# Il And Fs Financial Services Limited vs Gujarat-Dwarka Portwest Limited And 8 ... on 18 February, 2020

## Author: N. J. Jamadar

## Bench: N. J. Jamadar

SJ30-19INCOMSS779-19+.DOC

Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
SUMMONS FOR JUDGMENT NO. 30 OF 2019
IN
COMM SUMMARY SUIT NO. 779 OF 2019

IL & FS Financial Services Ltd. ...Applicant
In the matter between
IL & FS Financial Services Ltd. ...Plaintiff
Versus
SKIL Infrastructure Limited & ors. ...Defendants
WITH
SUMMONS FOR JUDGMENT NO. 37 OF 2019
IN
COMM SUMMARY SUIT NO. 886 OF 2019

IL & FS Financial Services Ltd. ...Applicant
In the matter between
IL & FS Financial Services Ltd. ...Plaintiff
Versus
Gujarat-Dwarka Portwest Limited & ors. ...Defendants
WITH
SUMMONS FOR JUDGMENT NO. 83 OF 2019
IN
COMM SUMMARY SUIT NO. 923 OF 2019

IL & FS Financial Services Ltd. ...Applicant
In the matter between
IL & FS Financial Services Ltd. ...Plaintiff
Versus
SKIL Himachal Infrastructure & Tourism
Ltd. & ors. ...Defendants
WITH
SUMMONS FOR JUDGMENT NO. 84 OF 2019
IN
COMM SUMMARY SUIT NO. 887 OF 2019

IL & FS Financial Services Ltd. ...Applicant

In the matter between
IL & FS Financial Services Ltd. ...Plaintiff
Versus
Gujarat-Dwarka Portwest Limited & ors. ...Defendants
1/67




Dr. Birendra Saraf, Senior Counsel, a/w Mr. Ranjeev Carvalho, Mr. Sachin Chandarana, Ms. Dhruti Doctor & Ms. Shreya Anuwal, i/b M/s. Manilal Kher Amballa & Co., for the Plaintiff.
Mr. Navroz Seervai, Senior Counsel, a/w Mr. Kunal Mehta, Ms. Anaisha Zachariah, Ms. Sonam Shethia, Ms. Ragini Jaitha, i/b Crawford Bayley & Co., for the Defendants in Suit No.779 of 2019.
Mr. Kunal Mehta, Ms. Anaisha Zachariah, Ms. Sonam Shethia, Ms. Ragini Jaitha, i/b Crawford Bayley & Co., for the Defendants, Suit Nos.886/2019, 923/2019 and 887/2019.

CORAM: N. J. JAMADAR, J.

DATED : 18th FEBRUARY, 2020 Order :-

1. These commercial division summary suits are instituted for recovery of the sums advanced by the plaintiff to the defendants on the basis of written contracts, negotiable instrument and documents evidencing acknowledgment of liability.

2. The plaintiff is a company registered under the Companies Act, 1956. It is a non-banking financial company engaged in the business of financial and advisory services. The defendants are entities which form part of SKIL Group of Companies and/or represent the SKIL Group. The plaintiff had exposure to SKIL Group of Companies. Various financial facilities were extended by the plaintiff to SKIL Group of Companies. These suits arise out those financial transactions. Hence, these summonses for SJ30-19INCOMSS779-19+.DOC judgments are being determined by a common order as common questions of facts and law arise for consideration, in all the suits.

3. Since the Summons for Judgment No.30 of 2019 in Commercial Summary Suit No.779 of 2019 was heard extensively as a lead case, the facts in the said are considered in detail. The facts in the rest of the suits are thereafter noted in brief.

4. This commercial division summary suit is instituted for recovery of a sum of Rs.314,19,51,918/- along with further interest at the rate of 16% p.a. and additional interest at 2% p.a., penal interest at 2% p.a. and delayed payment interest at 2% p.a.

