawful, especially given that the defendant No. 1 was admittedly aware that its accounts with the defendant No. 2 were on a "regulatory hold". Hence, the defendant No. 1 cannot be permitted to unjustly enrich there from, by refusing to repay the plaintiff.

26. The proceedings initiated by the ED against inter alia the plaintiff under PMLA does not relate to or pose any allegations regarding the background on the basis on which the corporate guarantee furnished by the plaintiff came to be invoked by the defendant No. 2, or the default in the repayment obligations of the defendant No. 1. In fact, insofar as the plaintiff is concerned, the allegation in respect of which cognizance has been taken by the Criminal Court is with regard to contravention of Section 3 of the PMLA, which is in relation to the offence of money laundering and does not relate to the invocation of the corporate guarantee and discharge of the plaintiff s obligations thereunder as a surety. Further, decisions of Criminal Courts do not Digitally Signed By:MAYANK 11:50:41 bind Civil Courts, nor vice versa, as per the judgments of Syed Askari Hadi Ali Augustine Imam & Anr. v. State of Delhi Admin. &Anrs. (2009) 5 SCC 528 and Devendra v. State of UP., (2009) 7 SCC 495.

27. Defendant No. 1 has filed rejoinder to the reply filed by the plaintiff and has reiterated its stand taken in the present application.

SUBMISSION

28. Mr Jayant Mehta, learned senior counsel appearing for the defendant No. 1 argues that in the ED Complaint, which is equivalent to a chargesheet, under which both the plaintiff and the defendant No. l have been made accused, various statements recorded of the employees of the plaintiff, confirms that the corporate guarantee issued to the defendant No. 1 was an investment by the plaintiff, which was done by the plaintiff with the sole objective of increasing its market share in the NCT of Delhi, by way of achieving increased shelf space, brand presence, etc. at the various retail outlets of the defendant No. l, and due to such initiatives, the market share of the plaintiff had increased dramatically in the NCT of Delhi, and resultantly the plaintiff has made substantial gains. The plaintiffs witness also stated that through this mechanism, the plaintiffs market share increased from 15% to 35%.

29. He further submits that the defendant No. 2 before the ED through its personnel, Mr. Priyank Kucchal who is the Director, Global Banking Team stated that request for funding the defendant No. l was made by the plaintiff, negotiations on terms & conditions including but not limited to the interest rates, were made by the plaintiff, and the Digitally Signed By:MAYANK 11:50:41 corporate guarantee was extended by the plaintiff, all of which very clearly shows and proves the control of the plaintiff on the entire loan transaction, as the said loan and corporate guarantee was its investment.

30. The above statements/observations/chargesheet of the ED highlights the true nature of the agreement between the parties. There was an intrinsic understanding that the defendant No. 1 will repay the loan through the benefits which it would receive from the plaintiff during the course of business in the form of schemes and credit notes, etc. Therefore, it was the plaintiff who was actually responsible for the repayment of the loan; all throughout.

31. Mr Mehta further argues that there is every likelihood that the object of the Corporate Guarantee or loan agreement would be held to be illegal by the Special Criminal Court which has taken the cognizance of the ED prosecution complaints, and the trial proceedings which are in the commencement stages. The plaintiff at para 18 of the plaint itself discloses that the money sought to be recovered in this very suit, has been regarded as "proceeds of crime" by the ED. The prosecution Complaint filed by the ED is equivalent to a chargesheet (hence investigation on the issue has already been carried out by ED at length) and it portrays the plaintiff as an accused, who has been indicted for carrying out the very transaction involved in the present matter.

32. It is further argued that it is a settled principle of law that Courts do not aid and abet any illegal transaction, reliance is placed on Abhey Dewan v. Manoj Sethi, 2013 SCC OnLine Del 2414. Reliance is Digitally Signed By:MAYANK 11:50:41 further placed on Immani Appa Rao v. Gollapalli Ramalingamurthi, AIR 1962 SC 370, that even when an agreement between parties is said to be fraudulent, paramount consideration must be given to public interest. In view of Public Interest requires that the plea of fraud should be allowed to be "raised and tried". The Hon'ble Court held that doing so is less injurious to public interest than the alternative course of giving effect to a fraudulent transaction.

