Idbi Trusteeship Services Ltd vs Hubtown Ltd on 15 November, 2016

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Bench: Kurian Joseph, Rohinton Fali Nariman

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO._10860_ of 2016
(ARISING OUT OF SLP (CIVIL) NO.31439 OF 2015)

IDBI TRUSTEESHIP SERVICES LTD. …APPELLANT

VERSUS

HUBTOWN LTD. …RESPONDENT

J U D G M E N T

R.F. Nariman, J.

1. Leave granted.

2. The present appeal arises out of a Summons for Judgment No. 39 of 2013 in a Summary Suit filed on the original side of the Bombay High Court, by the Petitioner, a debenture trustee, to enforce rights that arise out of a Corporate Guarantee executed by the Respondent-defendant. The necessary averments made in the plaint would disclose the cause of action of the suit as well as the facts

necessary to decide this appeal. They are as follows:

> "3. In 2009 and 2010, Nederlandse Financierings-Maatschappij voor Ontwikkelingslanden N.V. (hereinafter referred to as "FMO") invested in certain equity shares and compulsorily convertible debentures (hereinafter referred to as the "CCDs") of Vinca Developer Private Limited (hereinafter referred to as "Vinca"). As a result of the said investment, FMO currently holds (i) 10% of the equity of Vinca through Class A shares and is entitled to 10% of the voting rights and economic interest in Vinca by virtue thereof; and (ii) 3 CCDs in Vinca. Further, as on date, the Defendant owns 49% of the equity of Vinca through Class A shares and is entitled to 49% of the voting rights and economic interest in Vinca by virtue thereof. The remaining 41% Class A equity shares in Vinca are owned by the individual promoters of the Defendant, being Hemant Shah and Vyomesh Shah, which entitles them to 41% of the voting rights and economic interest in Vinca. Hemant Shah and Vyomesh Shah together also own 100% of Class B equity shares of Vinca, which carry with them collective voting rights and dividend entitlement not exceeding 0.01%. Upon conversion, the 3 CCDs in Vinca will entitle FMO to 99% of the equity of Vinca (by allotment of additional Class A shares), thereby entitling it to 99% of the voting and economic rights of Vinca. The said monies invested by FMO into Vinca were then used by Vinca to subscribe to certain optionally partially convertible debentures (hereinafter referred to as "OPCDs"), as specified below.
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> 4. The Plaintiff is India's largest Trusteeship Company and provides a wide spectrum of Trusteeship Services. The Plaintiff has been appointed as the Debenture Trustee under (i) the Debenture Subscription and Debenture Trust Deed dated 1st December, 2009 executed by Amazia Developers Private Limited (hereinafter referred to as "Amazia"), Vinca, Brainpoint Infotech Private Limited (hereinafter referred to as "Brainpoint"), the Defendant and the Plaintiff; and (ii) the Debenture Subscription and Debenture Trust Deed dated 1st December, 2009 executed by Rubix Trading Private Limited (hereinafter referred to as "Rubix"), Vinca, the Defendant and the Plaintiff as amended by OPCD Amendment Agreement dated 8th September, 2010;

(hereinafter collectively referred to as the "Debenture Trust Deeds") in relation to Vinca's investment in OPCDs issued by Amazia and Rubix. A copy of the Debenture Trust Deeds is annexed hereto and marked as Exhibits "A- 1", "A-2" and "A-3".

5. Pursuant to and in accordance with the terms of the Debenture Trust Deeds, Vinca has subscribed to:

> i. certain secured, non marketable, transferable, OPCDs of Rubix, of a face value of Rs.10,00,000 each aggregating to INR 1,285,000,000 in tranche 1;
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> ii. additional secured, non marketable, transferable, OPCDs of Rubix, of a face value of Rs. 10,00,000 each, aggregating to INR 1,395,000,000 in tranche 2;

iii. certain secured, non marketable, transferable, OPCDs of Amazia, of a face value of Rs.10,00,000 each, aggregating to INR 1,500,000,000.

6. The OPCDs carry a variable running coupon and a back ended coupon to ensure an internal rate of return of 14.75% per annum.

7. The Plaintiff states that the proceeds obtained by Amazia and Rubix from the issue of the OPCD's to Vinca were to be applied towards inter alia projects which are compliant with Indian foreign direct investment law as applicable to townships, housing, built-up infrastructure and construction development projects, as provided more particularly under clause I, Part C, Schedule 7 of the Debenture Trust Deeds.

8. The Plaintiff states that in order to secure the said OPCDs, and to ensure the due and punctual payment by Amazia and Rubix of all dues to Vinca under the Debenture Guarantee Deeds, the Defendant has, inter alia vide the Corporate Guarantee Deed, dated 9th December, 2009, issued an unconditional, absolute and irrevocable corporate guarantee in favour of the Plaintiff, inter alia for the benefit of Vinca (hereinafter referred to as the "Guarantee"). A copy of the Guarantee is annexed hereto and marked as Exhibit "B".

9. The Plaintiff submits that inter alia the following defaults were committed by Amazia and Rubix, inter alia under the said Debenture Trust Deeds:

Defaults by Amazia and Rubix in payment of interest on the OPCDs, as contemplated under Condition 7 of Schedule 3 of the Debenture Trust Deeds, which default has been subsisting since 15th June, 2011, on the interest accrued on the OPCDs since 16th March, 2011;

Defaults by Amazia and Rubix in payment of default interest accrued on the OPCDs since 16th June, 2011;

The occurrence of an event of default (cross default) specified in Clause 21(a) of Schedule 14 of the Debenture Trust Deeds, arising inter alia out of a default by Vinca under the CCDs;

Failure on the part of Rubix, Amazia and the Defendant in providing the financial statements required to be provided as per Entry I (Financial Statements) of Part A of Schedule 7 (Covenants of the Obligors and Security Providers) of the Debenture Trust Deeds;

Failure on the part of the Defendant in maintaining the Net Debt to EBITDA Ratio, the Debt Service Cover Ratio and the Interest Coverage Ratio as per the provisions of Part B of Schedule 7 (Covenants of the Obligors and Security Providers) of the Debenture Trust Deeds, for the Ratio period from 1st April, 2011 to 30th September, 2011;

Failure on the part of Rubix, Amazia and the Defendant in complying with a number of the Positive Covenants which were required to be fulfilled by them as per the provisions of Part C of Schedule 7 (Covenants of the Obligors and Security Providers) of the Debenture Trust Deeds, including the failure to apply the proceeds from the issue of OPCD's in the manner contemplated in the abovementioned Schedule i.e. towards projects that are compliant with the Indian foreign direct investment law;

Failure on the part of Rubix, Amazia and the Defendant in complying with a number of the Negative Covenants as per the provisions of Part D of Schedule 7 (Covenants of the Obligors and Security Providers) of the Debenture Trust Deeds.