5. The material averments in the plaint can be summarised as under:

> Defendant no.1 is a part of SKIL Group of Companies. In or about 2015, defendant no.1 requested for a loan facility to inter alia facilitate SEZ Development, associated infrastructure facilities and refnance of loans. The plaintiff vide sanction letter dated 17th September, 2015, offered to grant an Infrastructure Term Loan Facility (ITLF) to defendant no.1 on SJ30-19INCOMSS779-19+.DOC the terms and conditions set out therein. Defendant no.1 accepted the said terms and conditions by acknowledging the sanction letter. Upon acceptance, the formal Loan Agreement dated 28th September, 2015 (the Loan Agreement) came to be executed under which the plaintiff extended ITL Facility upto 250 Crores. The Loan Agreement incorporated the terms and conditions of the ITL facility.

6. In addition, defendant no.1 furnished security by creating charge over its certain assets in favour of the plaintiff. Defendant nos.2 to 6 executed fve separate letters of guarantee of even date in favour of the plaintiff and unconditionally agreed, undertook and guaranteed to pay on demand the amounts payable by defendant no.1 in accordance with the terms of the Loan Agreement. Defendant no.7 also executed a personal guarantee to pay on demand the amount payable by defendant no.1.

7. Furthermore defendant no.1 pledged its 3,93,90,826 shares held in Reliance Defence and Engineering Limited (RDEL) by executing a pledge agreement dated 28 th September, 2015. Another entity, Infrastructure Investment Trust also executed a Pledge Agreement to pledge 36,25,000 shares of RDEL. Defendant no.8 executed a Pledge Agreement to pledge SJ30-19INCOMSS779-19+.DOC the shares held in defendant no.1 - company. Apart from the undertakings executed by defendant nos.1 and 7 and a group concern, Gujarat-Dwarka Portwest Limited (GDPL) in favour of the plaintiff, defendant no.1 also executed a Demand Promissory Note dated 22nd September, 2015. Defendant nos.2 to 6 executed an Indenture of Mortgage dated 23rd March, 2016, in respect of their properties in favour of plaintiff.

8. After execution of aforesaid documents evidencing the Loan Agreement and creation of security therefor, defendant no.1 made a request to disburse the loan amount. Thereupon, the plaintiff credited a sum of Rs.233,16,04,691/- to the account of defendant no.1 after deducting upfront interest, in tranches: on 30th September, 2015, 23rd March, 2016, 23rd June, 2016, 30th September, 2016 and 3rd November, 2016.

9. To discharge its obligation under the contract, defendant no.1 had issued Electronic Clearing Systems Mandates (ECS Mandates) dated 30th December, 2015, 26th May, 2016 and 27th June, 2016 for various amounts. However, defendant no.1 started committing default in performance of its obligation.

10. There were meetings and exchange of correspondence. Defendant no.1 made offers of One Time Settlement (OTS). In the correspondence, defendant no.1 acknowledged the liability SJ30-19INCOMSS779-19+.DOC to repay the loan amount along with accrued interest thereon, in clear and unequivocal terms. However, the loan amount remained outstanding. Plaintiff no.1 thereupon addressed notices mentioning the events of default and called upon defendant no.1 and 7 to repay the outstanding amount along with interest. The frst notice was issued on 25th July, 2018. In the meanwhile, the ECS Mandates issued by defendant no.1 were dishonoured on account of insuffciency of funds. In replies to the notices issued by the plaintiff, defendant no.1, on the one hand, acknowledged the liability and, on the other hand, made an endeavour to raise untenable and frivolous grounds.

11. Ultimately, the plaintiff was constrained to address recall notice dated 5th October, 2018, to defendant nos.1 to 8 and call upon them to repay the outstanding amount along with interest. Another notice followed on 17th October, 2018, outlining the persistent default and reiterating the demand. The plaintiff also sought to encash the ECS Mandates but to no avail. In desperation, defendant no.1 made OTS offer which was not acceptable. As the amount remained outstanding despite adequate opportunity to the defendants to discharge their liability, the plaintiff was constrained to institute this suit for SJ30-19INCOMSS779-19+.DOC recovery of the outstanding amount of Rs.314,19,51,918/- as of 15th February, 2019, along with further interest in accordance with the terms of Loan Agreement.