33. He further argues that the Hon ble High Court of Bombay in the case of Standard Chartered Bank vs. ICICI Lombard General Insurance Co, 2018 SCC Online Bom 1064, has held that when a

transaction is being investigated by Government investigating agencies like the Central Bureau of Investigation, an unconditional leave to defend should be granted in such scenarios as they call for a "full scale trial".

34. It is further submitted that the present suit is an afterthought and plaintiff wants to get a clean chit form this Hon ble Court so that it can place it before the ED that the corporate guarantee is a clean transaction and not a tainted one. It is in actuality, only for this reason the present suit is filed after the filing of the ED s complaint.

35. Plaintiff has erroneously averred in the plaint that the defendant No. 1 has committed a "default" in the repaying of the loan amount to defendant No. 2. The plaintiff has also falsely averred that the defendant No. 1 did not question the unilateral invocation of the corporate guarantee. The defendant No. 1 made multiple attempts to contact the defendant No. 2 but did not however receive any response from the defendant No. 2. There are multiple communications which highlight that there was no default of the defendant No. 1, and that Digitally Signed By:MAYANK 11:50:41 there were clear breaches and defaults on part of the plaintiff and defendant No. 2. Further, the defendant No. 1 sent an email on 22.11.2022, to the plaintiff to understand the reasons behind the account freeze, however no response was received from defendant No.

2.When the defendant No. 2 demanded the entire principal amount of Rs. 35,78,01,237.41/- to be repaid by 14.11.2022, on the same day, the defendant No. 2 invoked the corporate guarantee without informing defendant No. 1 i.e. without even waiting for the expiry of the period granted by the defendant No. 2 itself to the defendant No. l.

36. Despite repeated inquiries from defendant No. 1 via emails dated 22.11.22 and 30.11.22, no reasons were provided by defendant No. 2 for freezing the account. The defendant No. 1 submits that the plaintiff and the defendant No. 2 were hand in glove to put the defendant No. 1 deliberately in a position to commit default. The defendant No. 1 is in the process of filing a civil suit against wrongful invocation of the corporate guarantee and illegal withhold on the monies of the defendant No. l lying with the defendant No. 2.

37. He further submits that defendant No. 1 has not defaulted on its contractual obligations, it has consistently enquired the defendant No. 2 for explanations regarding the illegal "regulatory hold" on its account, and the unwarranted invocation of the corporate guarantee. Moreover, the plaintiff also never communicated with the defendant No. l and readily paid the monies thereby improperly suffering the invocation. Without prejudice to the above, it is settled law that a subrogee can only claim amounts, which were suffered properly by it (and incurrence of any liability, if improper, is not liable to be Digitally Signed By:MAYANK 11:50:41 compensated). It is further contended that defendant No. 1 was kept in the dark about the invocation.

38. In view of the above it is submitted that no default has been committed by the defendant No. l and the invocation of the corporate guarantee was illegal and improper.

On behalf of the Plaintiff

39. Refuting the above submissions, Mr Rajshekhar Rao, learned senior counsel appearing for the plaintiff, with regard to the maintainability of the suit, submits that the defendant No. 1 has, vide its reply dated 28.04.2023 addressed to the plaintiff clearly admits the transactions and the factum of recovery of the said amounts by defendant No. 2 by debiting the plaintiff s account and, considering it was called upon to repay the said amounts, requested the plaintiff to show "patience and cooperation" as defendant No. 1 was "completely incapacitated to fulfil our financial commitments" or even have a discussion with the plaintiff "with regard to the repayment of the aforesaid amount". Moreover, the said communication further states that "....we will first need to recover the aforesaid amount of monies from various sources, in order to be in a position to have a discussion with Pernod regarding the payment of the aforesaid amount."