10. In view of the aforesaid defaults, the Plaintiff was constrained to issue notices dated 2nd May, 2012 to Amazia and Rubix respectively, under Clause 33.1 of the Debenture Trust Deeds, for subsisting payment of interest on OPCDs as contemplated under Condition 7 of Schedule 3 of the Debenture Trust Deeds, setting out inter alia (i) the payment defaults subsisting as on the said date; (ii) the default by Amazia and Rubix in crediting the designated account with lease rental proceeds; and (iii) the failure to provide information, and breach of certain identified covenants. However, no response was forthcoming from Amazia and/or Rubix. A copy of the notices dated 2nd May, 2012 is annexed hereto and marked Exhibits "C-1" and "C-2".

11. Consequently, and further to the Plaintiff's letters dated 2nd May, 2012, and in view of the fact that the said defaults were not rectified by Amazia and Rubix as required under the said letters dated 2nd May, 2012, the Plaintiff, in exercise of its right of early redemption under Condition 12.1(a) and Condition 12.2 of Schedule 3 of the Debenture Trust Deeds, has issued redemption notices to both Amazia and Rubix on 27th June, 2012 (hereinafter referred to as the "Redemption Notices") for the reasons and on the grounds contained therein, inter alia calling upon Amazia and Rubix to fully redeem all the OPCDs at par value on 3rd July, 2012 (hereinafter referred to as the "Early Redemption Date") and to credit the Principal Redemption Amount alongwith interest accrued and unpaid thereon, aggregating to Rs.4,843,299,862.97/- into A/c. no.: 00600350098359 held in the name of the Plaintiff at HDFC Bank, on the Early Redemption Date. A copy of the Redemption Notices is annexed hereto and marked Exhibits "D-1" and "D-2".

12. However, despite repeated reminders to rectify their various defaults under the Debenture Trust Deeds, and various attempts to resolve the issues amicably, Amazia and Rubix have failed and neglected to pay the amounts due and payable in terms of the Debenture Trust Deeds. Consequently, the Plaintiff was constrained to issue a Demand Certificate for the enforcement of the Guarantee, in terms of the said Guarantee, to the Defendant on 3rd August, 2012. A copy of the Demand Certificate dated 3rd August, 2012 is annexed hereto and marked Exhibit "E".

13. No reply has been received to the aforementioned Demand Certificate from the Defendant till date. The Defendant therefore failed and neglected to make payment of the amounts due to the Plaintiff under the Guarantee.

33. The Plaintiff therefore prays:

> this Hon'ble Court be pleased to order and decree the Defendant to pay to the Plaintiff a sum of Rs.532,11,29,364.05/- (Rupees Five Hundred and Thirty Two Crores Eleven Lakhs Twenty Nine Thousand Three Hundred and Sixty Four and Five Paisa Only) as on May 6, 2013, being (i) Rs. 477,51,90,932.97/- (Rupees Four Hundred Seventy Seven Crores Fifty One Lakhs Ninety Thousand Nine Hundred and Thirty Two and Ninety Seven Paisa only) as the revised principal amount, being Rs.484,32,99,862.97/- (Rupees Four Hundred and Eighty Four Crores Thirty Two Lakhs Ninety Nine Thousand Eight Hundred and Sixty Two and Ninety Seven Paise only) (hereinafter referred to as "Principal Amount"), less an amount of Rs.6,81,08,930/- (Rupees Six Crores Eighty One Lakhs Eight Thousand Nine Hundred and Thirty Only) received on March 4, 2013 under the Amazia TRA Agreement (hereinafter referred to as "Revised Principal Amount"); (ii) Rs.42,26,78,815.12/-

(Rupees Forty Two Crores Twenty Six Lakhs Seventy Eight Thousand Eight Hundred and Fifteen and Twelve Paisa only) as the default interest on the Principal Amount, at the rate of 14.75% per annum from August 11, 2012 till March 4, 2013 as per Clause 3 of the Guarantee; and (iii) Rs.12,32,59,615.96/- (Rupees Twelve Crores Thirty Two Lakhs Fifty Nine Thousand Six Hundred and Fifteen and Ninety Six Paise only) as the default interest on the Revised Principal Amount, at the rate of 14.75% per annum from March 5, 2013 till May 6, 2013, as per Clause 3 of the Guarantee and thereafter, such further interest @ 14.75% per annum on the Revised Principal Amount being Rs. 477,51,90,932.97/- (Rupees Four Hundred Seventy Seven Crores Fifty One Lakhs Ninety Thousand Nine Hundred and Thirty Two and Ninety Seven Paise only), till the date of actual payment or realization."

3. The affidavit-in-reply to the aforesaid Summons for Judgment raised the following defence, as recorded by the Ld. Single Judge in the impugned judgment dated 8th May, 2015.

"16. Since according to the Defendant, the above submission is their main submission in the present matter, the same is elaborated as follows:

> 16.1 That the FDI Policy and the statutory FEMA Regulations (which incorporate the FDI Policy as a Schedule thereto), permit FDI in townships, construction of houses, only by way of equity investments (which is defined to also include debentures which are compulsorily required to be converted into equity: CCDs). The FDI Policy and the FEMA Regulations prohibit any other form of investment (non equity) in the said sector with an assured return/rate of return.
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> 16.2 That FMO, a foreign entity wanted to invest a substantial sum by way of FDI in a slum rehabilitation project being undertaken in Mumbai by Rubix and an Industrial Park being undertaken/ owned by Amazia. FMO was however only willing to invest in the said projects on the basis of an assured/fixed return, which was and is not permissible under the FEMA Regulations/FDI Policy. To enable FMO to bypass/circumvent the said FEMA/FDI prohibitions and get a fixed return of 14.5%

per annum on its investment of Rs. 418 crores, the investment structure (i.e investment by way of CCDs in Vinca and Vinca purporting to invest the said amounts in OPCDs of Amazia and Rubix) was devised/adopted as follows:

i) Vinca was interposed as the Holding Company of Amazia and Rubix and Vinca was the nominal recipient of the FDI of Rs. 418 crores from FMO by way of equity investment and CCDs (in apparent compliance with the FDI/FEMA Regulations).

ii) The documents executed for the FDI investment (Subscription Agreement and Debenture Trust Deed annexed as Schedule 13 thereto), however establish that the FDI received from FMO, was not intended for/could not be used by Vinca for any project of its own but was specifically required to be immediately invested by/through Vinca in OPCDs of Rubix & Amazia, bearing a fixed rate of return of 13.5%.

iii) Under the FEMA/FDI regulations/policy FMO could not have invested the said amounts in Amazia and Rubix through OPCDs bearing a fixed rate of return. By interposing Vinca (an Indian Company) the amounts received from FMO were invested in OPCDs of Amazia and Rubix bearing the fixed 14.5% rate of return.

iv) At the same time it was provided (a) that on conversion of the CCDs FMO would own 99% of the equity of Vinca and further that (b) the Articles of Vinca were amended to provide that any decision regarding the OPCDs/investment could only be taken by FMO nominees on the Board of Vinca.