SJ 37 of 2019 in Comm. Summ. Suit No.886 of 2019

12. This commercial division summary suit is instituted for recovery of a sum of Rs.321,46,29,047/- along with interest. Defendant no.1 Gujarat-Dwarka Portwest Limited, a SKIL Group entity, is the borrower. The loan of Rs.250 Crore was offered in terms of sanction letter dated 17th September, 2015. Loan Agreement came to be executed on 28th September, 2015. Defendant nos.2 to 7 are the corporate guarantors. Defendant nos.2 to 7 have executed the letters of guarantee on 28 th September, 2015. Defendant no.8 has executed a personal guarantee. Defendant no.9, a partnership frm, is also a guarantor. Defendant nos.2 and 9 and another SKIL Group entity Infrastructure Investment Trust have pledged the shares of Pipavav Defence and Offshore Engineering Company Ltd. (now Reliance Naval and Engineering Limited) and SKIL Infrastructure Limited by executing the Pledge Agreements dated 28th September, 2015. Defendant no.1 has drawn a Demand Promissory Note on 19th September, 2019.

SJ30-19INCOMSS779-19+.DOC SJ 83 of 2019 in Comm. Summ. Suit No.923 of 2019

13. This commercial division summary suit is instituted for recovery of a sum of Rs.53,93,87,934/- along with interest. Defendant no.1 - SKIL Himachal Infrastructure and Tourism Limited, a SKIL Group Company, is the borrower. Defendant no.2 SKIL Infrastructure Limited is the corporate guarantor. Defendant no.3 is the personal guarantor. Defendant no.4, a partnership frm, is also a guarantor. The loan of Rs.43 Crore was offered in terms of sanction letter dated 20 th October, 2016. Loan Agreement came to be executed on 26 th October, 2016. The Letters of Guarantee were executed on 26th October, 2016. Defendant no.4 pledged the shares of SKIL Infrastructure Limited

by executing the Pledge Agreement dated 26 th October, 2016. Defendant no.2 pledged the shares of Reliance Naval and Engineering Limited by executing the Pledge Agreement dated 26th October, 2016. Defendant no.1 has also drawn a Demand Promissory Note on 26th October, 2016.

SJ 84 of 2019 in Comm. Summ. Suit No.887 of 2019

14. This commercial division summary suit is instituted for recovery of a sum of Rs.159,19,81,284/- along with interest. Defendant no.1 Gujarat-Dwarka Portwest Limited, a SKIL Group entity, is the borrower. The loan of Rs.120 Crore was offered in SJ30-19INCOMSS779-19+.DOC terms of sanction letter dated 22nd December, 2014. Upon acceptance of the terms and conditions therein by defendant no.1, Loan Agreement came to be executed on 30 th December, 2014. Defendant no.2 is the corporate guarantor. Defendant no.3 is the personal guarantor. Defendant no.4, a partnership frm, has also guaranteed the repayment of due amount by defendant no.1. Defendant nos.2 and 4 executed the letters of guarantee on 30th December, 2014. Defendant nos.1, 2 and 3 pledged the shares of the abovenamed companies by executing Pledge Agreements dated 28th September, 2015. Defendant no.1 had drawn a Demand Promissory Note on 26th December, 2014.

15. The defendants committed default in repayment of outstanding loan amount and the interest accrued thereon. Hence, the suits.

16. The defendants have appeared in response to the writ of summons. Thereupon the plaintiff has taken out the Summonses for Judgment.

17. An affdavit-in-reply is fled by defendant no.1 to seek an unconditional leave to defend the suit. Defendant nos.2; 3, 4, 5 and 6; and 7 and 8 have also fled affdavits-in-reply adopting the contentions raised by defendant no.1.

18. The defence in all the suits proceeds on identical grounds.

SJ30-19INCOMSS779-19+.DOC

19. The substance of the defence sought to be put-forth by the defendants can be stated as under:

> Claim based on insuffciently stamped instrument:
>
> (A) The defendants contend that the Loan Agreement dated 28th September, 2015, under which the purported loan was advanced, and the Letters of Guarantee dated 28th September, 2015 and the Pledge Agreements whereunder the loan was secured have not been stamped with the duty chargeable on those instruments in accordance with the provisions contained in the Maharashtra Stamp Act, 1958 ('the Stamp Act, 1958'). It is contended that all these instruments indicate that a stamp-