40. He further submits that Order XXXVII Rule 1(2)(b)(iii) of CPC expressly envisages that suits "based on a guarantee where the claim against the principal is in respect of a debt or liquidated demand only" can be filed under the said provision. The plaintiff s claim against defendant No. 1 falls within the said ambit in exercise of its statutory and contractual right of subrogation.

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41. With regard to contradictory pleas in the suit, Mr Rao submits that the Memorandum of Association (□MOA) of the plaintiff notes that plaintiff is primarily engaged in inter alia, the business of manufacturing, developing, processes and merchanting alcoholic beverages and for furtherance of the aforesaid objective, plaintiff also lends monies to persons/companies and others having dealings with the plaintiff, to guarantee performance of contracts and also furnishes indemnities.

42. Further, relying on Section 2(1)(c)(i) of the 2015 Act, he states that the corporate guarantee issued by the plaintiff is a mercantile document. For reasons abovementioned, the instant application ought to be rejected, particularly owing to the admission by defendant No. 1.

43. With regard to invocation of the corporate guarantee, Mr Rao argues that the corporate guarantee was rightfully invoked by defendant No. 2 after the failure of defendant No. 1 to make payments of the amounts due to defendant No. 2 despite repeated reminders.

44. He further submits that the defendant No. 1 has never challenged the invocation of the corporate guarantee by defendant No. 2 and is estopped from doing so at this belated stage, particularly having benefited from the said invocation. As such, the said averment which has been made for the first time by defendant No. 1 in its reply dated 28.04.2023 and in its leave to defend, is not only misconceived but a clear afterthought and ought to be rejected as such. On the contrary, defendant No. 1 was admittedly aware that its accounts with defendant No. 2 were on a "regulatory hold" and that defendant No. 2 had already recalled the entire loan facility [vide letter dated 03.08.2022 Digitally Signed By:MAYANK 11:50:41 addressed to defendant No. 1] and directed defendant No. 1 to repay the entire principal amounts due under the facilities availed. Admittedly, there has been no challenge to this act by defendant No.

45. With regard to the criminal proceedings initiated by the ED, he submits that the ED s investigation proceedings against the plaintiff under the PMLA does not pose any allegations regarding the basis on which the corporate guarantee came to be invoked by defendant No. 2 or the default in payment obligations of defendant No. 1.

46. Furthermore, at best, the ED s case is that there was an alleged conspiracy to cartelize by and amongst several liquor manufacturers, distributors, retail vendors and politicians, in violation of the terms of the Excise Policy. Notably, while the plaintiff is not arrayed as an accused in the predicate offence criminal case (by the Central Bureau of Investigation), however, is stated to have acted in contravention of Section 3 of PMLA, which relates to the offence of money laundering, and nowhere concerns the invocation of the corporate guarantee and discharge of the plaintiff s obligations thereunder as a surety.

47. The said allegation is, ex-facie, misplaced, in as much as the plaintiff has only helped the defendant No. 1 to obtain financial assistance from defendant No. 2 by offering a corporate guarantee which, as mentioned above, was invoked by the defendant No. 2 and in consequence of which, the plaintiff discharged its obligation as a guarantor/surety. The plaintiff reserves its rights to make appropriate submissions in this regard in the PMLA proceedings.

Digitally Signed By:MAYANK 11:50:41 ANALYSIS AND FINDING

48. I have heard the rival contentions raised by the learned senior counsels for the parties and perused the materials on record.