(c) the DTDs for the Amazia and Rubix OPCDs provided that the Debenture Trustee/the Petitioner would only act on the instructions of the Nominee Directors of FMO.

v) Accordingly though Vinca was an “Indian Company” and the nominal recipient of the FDI, the transaction was so structured that:

(a) the FDI amount would be immediately routed by Vinca to Amazia & Rubix against issue by them of OPCDs bearing a return of 14.5%.

(b) FMO/its Nominee Directors could exclusively deal with the OPCDs and the Debenture Trustee/IDBI.

(c) after receipt by Vinca of the fixed rate of return (14.5 per cent per annum) from Amazia and Rubix under the OPCDs, FMO would on conversion of the CCDs, become the owner of Vinca and thereby receive/become entitled to the amounts received by Vinca by way of the fixed rate of return from Amazia and Rubix.

> vi) The Deed of Guarantee was contemporaneously executed by the Respondents on 9th December, 2009 in favour of the Debenture Trustee (the Petitioner herein) for securing the "due and punctual payment" of the principal and the interest by Amazia and Rubix to Vinca, actually to FMO and was part of the structure devised to ensure the receipt by FMO at the fixed rate of return of 14.5%.

16.3 That, if the entire transaction is looked at as a whole, it is clear that the interposing of Vinca as the nominal recipient of the FDI (against issuance of equity shares and CCDs) was a colourable and artificially structured transaction, the object and purpose of which was to enable FMO to secure a fixed rate of return on its FDI investments in townships/construction of housing, notwithstanding the FEMA Regulations/FDI Policy which permit only an equity investment without any fixed/agreed rate of return in the said sector. The said structure was and is not lawful and was and is opposed to public policy as it was designed to defeat and would defeat the provisions of law, the FEMA Regulations read with the FDI Policy.

16.4 That, the present Petition has been filed to effectuate the said illegal object of securing the said fixed rate of return for FMO. Although IDBI, the Petitioner, claims to be nominally acting on behalf of Vinca, it is in fact admittedly acting only at the instance of FMO/FMO's Nominee Directors on the Board of Vinca. FMO through its Nominee Directors on the Board of Vinca has instructed IDBI to demand the said sums (principal and agreed rate of return) from Amazia and Rubix and has further instructed/required IDBI to invoke the said Guarantee and file the present Petition. (sic – actually, Plaint). This is apparent from the correspondence annexed as Exhibits-C to V to the Petition.

xxx 16.6 That, by the present Petition, the Petitioner, acting at the instance of FMO, is seeking to utilise the process of this Court to secure for FMO a 14.5 per cent fixed rate of return on its FDI investment, contrary to the statutory stipulation/prohibition contained in the FEMA Regulations (which incorporate/embody the FDI Policy), which require FDI in townships/housing/construction development projects to be made only by equity participation (including compulsorily convertible debentures) and prohibits/precludes any assured return/rate of return. It is submitted that this would be contrary to law, public policy and public interest." Based on this defence, the Ld. Single Judge in the impugned judgment arrived at the following conclusions:

> "31. According to the Plaintiff, the doctrine of Pari Delicto is not applicable, that IDBI is not a party to the conspiracy and IDBI is not acting on behalf of FMO. Even if IDBI is acting on behalf of FMO, the doctrine of Pari Delicto would not be applicable as the Defendant had induced FMO to make the FDI/Investment by representing that the transaction was FDI/FEMA complaint.
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> 31.1 The above submission of the Plaintiff cannot be accepted. The conduct of FMO in routing its FDI nominally through Vinca to Amazia and Rubix against issuance by them of OPCDs and the amendments/provisions made in Vinca's Articles of Association, establishes that FMO was fully aware that it could not under the FDI policy and FEMA Regulations directly invest in the OPCDs, or require that its FDI amount/investment be returned back to it with a fixed rate of return after a

stipulated period i.e. without bearing an equity investment risk. The complex structure devised for FMO's FDI investment establishes that all parties (including FMO) were aware that the transaction which was premised on return back of the FDI amount along with a fixed rate of return thereon, was not permissible under/in violation of the FDI policy and the FEMA Regulations. It is clear that in claiming the amount and initiating the present proceedings, the Plaintiff is acting at the instance of FMO/FMO nominees on the Board of Directors of Vinca. This is the stipulation in Vinca's articles and under the DTD. In any event, inasmuch as the transaction (based on return of the FDI/principal amount invested along with a fixed rate of return thereon) is not permissible/prohibited under the FDI policy and the FEMA Regulations, neither IDBI nor FMO can seek the assistance of the Court to effectuate/implement/enforce such a prohibited/illegal transaction.

32. The Plaintiff has lastly contended that the alleged illegal purpose of securing a fixed return has not been carried out and that if the proceedings are allowed, the money will go to Vinca and not to FMO. It has been contended that FMO cannot receive the sums without complying with the FDI Regulations for sale of shares and repatriation.

32.1 This submission too of the Plaintiff cannot be accepted. The present claim has been made and the present proceeding has been initiated/filed by the Plaintiff at the instance of FMO/FMO nominees on Vinca's Board of Directors, in order to secure repayment/return of the FDI amount invested along with a fixed rate of return thereon i.e. for seeking the active assistance of this Court to implement/effectuate/enforce a transaction prohibited by the FDI policy and the FEMA Regulations. The contractual documents (SSA & DTD) establish that it was always agreed and understood that Vinca was only the nominal recipient of the FDI amount received from FMO and was also only nominally the recipient of the FDI amount and interest thereon at 14.5 per cent per annum to be received back from Amazia and Rubix. On receipt back by Vinca of the FDI amount and 14.5 per cent interest thereon, FMO can and will by conversion of the three CCDs become the 99% shareholder of Vinca. Under the FDI policy/FEMA Regulations, FMO can thereafter sell the shares of Vinca at the fair value, which will necessarily include the value/benefit of the FDI amount and interest at 14.5 per cent thereon.

33. However, I must also state that I do not find substance qua the following defences raised by the Defendant:

33.1 That the Suit deserves to be dismissed on the ground that the guarantee as well as trusteeship of IDBI has been discharged/terminated;

33.2 That under the provisions of the FDI Policy, an Indian Company which has received foreign direct investment can utilise its funds downstream only for making investment by way of equity instruments (i.e. in the form of equity capital or

compulsorily and mandatorily convertible preference shares or debentures);

33.3 That Investment by an Indian Company in OPCDs issued by subsidiary (also an Indian Company) would amount to an external commercial borrowing.

xxx 37.2 In the case in hand, I am prima facie of the view that the structure/device of routing FMO's FDI amount of Rs. 418 crores to Amazia and Rubix through the newly interposed Vinca (as the nominal recipient of the FDI) was a colourable device structured only to enable FMO to secure repayment (through Vinca) of its FDI amount and interest thereon at 14.75%, contrary to the statutory FEMA Regulations and the FDI policy embodied therein, which only permit FDI investment in townships/real estate development sector to be made in the form of equity (including Compulsorily Convertible Debentures) and preclude any assured return. I am also prima facie of the view that the Defendant's guarantee (which is the basis of the Company Petition No. 644 of 2013) though ostensibly in favour of Vinca, an Indian Company, was part of the aforesaid illegal structure/scheme and was given to ensure that FMO received back its FDI amount with interest as aforesaid through Vinca. The Guarantee was therefore part of the aforesaid illegal structures/scheme and therefore prima facie illegal and unenforceable.