duty of Rs.150/- only is paid on each of these instruments. However, in accordance with the provisions contained in the Stamp Act, 1958 stamp-duty of 0.2% of the monetary value of the

instruments is required to be paid. Thus, each of these instruments are chargeable with a duty of Rs.50,00,000/-. Indisputably, the instruments on which the summary suit is based are insuffciently stamped. Moreover, as the instruments have been executed at Delhi, they are amenable to duty under Section 19 of the Stamps Act, 1958, as well. Thus, the instruments being inadmissible in evidence under Section 34 of the Stamp Act, 1958, they are required to be impounded SJ30-19INCOMSS779-19+.DOC forthwith and they cannot be acted upon in the instant summons for judgment untill the requisite duty and prescribed penalty are adjudicated and paid.

Loan Agreement Legally unenforceable :-

> (B) The defendants assert that the purported loan transaction is tainted with fraud. The Loan Agreement under which a sum of Rs.250 Crores is shown to have been advanced is unenforceable in law as the device adopted by the plaintiff of "ever-greening the loan" is prohibited by law and also defeats the provisions of law. The defendants contend that the Serous Fraud Investigation Offce ('SFIO') is investigating into the affairs of the plaintiff. A report is submitted on 28 th May, 2019 ('SFIO Report'). The SFIO Report adverts to wide-scale "ever greening of loans" by the plaintiff which is wrongful and prohibited by law. The loan transaction in question has also been a subject matter of investigation. The SFIO Report reveals that the instant loan was also advanced in fagrant violation of binding directions and is, thus, legally unenforceable. The SFIO Report, according to the defendants, itself warrants an unconditional leave to defend the suit.

SJ30-19INCOMSS779-19+.DOC Entire amount disbursed by the plaintiff returned to the plaintiff on the day of disbursement or soon thereafter:

> (C) Banking upon the SFIO Report, the defendants contend that the disbursal of fresh loan was an eye-wash. The plaintiff had advanced the loan, in question, only with a view to close the old outstanding loan accounts of defendant no.1 and its group companies and prevent them from being labelled as bad loan or NPA. The plaintiff advanced the loan in question, to defendant no.1, who was made, in turn, to transfer the disbursed amount to its associate/sister companies and later were then made to transfer the amount back to the plaintiff, towards the repayment of the outstanding loans. The defendants have pointed out that the amount of Rs.250 Crore which was shown to have been disbursed under the Loan Agreement in tranches on 30th September, 2015, 23rd March, 2016, 23rd June, 2016 and 3rd November, 2016, was returned to the plaintiff on the day of disbursement or immediately thereafter by the SKIL Group companies. Thus, there was no outstanding amount, in true sense, under the transaction in question.

Failure of the plaintiff to sale the pledged shares and realise the loan amount at an opportunate time:-

(D) It is the case of the defendants that as of 17 th September, 2005, when the purported loan of Rs.250 Crore was sanctioned, SJ30-19INCOMSS779-19+.DOC the total liability of SKIL group (including defendant no.1) towards the plaintiff was approximately 575 Crores. The said exposure consisted of the prior loans advanced by the plaintiff to defendant no.1 and its group companies namely Gujarat Dwarka Portwest Ltd., SKIL Shipyard Holdings Pvt. Ltd. and Grevek Investment and Finance Pvt. Ltd. Against the aforesaid exposure of 575 Crores, the plaintiff had at its disposal as of 17th September, 2015, pledged shares worth Rs.317 Crores. The prices of the pledged shares appreciably increased in the intervening period. In the month of December, 2015, the approximate value of the pledged shares was about 501 Crores. Defendant no.1 and its promoters on several occasions verbally called upon the representatives of the plaintiff to invoke the pledged shares and appropriate the proceeds thereof towards the outstanding amount. The plaintiff failed to discharge the duties of a bona fde lender. Instead of realising outstanding amount by liquidating the pledged shares, the plaintiff thrust an additional purported loan of Rs.250 Crores on defendant no.1, despite resistance of defendant no.1 and its promoters. Had the plaintiff liquidated the pledged shares at a time when the shares were commanding high prices, the entire loan could have been recovered. The plaintiff, on the SJ30-19INCOMSS779-19+.DOC contrary, invoked the pledged securities when their price plummeted and sold the shares in May-2017 and June 2018, which led to realization of diminished sum of Rs.58,39,35,781/-.