49. The principles with regard to grant of leave to defend have clearly been crystallized by the Hon ble Supreme Court in B.L. Kashyap & Sons Ltd. v. JMS Steels & Power Corpn., (2022) 3 SCC 294. The relevant paragraphs are extracted below:-

> 33.....Putting it in other words, generally, the prayer for leave to defend is to be denied in such cases where the defendant has practically no defence and is unable to give out even a semblance of triable issues before the court. 33.1. As noticed, 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. In the second eventuality, where the defendant raises triable issues indicating a fair or bona fide or reasonable defence, albeit not a positively good defence, he would be ordinarily entitled to unconditional leave to defend. In the third eventuality, 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 is expected to balance the requirements of expeditious disposal of commercial causes on one hand and of not shutting out triable issues by unduly severe orders on the other. Therefore, the trial court may impose conditions both as to time or mode of trial as well as payment into the court or furnishing security. In the fourth eventuality, where the proposed defence appears 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 Digitally Signed By:MAYANK 11:50:41 sum together with just and requisite interest. 33.2. Thus, it could be seen that in the case of substantial defence, the defendant is entitled to unconditional leave;

and even in the case of a triable issue on a fair and reasonable defence, the defendant is ordinarily entitled to unconditional leave to defend. In case of doubts about the intent of the defendant or genuineness of the triable issues as also the probability of defence, the leave could yet be granted but while imposing conditions as to the time or mode of trial or payment or furnishing security. Thus, even in such cases of doubts or reservations, denial of leave to defend is not the rule; but appropriate conditions may be imposed while granting the leave. It is only in the case where the defendant is found to be having no substantial defence and/or raising no genuine triable issues coupled with the court's view that the defence is frivolous or vexatious that the leave to defend is to be refused and the plaintiff is entitled to judgment forthwith. Of course, 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.

33.3. Therefore, while dealing with an application seeking leave to defend, it would not be a correct approach to proceed as if denying the leave is the rule or that the leave to defend is to be granted only in exceptional cases or only in cases where the defence would appear to be a meritorious one. Even in the case of raising of triable issues, with the defendant indicating his having a fair or reasonable defence, he is ordinarily entitled to unconditional leave to defend unless there be any strong reason to deny the leave. It gets perforce reiterated that even if there remains a reasonable doubt about the Digitally Signed By:MAYANK 11:50:41 probability of defence, sterner or higher conditions as stated above could be imposed while granting leave but, denying the leave would be ordinarily countenanced only in such cases where the defendant fails to show any genuine triable issue and the court finds the defence to be frivolous or vexatious.

50. The test laid down by the Hon ble Supreme Court is whether the defence raised by the defendant in its leave to defend application is merely moonshine or sham to delay the proceedings and an attempt to prolong the litigation to disentitle the plaintiff of its legitimate dues. The Court while deciding leave to defend application is only required to see whether the defendant has raised triable issues which requires trial/evidence. Once the defendant meets the said threshold, he is entitled to an unconditional leave to defend and in case the defendant has no defence and raises issues which are meritless, frivolous and vexatious, the leave to defend must be rejected. In case, there are some doubts regarding the defence set up by the defendant, the Court can also grant conditional leave to defend.

51. With these broad principles, I will decide the present application filed by the defendant No. 1 seeking leave to defend. With regard to status and maintainability of the Suit

52. In the present case, the plaintiff has claimed that the present dispute arises from the loan facility advanced to the defendant No. 1 by defendant No. 2 in which the plaintiff issued corporate guarantee to secure the said loan amount. This corporate guarantee is therefore a mercantile

documents which falls under the category of "commercial dispute" under section 2(1)(c)(i) of the 2015 Act. Further the plaintiff Digitally Signed By:MAYANK 11:50:41 has asserted themselves as financer to maintain the present suit. In case there are some doubts regarding the defence set up by the defendant, the Court can also grant conditional leave to defend.

53. Defendant No. 1 in its leave to defend has stated that there are contradictory pleas vis-a-vis plaintiff s nature of business. On one hand, the plaintiff has claimed that they are engaged in manufacturing of alcohol beverages and on the other hand, plaintiff also claims to be a financer. In view of contradictory pleas taken by the plaintiff, the present suit filed by the plaintiff is not maintainable under the 2015 Act.