37.3 Further the question of the Defendant not being allowed to plead its own wrong also does not arise in the facts of the present case. Through the present Petition, the Plaintiff (who is admittedly acting at the instance of FMO/FMO's nominees) is in effect seeking the assistance of this Court to enable/enforce recovery by FMO of its FDI amount and interest thereon (through Vinca), contrary to the provisions of the FEMA Regulations and FDI policy embodied therein. As has been held by the Hon'ble Supreme Court in the case of Immami Appa Rao vs. G. Ramalingamurthi (supra), the Plaintiff who wants orders in his favour, is actually seeking the active assistance of the Court to achieve what the law prohibits/declares illegal and that is clearly and patently inconsistent with public interest.

Moreover, as has been held by the Supreme Court in the above case, in such a case there can be no question of estoppel and the paramount consideration of public interest requires that the plea be allowed to be raised and tried." xxx 40.2 In my view, the Plaintiff is also not correct when they state/submit that the judgment supports the Plaintiff in contending that the Defendant had not "brought on record a shred of material to show how the facts of the present dispute would mandate lifting of the corporate veil..." Even if it is assumed that the corporate veil is not to be lifted or Vinca, Amazia and Rubix are to be treated as one Company, as has been mentioned hereinabove, Vinca interposed as the holding Company of Amazia and Rubix only for the purpose of structuring FMO's FDI investment into Amazia and Rubix, through Vinca as the nominal recipient. The SSA and the annexed Debenture Trust Deed, specifically provided that the FDI amount to be received by Vinca from FMO against issuance of CCDs and equity shares by Vinca, was not to be retained by Vinca or used by Vinca in its own projects. The SSA and Trust Deed in fact expressly stipulated that the FDI amount received by Vinca from FMO, was to be immediately passed on by Vinca to Amazia and Rubix, against issuance by them of OPCDs. Accordingly the SSA and the Trust Deed itself established that Vinca had been interposed only to provide a facade of compliance with the FEMA Regulations/FDI policy and was only a nominal recipient of the FDI and that Vinca was immediately

required to route the entire amount received from FMO to Amazia and Rubix, against issuance by them of OPCDs." xxx

42. In the circumstances I am of the view that the Defendant has raised triable issues which require adjudication on further evidence at the time of final disposal of the suit. Hence the following order:

> (i) Unconditional leave is granted to the Defendant to defend the above suit;
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> (ii) The suit is transferred to the list of commercial causes and the Defendant is directed to file its written statement on or before 15th June, 2015;
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> (iii) The hearing of the suit is expedited and the Court will endeavour to dispose of the suit within a period of one year from the date of this order. It is clarified that the Suit shall be decided without being influenced by any of the observations made in the present order.
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> (iv) Place the suit for framing of issues on 29th June, 2015."
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> 5. Since the summary suit is filed on a Corporate Guarantee, and since this document has been heavily relied upon by Dr. Abhishek Manu Singhvi, Ld. Senior Counsel on behalf of the appellant, it is necessary to set out some of the clauses of this Guarantee. It may first be noticed that the deed of Corporate Guarantee cum Mortgage, dated 9th December, 2009, was made by Ackruti City Ltd. as guarantor. Ackruti City Ltd. has since become Hubtown Ltd., the Respondent-defendant. IDBI Trusteeship Services Ltd. is described as the debenture trustee for the benefit of Vinca Developer Pvt.

Ltd., for the Amazia Optional Partially Convertible Debentures (hereinafter referred to as "OPCDs") and the Rubix OPCDs, and appointed pursuant to the Amazia OPCD subscription and debenture trust deed and the Rubix OPCD subscription and debenture trust deed. The very opening clause of the Deed of Corporate Guarantee states as follows:

> "A. GUARANTEE In consideration of the premises, the Surety hereby unconditionally, absolutely and irrevocably guarantees to and agrees with the Debenture Trustee for the benefit of the Debenture Holder and the Security Trustee, for the benefit of the Lender, respectively, that:
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> 1. It shall ensure that Amazia shall duly and punctually pay or repay the Amazia Secured Obligations and Rubix shall duly and punctually pay or repay the Rubix Secured Obligations and Rubix Facility Secured Obligations, including but not limited to the Principal Amount under the Amazia OPCD Subscription and Debenture Trust Deed and the Rubix OPCD Subscription and Debenture Trust Deed, respectively and the Facility, together with all interest, liquidated damages, commitment charges, premia on prepayment or on redemption, costs, expenses, and other monies due to (i) the Debenture Holder and the Debenture Trustee and any

remuneration and charges that and

(ii) the Lender and the Security Trustee and any remuneration and charges that might be payable to the Security Trustee, in accordance with the Facility Agreement and perform and comply with all the other terms, conditions and covenants contained in the OPCD Subscription and Debenture Trust Deeds and the Facility Agreement.

2. The Surety guarantees to the Debenture Trustee acting for the benefit of the Debenture Holder and the Security Trustee acting for the benefit of the Lender, jointly and severally, the due and punctual payment by Amazia of the Amaxia Secured Obligations and by Rubix of the Rubix Secured Obligation and Rubix Facility Secured Obligations, which are due but unpaid, and irrevocably and unconditionally agrees and undertakes (as primary obligor and not only as (sic.) to pay to the Debenture Trustee and/or the Security Trustee forthwith on demand (which demand shall be made in terms of the Transaction Documents) as stated in Clause 31 herein (and in any event within five (5) Business Days of the demand) and indemnify and keep indemnified the Debenture Trustee acting for the benefit of the Debenture Holder and the Security Trustee acting for the benefit of the Lender against all losses, damages, claims, charges, fees and expenses whatsoever which the Debenture Trustee/Security Trustee may incur by reason of or in connection with any default on the part of the Guarantor or on the part of the Issuers in making such payment and including in connection with legal proceedings taken against the Issuers and/or the Guarantor for recovery of the moneys referred to in this Guarantee. In this regard the Debenture Trustee's and/or the Security Trustee's independent opinion of default of the Issuers and the amounts comprising shortfall amounts, as indicated in the Demand Certificate (as defined hereinafter in Clause 31) shall be final and binding on the Guarantor and the Guarantor shall not dispute the same. This Guarantee shall be continuing and shall remain in full force and effect until all the Secured Obligations have been discharged in full to the satisfaction of the Debenture Approved Instructions) and the Security Trustee certify the same in writing.

3. If the Guarantor delays in making payments in full pursuant to the demand being made on it, then it shall pay interest at the rate of 14.75% per annum ("Default Interest Rate") on the outstanding amount, till the same is discharged in full to the satisfaction of the Debenture Trustee (acting on Approved Instructions) or the Security Trustee and the Guarantor agrees that the Default Interest Rate agreed, is a genuine pre-estimate of the loss likely to be suffered by the Debenture Holder, Debenture Trustees, Security Trustee and/or the Lender on account of any default by the Guarantor in discharging its obligations as agreed herein.