(E) The defendants also contend that the Loan Agreement and the underlying transaction are hit by the provisions of Section 23 of the Indian Contract Act, 1872. The aforesaid defences raise genuine triable issues. The question of enforceability of the Loan Agreement, which was executed with the object of defeating the provisions of law, requires consideration. All these defences are rooted in facts: the determination of which hinges upon evidence. Moreover, SFIO Report, bolsters up the defences raised by the defendants. Hence, the defendants are entitled to an unconditional leave to defend.

20. I have heard Dr. Saraf, the learned Senior Counsel for the plaintiff in all the suits, Mr. Seervai, the learned Senior Counsel for the defendants in Comm Summary Suit No.779 of 2019 and Mr. Mehta, the learned Counsel for the defendants in other suits, at a considerable length.

21. In the backdrop of the defences raised on the part of the defendants, I deem ft in the ftness of things to frst deal with substantive grounds of defence sought to be raised by the defendants to seek an unconditional leave to defend the suit and SJ30-19INCOMSS779-19+.DOC thereafter consider the challenge based on insuffciency of stamps on the instruments in question. It bears repetition to note that the grounds of challenge in all the suits are identical and, thus, the consideration is based on the facts in the lead matter i.e. Comm. Summary Suit No.779 of 2019.

Legally unenforceable debt:-

22. Mr. Seervai assailed the enforceability of debt on the count of it being in express breach of the directives of the Reserve Bank of India, which have the statutory force. The loan was advanced by the plaintiff in furtherance of an object prohibited by law. Thus, the contract is void under Section 23 of the Indian Contract Act, urged Mr. Seervai.

23. As a second limb of this submission, it was urged with a degree of vehemence that in such a scenario where a party has resorted to an unlawful and fraudulent device, the policy of law is to let the loss fall where it rests. In the case at hand, according to Mr. Seervai, the situation is further accentuated by the fact that it is not the defendant who alleges the fraud but SFIO, a specialized investigative agency, constituted under the Companies Act, 2013, in a well documented report concluded that the top offcials of the plaintiff indulged in nefarious and fraudulent activities in the matter of advancing loans including SJ30-19INCOMSS779-19+.DOC the loans to the SKIL Group. This report of SFIO by itself furnishes a justifable ground to grant an unconditional leave to defend the suit.

24. To buttress the aforesaid submissions, Mr. Seervai drew the attention of the Court to the communication dated 13 th September, 2015, addressed by the offcer of the plaintiff to the defendants wherein the purpose and intent of the fresh loan was spelled out. This communication, according to Mr. Seervai, laid the foundation of fraud. By the said communication, it was proposed that under, Step I, a new Line of Credit of Rs.250 Crores was to be sanctioned to the Gujarat-Dwarka Portwest to pay (i) Rs.11 Crore to Union Bank of India and (ii) current overdues of SKIL Infra, and, Step II, a new Line of Credit (LOC) of Rs.225 Crore to SKIL Group to be used to repay the existing loan to Grevek Investment, another group company.

25. In the aforesaid fashion, instead of declaring the loans which had fallen overdue, as non performing assets, in conformity with the directives of RBI, the plaintiff proposed to advance fresh lines of credit only for the purpose of showing repayment of the earlier loans sanctioned to group companies. The top offcers of the plaintiff were fully aware that the said course of "ever-greening of loan" is statutorily proscribed. Yet, SJ30-19INCOMSS779-19+.DOC the plaintiff pursued the said fraudulent course with impunity, submitted Mr. Seervai.

26. Mr. Seervai invited the attention of the Court to the report submitted by SFIO in the matter of IL&FS limited and its subsidiaries, under Section 212(1)(c) of the Companies Act, 2013, to bolster up the aforesaid submissions. Special emphasis was laid on the following observations in the report:

> ABUSIVE FUNDING TO NON GROUP ENTITIES 1.13 .... A number of these borrowers were not servicing their debt obligation timely. The top management of IFIN were aware of the potential problem accounts which were getting stressed in the succeeding months of the reports generated through the MIS of the company. Thereafter in order not to classify the loan/credit facility as a Non Performing Asset (NPA) as required under the RBI Directions, and not provisioning for such NPAs/defaulting loan facilities which otherwise would have adversely impacted the fnancial statements, lent to other companies belonging to the borrowing group for repaying the principal and/or interest of the defaulting borrower company. This

process was repeated multiple times with the earlier loan facility getting closed and a new facility being created which was again funded, on their default, through another cycle of funding through the same or another group company. Such manner of debt servicing led to ballooning up of the outstanding liabilities against a group, which were funded from the borrowing from market. ..."