54. The MOA filed by the plaintiff clearly shows the objective of the plaintiff is to be engaged in the businesses of manufacturing, merchanting, importing, exporting, distributing and dealing of all kinds of alcoholic beverages. In order to increase its market share, the plaintiff extended financial assistance to the defendant No. 1 who wanted to bid in the New Delhi Excise Policy 2021-22 in the form of corporate guarantee in favour of the defendant No. 2 to secure the loan facility extended to the defendant No. 1. In this regard, Clause III(B)(9) of the MOA reads as under:-

> □9. To lend money to such persons or companies and on such terms as may seem expedient and in particular, to customers and others having dealings with the Company and to guarantee performance of contracts by obligation of any person or companies and to give all kinds of indemnity.

55. A perusal of the said clause clearly shows that there are no contradictions in the averments made in para Nos. 1 and 20 of the Digitally Signed By:MAYANK 11:50:41 plaint with regard to the status of the plaintiff. Further, the object clause of the MOA clearly permits the plaintiff to advance credit facilities to persons or companies dealing with the plaintiff.

56. Further with regard to the maintainability of the suit under the 2015 Act, section 2(1)(c)(i) of 2015 Act reads as under:-

> □2. Definitions.--(1) In this Act, unless the context otherwise requires,--
>
> (a) .....
>
> (b) .....
>
> (c) □commercial dispute means a dispute arising out of--
>
> (i) ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents;

57. The Division Bench of this Court in Punj Llyod Ltd. v. Hadia Abdul Latif Jameel Co. Ltd., 2018 SCC OnLine Del 12455 has clearly held that the corporate guarantee comes under the mercantile documents. The relevant para is extracted below:-

> ☐1..... As far as the matter on merit is concerned, we are of the view that there is no infirmity with the view expressed by the learned Single Judge. The defendant No. 2 in the suit is not a stranger but is a joint venture of the defendant No. 1 (appellant herein). The appellant No. 1 had issued the corporate guarantee in favour of the plaintiff being respondent No. 1 herein. The opening lines of the guarantee would suggest that the same was executed to secure the lease rent in respect of the lease agreement which was proposed to be executed between the plaintiff (landlord) and the joint venture of the appellant herein. Section 2(c)(i) is not to be read in isolation but to be read with the facts of Digitally Signed By:MAYANK 11:50:41 this case along with Section 2(c)(vii). The respondents had entered into an agreement relating to immovable property, which is to be used exclusively for trade or commerce and with respect to this transaction a corporate guarantee was executed, which would fall under the broader definition of a mercantile document and thus, this plea of the appellant is also rejected.

58. The plaintiff in the present case had extended financial assistance to the defendant No. 1 in form of corporate guarantee so that the defendant No. 1 can bid/participate in the New Delhi Excise Policy 2021-22. On default by the defendant No. 1, the said corporate guarantee was invoked by the defendant No. 2. The plaintiff is seeking recovery of the said amount debited by the defendant No. 2 pursuant to the invocation of the corporate guarantee issued by the plaintiff in favour of defendant No. 2. The parties herein were in commercial relationship and the transaction arises from the commercial arrangement. Hence, I am of the view that the present dispute as noted above clearly falls under section 2(1)(c)(i) of the 2015 Act. With regard to the default in repayment by the defendant No. 1

59. The present suit filed by the plaintiff is premised on the default on the part of the defendant No. 1 in repayment of the loan amount. Defendant No. 1 has repeatedly emphasized that there has been no default in payment of the EMI to defendant No. 2 and defendant No. 2 had wrongly issued instructions for "regulatory hold" and thereafter invoked the corporate guarantee.

60. The said submission is devoid of merit and is merely moonshine.

61. On perusing the leave to defend application, it is pertinent to note that Digitally Signed By:MAYANK 11:50:41 defendant No. 1 has not denied the loan extended by defendant No. 2. Further, it is also not denied that the plaintiff was the guarantor in the said loan which is also clear from the document Schedule IV of the Loan Agreement dated 14.12.2021.