14. Notwithstanding the Debenture Holder's/the Debenture Trustee's and the Security Trustee's/ Lender's rights under any security which the Debenture Holder/ the Trustee (acting on Approved Instructions) and the Security Trustee, jointly and severally, shall have the fullest liberty to call upon

the Guarantor to pay all or part of the monies for the time being due to the Debenture Holder/ the debenture Trustee and/or the Security Trustee/ the Lender (as the case may be) in respect of the Secured Obligations without requiring the Debenture Trustee/ the debenture Holder and/or the Security Trustee/ the Lender to realize from the Issuers the amount outstanding to the Debenture Holder/ the Debenture Trustee and/or the Security Trustee/ the Lender pursuant to the Debentures/ Facility and/or requiring the Debenture Trustee/ the Debenture Holder and/or the Security Trustee/ the Lender to enforce any remedies or securities available to the Debenture Trustee/ the Debenture Holder and/or the Security Trustee/ the Lender.

31. The Guarantor agrees that the amount hereby guaranteed shall be payable to the Debenture Trustee and/or the Security Trustee immediately upon the Debenture Trustee and/or the Security Trustee/ Lender serving the Guarantor with a notice requiring payment of the amount due (the "Demand Certificate"), in the form and manner set out in Schedule I hereto, at the address and details specified in Clause 34 below. Save and except as provided above, prior to making any demand hereunder, the Debenture Trustee/ the Debenture Holder and/or the Security Trustee/ the Lender shall not be required to take any step, make any demand upon, exercise any remedies or obtain any judgment against any of the Obligors, give notice to the Obligors or any other person under the Transaction Documents or otherwise and howsoever arising, or make or file any claim or proof in the dissolution or winding-up of any of the Obligors or enforce or seek to enforce any Security now or hereafter held by any of the Debenture Trustee/Debenture Holder and/or the Security Trustee/ Lender in respect of the when sent (with the correct answerback), (ii) if sent by fax, when sent (on receipt of a confirmation to the correct fax number), (iii) if sent by person, when delivered, (iv) if sent by courier, one (1) Business Day after deposit with an overnight courier, and (v) if sent by registered letter, when the registered letter would, in the ordinary course of post, be delivered whether actually delivered or not. An original of each notice and communication sent by telex or telecopy shall be dispatched by person or overnight courier and, if such person or courier service is not available, by registered first class mail with postage prepaid, provided that the effective date of any such notice shall be determined in accordance with paragraphs (i) or (ii) of this Clause 31, as the case may be, without regard to the dispatch of such original.

SCHEDULE I FORM OF DEMAND CERTIFICATE To: Ackruti City Limited [as "Guarantor"] From: [.] [as "Debenture Trustee"/ Security Trustee"] Dated: [.] Dear Sirs, Ref: Deed of Corporate Guarantee cum Mortgage dated [.] (the "Deed") executed by the Guarantor in favour of the Debenture Trustee and the Security Trustee.

[Amazia Developers Private Limited/Rubix Trading Private Limited] has not fulfilled its obligations under [the Amazia OPCD Subscription and Debenture Trust Deed dated [.] and/or the Rubix OPCD Subscription and Debenture Trust Deed dated [.] and/or the Facility Agreement] and an amount of Rs.[.] (Rupees [.] only) is due and payable by [Amazia Developers Private Limited/Rubix Trading Private Limited]. Accordingly, we hereby give you notice pursuant to Clause 2 and Clause 31 of the Deed that we require you to pay such amount.

All amounts due should be paid to the account [details of account] entitled [.] under the [.] immediately and in no event later than 5 Business Days from the date hereof.

Capitalised terms used herein shall have the meaning given to them in the Guarantee.

Yours faithfully [Debenture Trustee]/ [Security Trustee]"

6. It is on this Corporate Guarantee that the Summary Suit is based. Dr. Singhvi has argued before us that there has been no violation of the FEMA Regulations, 1999, as observed by the Ld. Single Judge. In particular, he referred to and relied upon Regulations 4 and 5 of the FEMA Regulations, which are set out as follows:

> "Restriction on an Indian entity to issue security to a person resident outside India or to record a transfer of security from or to such a person in its books :-
>
> |4. Save as otherwise provided in the Act or Rules or Regulations made | |thereunder, an Indian entity shall not issue any security to a person | |resident outside India or shall not record in its books any transfer of | |security from or to such person:- | | | | |Provided that the Reserve Bank may, on an application made to it and for | |sufficient reasons, permit an entity to issue any security to a person | |resident outside India or to record in its books transfer of security | |from or to such person, subject to such conditions as may be considered | |necessary. | |Permission for purchase of shares by certain persons resident outside | |India :- | |5. (1) (i) A person resident outside India (other than a citizen of | |Bangladesh or Pakistan) or an entity incorporated outside India (other | |than an entity in Bangladesh or Pakistan), may purchase shares or | |convertible debentures or warrants of an Indian company under Foreign | |Direct Investment Scheme, subject to the terms and conditions specified | |in Schedule 1. | |Explanation.--- Shares or convertible debentures containing an | |optionality clause but without any option/right to exit at an assured | |price shall be reckoned as eligible instruments to be issued to a | |person resident outside India by an Indian company subject to the terms | |and conditions as specified in Schedule 1." |

7. Dr. Singhvi argued that there is no breach whatsoever of the Regulations inasmuch as the suit, based upon a Corporate Guarantee to enforce its terms, is filed by an Indian company, namely, the debenture trustee IDBI Trusteeship Pvt. Ltd., against another Indian company namely Hubtown Ltd, the beneficiary being a subsidiary of Hubtown namely Vinca, which is also an Indian company. There is therefore no question of any funds going out of the country in violation of any FEMA Regulation, the ultimate repose of the funds being for the benefit of Vinca which is an Indian company. He argued before us that admittedly ?418 crores were paid by FMO, a Dutch company, and have been swallowed by the development project that has been set up by Amazia and Rubix. He also argued that there is no question of any infraction of the FEMA Regulations for the reason that these funds went to purchase equity shares of Vinca in the form of fully convertible debentures, such debentures having to be converted into shares after a certain period, and that, therefore, there was no question of any illegality in the said transaction. He further submitted that it is only in 2011 that defaults were made in payment, as a result of which the Corporate Guarantee was invoked. The said Corporate Guarantee is unconditional and not a word has been stated against its invocation, namely,

that it has not been alleged to have been invoked wrongly. According to him, there is no defence whatsoever to the suit, and the defence being entirely frivolous and vexatious, leave to defend ought to have been refused altogether. But, he stated as an alternative argument, that in any case the Appellant-plaintiff should be fully secured for the amount claimed in the plaint. He also submitted before us that the test laid down in Mechelec Engineers & Manufacturers v. Basic Equipment Corporation, (1976) 4 SCC 687 is no longer good law in view of the fact that O.XXXVII of the Code of Civil Procedure, 1908 ("CPC") was amended in 1976, and it is the amended provision that has to be looked at. He cited certain judgments before us to show that this court has taken the view that the amended provision makes a sea change in the law, as a result of which it is open to the court, even if it thinks that a triable issue is made out, to secure the plaintiff in monetary terms as a condition for leave to defend the suit.