LOANS TO GROUP COMPANIES THROUGH THIRD PARTIES:

1.25. IN extending fresh loans to other group companies of the defaulting borrowers, the intent of the coterie was to postpone/avoid recognition of the asset as Non-Performing Asset and thereby avoiding consequent provisioning as mandated by RBI.

This provisioning would have negatively affected the top line, led to adverse raring and consequent inability to borrow further. 1.26. This modus operandi, led IFIN to project his asset quality and recognition of high revenues. Suppression of NPA and non- provisioning fro NPA further led to show a rosy picture of the fnancial statement of IFIN. The fraudulent/fabricated fnancial statements were used for the purpose of accessing the funds of public."

IMPACT ON THE FINANCIAL STATEMENT:

1.32. IFIN had fraudulently avoided creation of provisioning for the stressed assets and its eventual writing off. They had self-funded SJ30-19INCOMSS779-19+.DOC the interest obligation from the borrowers and also various fees charged to the group entities. In this manner they had created a rosy top line of the fnancials of the company were fudged up and not refecting true and fair picture of the affairs of the company."

The SFIO also examined the facilities extended to the SKIL group and recorded its observations in paragraph 4.43 as under:

FACILITIES EXTENDED TO SKIL GROUP:

4.43. SKIL Group promoted by Nikhil Gandhi and Bhavesh Gandhi, was erstwhile promoter of Reliance Naval and Engineering Limited (RNEL). Flagship entity of SKIL Group was Pipavav Shipyard Ltd (now Reliance Naval and Engineering Limited) which was listed during October, 2009, wherein SKIL group held 20% stake & Punj Lloyd group held 19%. As of May, 2010, IF&FS Group enhanced its exposure to SKIL group fromPipavav Shipyard Ltd (now Reliance Naval and Engineering Limited) Rs.159.40 Crore to Rs.470.00 Crore. The increase in exposure for Rs.295.00 Crore was towards part fnancing the acquisition of 19% stake hled by Punj Lloyd Group in RNEL by SKIL Group. Since then, IFIN has extended multiple facilities to the Group, resulting in current terminal exposure of Rs.670.00 Crore. IFIN servicing and exit was predicated on divestment of RNEL stake by SKIL Group to strategic

> buyer given the thrust in the defence business and RNEL being one of the key players with facilities in place. However, with delay in defence orders and no signifcant cash fow generation from existing operations, servicing under the IFIN facilities were delayed.

Accordingly, IFIN had been invoking pledged RNEL shares towards appropriation of dues under the facility. Aggregate 5.36 Crore pledged equity shares of RNEL have been invoked in phases since Jan 14 till Sept 14 & Jan 16 - June 18 & Rs.192.30 Crore are appropriated towards SKIL Group dues. Of these invoked shares, IFIN has till date sold 1.62 Crore RNEL shares & balance 3.75 Crore RNEL shares continue as part of IFIN investment & presently based on market appellate IFIN has been continuously selling these shares. The credit appraisal memos, bank statements, concerned emails along with the note are collectively annexed as Annexure D9."