62. This Court in the present case is not concerned whether the account of the defendant No. 1 was validly or invalidly put on "regulatory hold"

> by the defendant No. 2 on 07.11.2022. If the defendant No. 1 felt that the same was invalidly done, the remedy of the defendant No. 1 was to challenge the same in appropriate proceedings in accordance with law and obtain appropriate orders which the defendant No. 1 has not done yet. Further, the facts before me shows that defendant No. 2 after putting the account of the defendant No. 1 on regulatory hold, invoked the corporate guarantee in terms of contractual obligations between the parties herein which was its legal and contractual right and debited an amount of Rs. 35,88,59,676.11. The plaintiff was legally bound to honour the corporate guarantee which it so did.

63. By invocation of the corporate guarantee by the defendant No. 2, the plaintiff steps into the shoes of the defendant No. 2 as a subrogee by virtue of section 140 of 1872 Act which reads as under:-

> □140. Rights of surety on payment or performance.--Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.

64. The Hon ble Supreme Court in BRS Ventures Investments Ltd. v. SREI Infrastructure Finance Ltd., 2024 SCC OnLine SC 1767 has Digitally Signed By:MAYANK 11:50:41 held as under:-

> □The words used in Section 140 are □upon payment or performance of all that he is liable for . When the principal debtor commits a default and when the liability under the deed of guarantee of the surety is not limited to a particular amount, its liability is in respect of the entire amount repayable by the principal debtor to the creditor. The words □all that he is liable' used under Section 140 cannot be ignored. The principal borrower must continuously indemnify the surety. Section 140 of the Contract Act may be founded on the said obligation. The 1st respondent-financial creditor relied upon a decision of this Court in the case of Economic Transport Corporation, Delhi, which holds that the doctrine of subrogation is a creature of equity. Therefore, the Section will have to be interpreted having regard to the equitable principles. If the surety pays the entirety of the amount payable under guarantee to the creditor, Section 140 provides a remedy to the surety to recover the entire amount paid by him in the discharge of his obligations. Therefore, the surety gets invested with the rights of the creditor to recover from the principal debtor the amount which was paid as per the guarantee. If the surety pays only a part of the amount payable to the creditor, the equitable right the surety gets under Section 140 will be confined to the debt he cleared.

65. From the aforesaid, it is clear that on default committed by the defendant No. 1, the defendant No. 2 invoked the corporate guarantee issued by the plaintiff to cover the debt of the defendant No. 1. The debt on becoming due was paid in entirety by the plaintiff as demanded by the defendant No. 2. Hence, in view of section 140 of 1872 Act read with BRS Ventures Investments Ltd. (supra), the

Digitally Signed By:MAYANK 11:50:41 plaintiff has stepped into the shoes of the defendant No. 2 and is entitled to recover the debited amount from defendant No. 1.

66. The invocation of the corporate guarantee was informed to the defendant No. 1 vide email dated 02.12.2022 by the defendant No. 2. The defendant No. 1 still chose not to challenge the said invocation of the corporate guarantee before any judicial authority in accordance with law. There is no material/document brought before me, wherein defendant No. 1 has filed a suit for declaration seeking declaration of corporate guarantee as void on the ground that the same was an investment mechanism adopted by plaintiff for illegal and malafide purposes.