8. Shri Aspi Chinoy, Ld. senior counsel appearing on behalf of the Respondent, has reiterated the submissions of his predecessor in the Bombay High Court. According to him there is a clear breach of the FEMA Regulations and this being so, the Ld. Single Judge was correct in referring to the judgment in Immami Appa Rao vs. G. Ramalingamurthi, (1962) 3 SCR 739, and stating that where two persons may be party to an illegality, the court would be justified, in the larger public interest, in not lending the court's aid to a person who comes to court to enforce such illegality. That this may incidentally benefit the defendant is of no moment, and therefore the Ld. Single Judge was correct in prima facie coming to the conclusion that the suit was to lend assistance to the plaintiff in enforcing something illegal, the Corporate Guarantee being part of the larger illegal transaction. According to ld. senior counsel, there is in fact no change made by the amendment of 1976, save and except in one area – that where the defendant admits that a certain amount is due from him, then even though leave to defend may be granted, the admitted amount ought to be deposited or secured. Short of this change, the law continues to be the same, and therefore, according to him, triable issues having been raised in the present case, it is clear that clause (e) of the propositions laid down in paragraph 8 of Mechelec's case alone would entitle the Plaintiff to an order for deposit into court or security, and sub-clause (e) not being attracted, the Ld. Single Judge was absolutely right in the conclusion that he reached. He also asked us not to interfere with the Ld. Single Judge's judgment under Article 136 as there was nothing perverse in the Single Judge's conclusions.

9. This case therefore raises a larger and very important question:

> namely, whether the judgment in Mechelec's case continues to be the law even after the amendment of O.XXXVII in 1976. To appreciate the respective submissions of counsel, it is necessary to set out O.XXXVII Rule 3 as it stood pre-amendment and as it now stands.
>
> O.XXXVII, Rule 3 (pre-amendment) "3. Defendant showing defence on merits to have leave to appear. (1) The Court shall, upon an application by the defendant, give leave to appear and to defend the suit, upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application.

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit." O.XXXVII, Rule 3 (post amendment) "3. Procedure for the appearance of defendant.—(1) In a suit to which this Order applies, the plaintiff shall, together with the summons under Rule 2, serve on the defendant a copy of the plaint and annexures thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader and, in either case, he shall file in Court an address for service of notices on him.

(2) Unless otherwise ordered, all summonses, notices and other judicial processes, required to be served on the defendant, shall be deemed to have been duly served on him if they are left at the address given by him for such service.

(3) On the day of entering the appearance, notice of such appearance shall be given by the defendant to the plaintiff's pleader, or, if the plaintiff sues in person, to the plaintiff himself, either by notice delivered at or sent by a prepaid letter directed to the address of the plaintiff's pleader or of the plaintiff, as the case may be.

(4) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment in Form 4-A in Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.

(5) The defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just:

Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious:

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.

(6) At the hearing of such summons for judgment,—

(a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith; or

(b) if the defendant is permitted to defend as to the whole or any part of the claim, the Court or Judge may direct him to give such security and within such time as may be fixed by the Court or Judge and that, on failure to give such security within the time specified by the Court or Judge or to carry out such other directions as may have been given by the Court or Judge, the plaintiff shall be entitled to judgment forthwith.

(7) The Court or Judge may, for sufficient cause shown by the defendant, excuse the delay of the defendant in entering an appearance or in applying for leave to defend the suit."

10. The 3 judge bench in Mechelec's case heard an appeal from a judgment of the Delhi High Court. In paragraph 2 of the judgment, the unamended O.XXXVII Rule 3 is set out, after which, in paragraph 4, the Court stated that the only question which arose before them in that appeal by special leave was whether the High Court could, in exercise of its powers under Section 115 of the CPC, interfere with the discretion of the district court in granting unconditional leave to defend to the defendant-appellant, upon grounds which even a perusal of the impugned judgment of the High Court showed to be reasonable. The answer to the question thus posed was in the question itself, and this Court had no doubt that the High Court judgment, in interfering with the trial court's judgment under its revisional jurisdiction, was wrong. Paragraphs 6 and 7, which constitute the ratio of the judgment, went into the well-established principles repeatedly laid down by this court which govern the jurisdiction of the High Courts under Section 115 of the CPC. This Court held that such principles had been ignored in the judgment under appeal. However, in paragraph 8, the judges set out the 5 propositions governing O.XXXVII laid down in Kiranmoyee Dassi Smt v. Dr J. Chatterjee, AIR 1949 Cal 479, as follows:

"In Kiranmoyee Dassi Smt v. Dr J. Chatterjee [AIR 1949 Cal 479 : 49 CWN 246, 253 : ILR (1945) 2 Cal 145.] Das, J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 37 CPC in the form of the following propositions (at p.

253):

"(a) If the defendant satisfies the court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shews such a state of facts as leads to the

> inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security.
>
> (d) If the defendant has no defence or the defence set-up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.
>
> (e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence." [para 8]

11. As the case before the court did not fall within clause (e), this Court held that imposition of a condition to deposit an amount in court would not be possible, and allowed the appeal as aforesaid. It is interesting to note that a binding four judge bench decision on order 37 in Milkhiram (India) (P) Ltd. v. Chamanlal Bros., AIR 1965 SC 1698, was bunched together with several other judgments that were relied upon in paragraph 6, as judgments relating to the exercise of jurisdiction of High Courts under section 115 of the CPC.

12. We find that Milkhiram's case is in fact an important judgment on the scope of O.XXXVII of the CPC, and is not a judgment on principles to be applied under Section 115. This judgment, being a judgment of four learned judges of this court, set out, in paragraph 1, O.XXXVII, Rule 3 sub-rules (2) and (3) as amended by the Bombay High Court at the relevant time, as follows:

> "(2) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment returnable not less than ten clear days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.
>
> (3) The defendant may at any time within ten days from the service of such summons for judgment by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend the suit. Leave to defend may be granted to him unconditionally or upon such terms as to the Judge appear just."