27. The SFIO has traced the fund fow of the loans advanced to the group companies for the purpose of repayment of previous loans which were over due or on the verge of becoming NPA in graphic details under paragraph 4.43.4 at page 388 to 396 of the report. The sum and substance of tracing of the trail SJ30-19INCOMSS779-19+.DOC is that the amounts which were advanced to Gujarat-Dwarka Portwest Limited, SKIL Infrastructure Limited and Himachal SKIL Limited were all returned to the IFIN either directly or through the group companies. Under the heading, "Loans given for funding repayment of principal/interest by existing borrowers during last fve years", which included the SKIL Group of companies, are collated under paragraph 4.46.1. Relevant entries are as under:

> Financial Year 2014-2015 Sr Client Name Group Sanction Sanction Amt Repay Principal Interest No. Amt. Date Disbursed ment Repayme Repaymen Recd nt Recd t Recd
>
> 17. Gujarat-Dwarka Skil 120.00 22-Dec-14 120.00 100.85 43.00 57.85 Portwest Limited Financial Year 2015-2016 Sr Client Name Group Sanction Sanction Amt Repay Principal Interest No. Amt. Date Disbursed ment Repayme Repaymen Recd nt Recd t Recd
>
> 12. SKIL SKIL 250.00 21-Sep-15 250.00 247.92 179.80 68.12 Infrastructure Limited
>
> 13. Gujarat-Dwarka SKIL 250.00 21-Sep-15 250.00 250.00 215.07 34.93 Portwest Lmited Financial Year 2016-2017 Sr Client Name Group Sanction Sanction Amt Repay Principal Interest No. Amt. Date Disbursed ment Repayme Repaymen Recd nt Recd t Recd
>
> 09. SKIL - Himachal SKIL 43.00 26-Oct-16 43.00 43.00 --- 43.00 Infrastructure And Tourism Limited The report concludes that aforesaid instances of lending for funding repayment of principal / interest by the existing borrowers are nothing but fraudulent repayment of the principal SJ30-19INCOMSS779-19+.DOC and interest of defaulting loans with the sole purpose of avoiding provisioning / NPA.

> 28. In the backdrop of the aforesaid report of the SFIO, Mr. Seervai would submit that the fresh loans in the instant case were thrust on the defendants to paint a rosy fnancial picture.

As the SFIO has categorically observed that such dubious device was adopted merely to avoid the categorisation of bad debts and/or NPA, which the plaintiff, under the directives of RBI, was enjoined to report, the transaction suffers from the vice of being prohibited by law.

29. The edifce of aforesaid submission was built on the premise that the directives issued by the RBI have a statutory force. To lend support to the aforesaid submission, the learned Senior Counsel for the defendants placed a strong reliance on the judgment of the Supreme Court in the case of B.O.I. Finance Ltd. vs. Custodian and others1.

30. In the case of B.O.I. Finance (supra) after referring to the provisions contained in Section 21, 35-A and 36 of the Banking Regulation Act, 1949, the Supreme Court explained the nature of the regulatory control exercised by RBI in the following words:

> "27. Referring to Section 36(1)(a), we fnd that it empowers the Reserve Bank to "caution or prohibit" the banking companies from entering into any particular type of
> 1 (1997) 10 SCC 488.
>
> SJ30-19INCOMSS779-19+.DOC transaction or generally to give advice to the said banking companies. This provision not only enables the Reserve Bank to assume an advisory role but it also gives it the power to prohibit a banking company against entering into any particular transaction/s or class of transactions. The use of the words, "caution or prohibit" in Section 36(1)(a) clearly implies that when the Reserve bank of India prohibits the banking companies from entering into any particular transaction then such a direction which is issued would be binding on the banks and has to be complied with. While the Reserve Bank of India has the power under Section 36(1)(a) of the Act to give advice or to caution the banking companies which may not be binding on the banking companies, but when the Reserve Bank prohibits the banking companies against their entering into any particular transaction or class of transactions, the said prohibition has to be regarded as being binding. The power to prohibit, given by Section 36, will be meaningless if it was not meant to be binding on the banking companies."

31. Mr. Seervai further submitted that in the case of B.O.I. Finance (supra) the Supreme Court has referred to the judgment in the case of Tinsley vs. Millingan,2 wherein it was noted that it is trite law that the Court will not give its assistance to the enforcement of executory provisions of an unlawful contract whether the illegality is apparent ex facie the document or whether the illegality of purpose of what would otherwise be a lawful contract emerges during the course of the trial.

32. In order to support the submission that the Courts do not lend assistance in enforcement of a transaction which is ex - turpi - causa, the learned Senior Counsel placed reliance on the judgments

in the cases of Bharat Barrel & Drum Mfg. Co. Pvt. 2 (1993) 3 All ER 65, HL.