67. Also, at this juncture, I cannot lose sight of the fact that the defendant No. 1 in its reply dated 28.04.2023 to the demand notices dated 13.01.2023 and 04.04.2023 i.e. after the invocation of the corporate guarantee, has stated that due to revocation of the New Delhi Excise Policy 2021-22, the defendant No. 1 is under financial hardship and requires the plaintiff to cooperate. The operative paras of the reply dated 28.04.2023 of the defendant No. 1 reads as under:-

> In the light of the aforesaid unfortunate and financially unpleasant circumstances that we are in, Pernod would be appreciative of the fact that we are completely incapacitated to fulfil our financial commitments as on today, and we shall not be in any position to even have a discussion with Pernod with regard to the repayment of the aforesaid amount till the time we are able to recover the aforesaid huge sums of money that are stuck without any cause and reasons attributable to us whether directly or indirectly. Therefore, we are requesting Pernod's patience and Digitally Signed By:MAYANK 11:50:41 cooperation towards us, as we will first need to recover the aforesaid amount of monies from various sources, in order to be in a position to have a discussion with Pernod regarding the payment of the aforesaid amount.

> 68. Hence, the invocation of corporate guarantee by defendant No. 2and the payment made by plaintiff pursuant to the said invocation, the payment credited from the account of the plaintiff of Rs.35,88,59,676.11 are admitted facts. With these admitted facts, the defendant No. 1 has not raise any triable issue which entitles the defendant No. 1 grant of leave to defend. That being so, the argument of defendant No. 1 that there was no default on the part of defendant No. 1 or the corporate guarantee was wrongly invoked by the defendant No. 2 is meritless.

> 69. The argument of the defendant No. 1 that the email dated 10.11.2022 was not marked and the same was only sent to the plaintiff and the corporate guarantee was invoked before the expiry of the due date is of no consequence as it would be an issue if the defendant No. 1 had filed a separate suit. In a cause of action for a wrongful invocation of the corporate guarantee which defendant No. 1 may have against defendant No. 2 would lie only in a separate suit if filed by the defendant No. 1 against defendant No. 2. In the present case, the plaintiff was bound by the terms and conditions of the corporate guarantee. The defendant No. 2 had to be paid by the plaintiff.

Plaintiff having paid the same, plaintiff is entitled to recover from the defendant No. 1. Hence the said argument is meritless.

70. Reliance placed on Abhey Dewan (supra) to urge that the agreement Digitally Signed By:MAYANK 11:50:41 herein is illegal is misconceived as therein the recovery was based on betting in cricket which itself is illegal in the eyes of law whereas in the present case, the defendant No. 1 took a loan from defendant No. 2 and to secure the loan amount, the plaintiff was the guarantor.

71. Further, reliance placed on Immani Appa Rao (supra) is also misplaced as there is no plea taken by the defendant No. 1 that the agreement between the parties was entered into by fraud.

72. Reliance placed on Standard Chartered Bank (supra) is also misplaced as the case of the defendant therein was based on the fraud committed by the plaintiffs therein and had caused a wrongful loss to the defendant therein. Based on the report of Comptroller and Auditor General of India and Central Vigilance Commission, the Court therein was of the view that the case requires full scale trial on oral and documentary evidence whereas in the present case, there is no such report. In addition, the said judgment does not deal with the principles for grant/rejection of leave to defend and the observations made are in the passing.

With regard to the criminal proceedings pending before the Special Court of ED

73. Lastly, the third argument raised by defendant No. 1 is with regard to criminal proceedings pending before the Special Court of ED.

74. Defendant No. 1 by placing reliance on the statements recorded by the ED which forms part of the complaint filed by the ED before the Special Court, has vigorously argued that both the plaintiff and defendant No. 1 are accused in the criminal proceedings and the Special Court has taken cognizance of the same. The subject matter Digitally Signed By:MAYANK 11:50:41 i.e. corporate guarantee is alleged to be "proceeds of crime" by the ED. Hence the suit cannot be decreed.