13. The trial court found that the defence disclosed by the affidavit required by sub-rule (3) was sufficient to grant leave to defend the suit, but as against a claim of ?4,05,434.38/-, the Court ordered the appellant to deposit security worth ?70,000/-. A first appeal having been dismissed, the Supreme Court had to decide whether it was incumbent upon the trial court to grant unconditional leave to defend, having found that a triable issue exists. Since this judgment is of seminal

importance in deciding the issue raised before us, it is necessary for us to quote parts of this judgment, as follows:

> "Learned counsel relied upon a decision of this court in Santosh Kumar v. Bhai Mool Singh [(1958) SCR 1211] and particularly upon a passage at p. 1216. That was a case in which the Court of Commercial Subordinate Judge, Delhi, had held that the defence raised a triable issue but that defence was vague and was not bona fide because the defendant had produced no evidence to prove his assertion. For these reasons the court granted leave to defend the suit on the condition of the defendant giving security for the entire claim in the suit and costs thereon. This court held that the test is to see whether the defence raises a real issue and not a sham one, in the sense that, if the facts alleged by the defendant are established, there would be a good, or even a plausible defence on those facts. If the court is satisfied about that, leave must be given unconditionally. This Court further held that the trial court was wrong in imposing a condition about giving security on the ground that documentary evidence had not been adduced by the defendant. This Court pointed out that the stage of proof can only arise after leave to defend has been granted and that the omission to adduce documentary evidence would not justify the inference the defence sought to be raised was vague and not bona fide. While dealing with the matter Bose, J., who spoke for the Court observed (p. 1216):
>
> "Taken by and large, the object is to see that the defendant does not unnecessarily prolong the litigation and prevent the plaintiff from obtaining an early decree by raising untenable and frivolous defences in a class of cases where speedy decisions are desirable in the interests of trade and commerce. In general, therefore, the test is to see whether the defence raises a real issue and not a sham one, in the sense that, if the facts alleged by the defendant are established, there would be a good, or even a plausible, defence on those facts." The latter part of the observations of the learned Judge have to be under- stood in the background of the facts of the case this Court was called upon to consider. The trial Judge being already satisfied that the defence raised a triable issue was not justified in imposing a condition to the effect that the defendant must deposit security because he had not adduced any documentary evidence in support of the defence. The stage for evidence had not been reached. Whether the defence raises a triable issue or not has to be ascertained by the court from the pleadings before it and the affidavits of parties and it is not open to it to call for evidence at that stage. If upon consideration of material placed before it the court comes to the conclusion that the defence is a sham one or is fantastic or highly improbable it would be justified in putting the defendant upon terms before granting leave to defend. Even when a defence is plausible but is improbable the court would be justified in coming to the conclusion that the issue is not a triable issue and put the defendant on terms while granting leave to defend. To hold otherwise would make it impossible to give effect to the provisions of Order 37 which have been enacted, as rightly pointed out by Bose, J., to ensure speedy decision in cases of certain types. It will be seen that Order 37 Rule 2 is applicable to what may be compendiously

described as commercial causes. Trading and commercial operations are liable to be seriously impeded if, in particular, money disputes between the parties are not adjudicated upon expeditiously. It is these considerations which have to be borne in mind for the purpose of deciding whether leave to defend should be given or withheld and if given should be subjected to a condition.

It may be mentioned that this Court relied upon the decision in Jacobs v. Booth's Distillery Co. [(1901) 85 LT 262] in which the House of Lords held that whenever a defence raises a triable issue leave must be given and also referred to two subsequent decisions where it was held that when such is the case leave must be given unconditionally. In this connection we may refer to the following observations of Devlin, L.J. in Fieldrank Ltd. v. Stein [(1961) 3 AELR 681 at pp 682-3] : “The broad principle, which is founded on Jacob v.Booth's Distillery Co. is summarised on p. 266 of the Annual Practice (1962 Edn.) in the following terms:

‘The principle on which the court acts is that where the defendant can show by affidavit that there is a bona fide triable issue, he is to be allowed to defend as to that issue without condition.'” If that principle were mandatory, then the concession by counsel for the plaintiffs that there is here a triable issue would mean at once that the appeal ought to be allowed; but counsel for the plaintiffs has drawn our attention to some comments that have been made on Jacobs v. Booth's Distillery Co. [(1901) 85 LT 262] They will be found at pp. 251 and 267 of the Annual Practice, 1962. It is suggested (see p. 251) that possibly the case, if it is closely examined, does not go as far as it has hitherto been thought to go; and on the top of p. 267 the learned editors of the Annual Practice have this note: “The condition of payment into court, or giving security, is nowadays more often imposed than formerly, and not only where the defendant consents but also where there is a good ground in the evidence for believing that the defence set up is a sham defence and the master ‘is prepared very nearly to give judgment for the plaintiff.” It is worth noting also that in Lloyd's Banking Co. v.Ogle 1 Ex. D. at p. 264 in a dictum which was said to have been overruled or qualified by Jacob v. Booth's Distillery Co.[(1901) 85 LT 262] Bramwell, B., had said that “....those conditions (of bringing money into court or giving security) should only be applied when there is something suspicious in the defendant's mode of presenting his case.” I should be very glad to see some relaxation of the strict rule in Jacob v. Booth's Distillery Co. I think that any Judge who has sat in chambers in RSC, Order 14 summonses has had the experience of a case in which, although he cannot say for certain that there is not a triable issue, nevertheless he is left with a real doubt about the defendant's good faith, and would like to protect the plaintiff, especially if there is not grave hardship on the defendant in being made to pay money into court. I should be prepared to accept that there has been a tendency in the last few years to use this condition more often than it has been used in the past, and I think that that is a good tendency;” These observations as well as some observations of Chagla, C.J., in Rawalpindi Theatres Private Ltd. v. Film Group Bombay [(1958) BLR 1373 at p 1374] may well be borne in mind by the court sitting in appeal upon

> the order of the trial Judge granting conditional leave to defend. It is indeed not easy to say in many cases whether the defence is a genuine one or not and therefore it should be left to the discretion of the trial Judge who has experience of such matters both at the bar and the bench to form his own tentative conclusion about the quality or nature of the defence and determine the conditions upon which leave to defend may be granted. If the Judge is of opinion that the case raises a triable issue, then leave should ordinarily be granted unconditionally. On the other hand, if he is of opinion that the defence raised is frivolous, or false, or sham, he should refuse leave to defend altogether. Unfortunately, however, the majority of cases cannot be dealt with in a clear cut way like this and the judge may entertain a genuine doubt on the question as to whether the defence is genuine or sham or in other words whether it raises a triable issue or not.

It is to meet such cases that the amendment to Order 37 Rule 2 made by the Bombay High Court contemplates that even in cases where an apparently triable issue is raised the Judge may impose conditions in granting leave to defend. Thus this is a matter in the discretion of the trial Judge and in dealing with it, he ought to exercise his discretion judiciously. Care must be taken to see that the object of the rule to assist the expeditious disposal of commercial causes to which the Order applies, is not defeated. Care must also be taken to see that real and genuine triable issues are not shut out by unduly severe orders as to deposit. In a matter of this kind, it would be undesirable and inexpedient to lay down any rule of general application." [paras 7 – 12]

14. We may hasten to add that Mechelec's case has since been followed in a series of judgments of this court – Municipal Corpn. of Delhi v. Suresh Chandra Jaipuria, (1976) 4 SCC 719 at para 11; Sunil Enterprises v. SBI Commercial & International Bank Ltd., (1998) 5 SCC 354 at para 4; State Bank of Saurashtra v. Ashit Shipping Services (P) Ltd., (2002) 4 SCC 736 at para 10; Uma Shankar Kamal Narain v. M.D. Overseas Ltd., (2007) 4 SCC 133 at paras 8 and 9; SIFY Ltd. v. First Flight Couriers Ltd., (2008) 4 SCC 246 at para 10; Wada Arun Asbestos (P) Ltd. v. Gujarat Water Supply & Sewerage Board, (2009) 2 SCC 432 at para 19; R. Saravana Prabhu v. Videocon Leasing & Industrial Finance Ltd., (2013) 14 SCC 606 at para 4; and State Bank of Hyderabad v. Rabo Bank, (2015) 10 SCC 521 at para 16.

15. However, there are two judgments of this Court which directly deal with the amendment made to O.XXXVII and the effect thereof on the ratio contained in Mechelec's case. In Defiance Knitting Industries (P) Ltd. v. Jay Arts, (2006) 8 SCC 25, this Court, after setting out the amended O.XXXVII and after referring to Mechelec's case, laid down the following principles – "While giving leave to defend the suit the court shall observe the following principles:

> (a) If the court is of the opinion that the case raises a triable issue then leave to defend should ordinarily be granted unconditionally.

See Milkhiram (India) (P) Ltd. v.Chamanlal Bros. [AIR 1965 SC 1698 : 68 Bom LR 36] The question whether the defence raises a triable issue or not has to be ascertained by the court from the pleadings before it and the affidavits of parties.

(b) If the court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious it may refuse leave to defend altogether. Kiranmoyee Dassi v. Dr. J. Chatterjee [AIR 1949 Cal 479 : 49 CWN 246] (noted and approved in Mechelec case [(1976) 4 SCC 687 : AIR 1977 SC 577]).

(c) In cases where the court entertains a genuine doubt on the question as to whether the defence is genuine or sham or whether it raises a triable issue or not, the court may impose conditions in granting leave to defend." [para 13]

16. In Southern Sales & Services v. Sauermilch Design & Handels GMBH, (2008) 14 SCC 457, this Court was squarely asked to render its decision on whether the judgment in Mechelec's case was to a large extent rendered ineffective in view of the amended O.XXXVII. This Court found:

> "Having considered the submissions made on behalf of the respective parties and the decisions cited, there appears to be force in Mr Sharma's submissions regarding the object intended to be achieved by the introduction of sub-rules (4), (5) and (6) in Rule 3, Order 37 of the Code. Whereas in the unamended provisions of Rule 3, there was no compulsion for making any deposit as a condition precedent to grant of leave to defend a suit by virtue of the second proviso to sub-rule (5), the said provision was altered to the extent that the deposit of any admitted amount is now a condition precedent for grant of leave to defend a suit filed under Order 37 of the Code. A distinction has been made in respect of any part of the claim, which is admitted. The second proviso to sub-rule (5) of Rule 3 makes it very clear that leave to defend a suit shall not be granted unless the amount as admitted to be due by the defendant is deposited in court." [para 15]

17. It is thus clear that O.XXXVII has suffered a change in 1976, and that change has made a difference in the law laid down. First and foremost, it is important to remember that Milkhiram's case is a direct authority on the amended O.XXXVII provision, as the amended provision in O.XXXVII Rule 3 is the same as the Bombay amendment which this Court was considering in the aforesaid judgment. We must hasten to add that the two provisos to sub-rule (3) were not, however, there in the Bombay amendment. These are new, and the effect to be given to them is something that we will have to decide. The position in law now is that the trial Judge is vested with a discretion which has to result in justice being done on the facts of each case. But Justice, like Equality, another cardinal constitutional value, on the one hand, and arbitrariness on the other, are sworn enemies. The discretion that a Judge exercises under Order XXXVII to refuse leave to defend or to grant conditional or unconditional leave to defend is a discretion akin to Joseph's multi-coloured coat – a large number of baffling alternatives present themselves. The life of the law not being logic but the experience of the trial Judge, is what comes to the rescue in these cases; but at the same time informed by guidelines or principles that we propose to lay down to obviate exercise of judicial discretion in an arbitrary manner. At one end of the spectrum is unconditional leave to defend, granted in all cases which present a substantial defence. At the other end of the spectrum are frivolous or vexatious defences, leading to refusal of leave to defend. In between these two extremes

are various kinds of defences raised which yield conditional leave to defend in most cases. It is these defences that have to be guided by broad principles which are ultimately applied by the trial Judge so that justice is done on the facts of each given case.

18. Accordingly, the principles stated in paragraph 8 of Mechelec's case will now stand superseded, given the amendment of O.XXXVII R.3, and the binding decision of four judges in Milkhiram's case, as follows:

> If the defendant satisfies the Court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit;
>
> if the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend;
>
> even if the defendant raises triable issues, if a doubt is left with the trial judge about the defendant's good faith, or the genuineness of the triable issues, the trial judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security;
>
> if the Defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.
>
> if the Defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith;
>
> if any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court.

19. Coming to the facts of the present case:

> It is clear that a sum of ?418 crores has been paid by FMO, the Dutch company, to Vinca for purchase of shares as well as compulsorily convertible debentures. This transaction by itself is not alleged to be violative of the FEMA regulations.

The suit is filed only on invocation of the Corporate Guarantee which on its terms is unconditional. It may be added that it is not the defendant's case that the said Corporate Guarantee is wrongly invoked. Payment under the said Guarantee is to the debenture trustee, an Indian company, for and on behalf of Vinca, another Indian company, so that prima facie again there is no infraction of the FEMA Regulations. Since FMO becomes a 99% holder of Vinca after the requisite time period has elapsed, FMO may at that stage utilise the funds received pursuant to the overall structure agreements in India. If this is so, again prima facie there is no breach of FEMA Regulations.

At the stage that FMO wishes to repatriate such funds, RBI permission would be necessary. If RBI permission is not granted, then again there would be no infraction of FEMA Regulations.

The judgment in Immami Appa Rao's case would be attracted only if the illegal purpose is fully carried out, and not otherwise.

20. Based on the aforesaid, it cannot be said that the defendant has raised a substantial defence to the claim made in the suit. Arguably at the highest, as held by the learned Single Judge, even if a triable issue may be said to arise on the application of the FEMA Regulations, nevertheless, we are left with a real doubt about the Defendant's good faith and the genuineness of such a triable issue. ?418 crores has been stated to be utilized and submerged in a building construction project, with payments under the structured arrangement mentioned above admittedly being made by the concerned parties until 2011, after which payments stopped being made by them. The defence thus raised appears to us to be in the realm of being 'plausible but improbable'. This being the case, the plaintiff needs to be protected. In our opinion, the defendant will be granted leave to defend the suit only if it deposits in the Bombay High Court the principal sum of ?418 crores invested by FMO, or gives security for the said amount of ?418 crores, to the satisfaction of the Prothonotary and Senior Master, Bombay High Court within a period of three months from today. The appeal is accordingly allowed, and the judgment of the Bombay High Court is set aside.

21. We further direct that the suit be tried expeditiously, preferably within a period of one year from the date of this judgment, uninfluenced by any observations made by us herein.

.....J.

(Kurian Joseph)

.....J.

(R.F. Nariman)

New Delhi;

November 15, 2016