75. The constitution bench of the Hon ble Supreme Court in Iqbal Singh Marwah v. Meenakshi Marwah, (2005) 4 SCC 370 has observed as under:-

> 32. Coming to the last contention that an effort should be made to avoid conflict of findings between the civil and criminal courts, it is necessary to point out that the standard of proof required in the two proceedings are entirely different. Civil cases are decided on the basis of preponderance of evidence while in a criminal case the entire burden lies on the prosecution and proof beyond reasonable doubt has to be given. There is neither any statutory provision nor any legal principle that the findings recorded in one proceeding may be treated as final or binding in the other, as both the cases have to be decided on the basis of the evidence adduced therein. While examining a similar contention in an appeal against an order directing filing of a complaint under Section 476 of the old Code, the following observations made by a Constitution Bench in M.S. Sheriff v. State of Madras [1954 SCR 1144 : AIR 1954 SC

> 397 : 1954 Cri LJ 1019] give a complete answer to the problem posed: (AIR p. 399, paras 15-16) □5. As between the civil and the criminal proceedings we are of the opinion that the criminal matters should be given precedence. There is some difference of opinion in the High Courts of India on this point. No hard-and-fast rule can be laid down but we do not consider that the possibility of conflicting decisions in the civil and criminal courts is a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of Digitally Signed By:MAYANK 11:50:41 one court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration here is the likelihood of embarrassment.
>
> 16. Another factor which weighs with us is that a civil suit often drags on for years and it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. The public interests demand that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. Another reason is that it is undesirable to let things slide till memories have grown too dim to trust.

This, however, is not a hard-and-fast rule. Special considerations obtaining in any particular case might make some other course more expedient and just. For example, the civil case or the other criminal proceeding may be so near its end as to make it inexpedient to stay it in order to give precedence to a prosecution ordered under Section 476. But in this case we are of the view that the civil suits should be stayed till the criminal proceedings have finished.

76. By referring to the above, it is evident that there is no straight jacket formula to apply. Both the proceedings i.e. Civil and Criminal proceedings, are to be decided on the basis of evidence produced therein. In civil proceedings, the suits are decided on the basis of balance of convenience and in criminal proceedings, the burden of proof lies on the prosecution.

77. In the present case, I am of the view that there is only a prima facie Digitally Signed By:MAYANK 11:50:41 initiation of a criminal prosecution by the prosecuting agencies. As of today, there is no finding of fact by a judicial authority regarding the fact that the sums involved in the present case are proceeds of crime. The mere fact that ECIR has been registered, complaint has been filed, cognizance has been taken do not make the transaction illegal and void. The criminal proceedings are of a much wider amplitude and concerns the violations of the New Delhi Excise Policy 2021-22. The present suit for recovery before this Court is only limited to contractual obligations between the parties herein regarding invocation of corporate guarantee of the plaintiff by defendant No. 2 for defaults committed by defendant No. 1.

78. Hence, in the absence of any findings recorded by judicial authority/Special Criminal Court, the argument that the criminal proceedings are underway before the Special Court and for this reason, unconditional leave to defend must be granted is without merit and stands rejected.

CONCLUSION

79. For the foregoing reasons, the defendant No. 1 has failed to raise any triable issue. In this view of the matter, the application seeking leave to defend is devoid of merits and is rejected. CS(COMM) 281/2023

80. As the application filed by the defendant No. 1 seeking leave to defend has been dismissed, the present suit is to be decreed in favour of the plaintiff.

81. On perusal the letter dated 10.11.2022, the defendant No. 2 has invoked the corporate guarantee and debited an amount of Rs.

Digitally Signed By:MAYANK 11:50:41 35,88,59,676.11 which was due and payable by the defendant No. 1 toward defendant No. 2.

82. The suit for recovery filed by the plaintiff is decreed for a sum of Rs.

35,88,59,676.11 against defendant No. 1 alongwith interest @ 9% per annum from the date of payment made by the plaintiff till the date of institution of this suit.

83. Further, the plaintiff is also entitled to pendente lite and future interest @ 9% per annum from the date of institution of suit till the date of payment.

84. Decree sheet be prepared accordingly.

85. No orders as to costs.

86. Pending applications are disposed of in the above terms.

JASMEET SINGH, J rd AUGUST 23 , 2024/(MSQ) Digitally Signed By:MAYANK 11:50:41