SJ30-19INCOMSS779-19+.DOC Ltd. vs. Hindustan Petroleum Corporation Ltd. & others 3, Life Insurance Corporation vs. Devendrappa Bujjappa Kadabi 4, Bhaskarrao Jageshwarrao Buty and others vs. Smt. Sara Jadhaorao Tumble and others5 and in an Arbitration between Mahmoud and Ispahani6.

33. There can be no quarrel with the proposition that the Court should not lend its assistance to a party who rests his claim on an illegal or unlawful act. In such a case, the policy of law is to allow the loss to fall where it rests, irrespective of the justice of the claim. The crucial question which, in the instant case, wrenches to the fore is whether the transactions in question are tainted with such an illegality or unlawfulness which dissuades the court from enforcement of the liability incurred thereunder?

34. Dr. Saraf would urge that the submission sought to be advanced on behalf of the defendants based on the alleged investigation into the affairs IL & FS, does not absolve the defendants of the liability to discharge the debt. It is incontestible that the defendants had availed of the loans in question. Even if the case of the defendants is taken at par, the 3 AIR 1989 Bom 170.

4 India Law Reporters 1986 Karnataka, 3759. 5 AIR 1978 Bom 322.

6 C.A. 1921 King's Bench Division, 716.

SJ30-19INCOMSS779-19+.DOC fact that the loan was advanced in breach of the directives of RBI does not render such debt legally unenforceable. The offcers who indulged in such activity may be hauled up and proceeded against. But that cannot be a ground to absolve the defendants from the obligation to discharge an otherwise admitted liability.

35. To buttress the aforesaid submission, Dr. Saraf placed a strong reliance upon the judgment of the Australian High Court in the case of Yango Pastoral Co Pty Ltd v. First Chicago Australia Ltd.7 In the case of Yango Pastoral (supra) the submission before the High Court of Australia was that the mortgage was rendered illegal and void by the provisions of Section 8 of the Banking Act, 1959 as the loan was advanced by a corporate entity without having an authority to carry on the banking business. The learned Judges, by separate judgments, unanimously concluded that the absence of a valid licence as granted by Section 8 of the Act does not vitiate the contract made by a body corporate in the course of carrying on a banking business in breach of the section, and the contracts of mortgage and guarantee were neither void nor unenforceable.

36. Aforesaid judgment in the case of Yango Pastoral (supra) was referred with approval by the Supreme Court in the case of 7 (1978) 21 ALR 585.

SJ30-19INCOMSS779-19+.DOC B.O.I. Finance (supra), to hold that the non-compliance of directions issued by the Reserve Bank of India will not result in invalidation of the agreement executed in breach thereof. The observations in paragraphs 32 to 34 read as under:

"32. It will also be useful to refer to the decision of the High Court of Australia in the case of Yango Pastoral Co. Pty. Ltd. v. First Chicago Australia Ltd. where Mason, J. made observations to this regard. That was a case where Section 8 of the Banking Act, 1959 prohibited a body corporate from carrying on the business of banking without a licence. The question arose whether a mortgage and guarantees given to an unicensed corporation in the course of carrying on business were void or unenforceable. The High Court unanimously held that nothing in the statute made them void and that examining the terms of the statute to determine the impact of illegality on the enforceability of the contract. At p.428, it was observed as follows:

"The weighing of considerations of public policy in this case and the decision in favour of enforcing the contract is infuenced by the from of the particular legislation. In this case the Act, as I have mentioned, is to a large extent directed to aiding the Government in executing its fscal policy rather than regulating the relationship between banker and customer per se, a feature which lends support for the view that the provision of a large recurrent penalty for offences against Section 8 is Parliament's determination of the consequences of breach of the section and as the only legal consequences thereof. There is much to be said for the view that once a statutory penalty has been provided for an offence the rule of the common law in determining the legal consequences of commission of the offence is thereby diminished-see my judgment in Jackson Vs. Harrison, (1978) 138 C.L.R. 438, at P. 452 . See also the suggestions that the principle cannot apply to all statutory offences (Beresford Vs. Royal Insurance Co. Ltd. in the Court of Appeal (1937) 2 K.B. 197, at p 22, per Lord Wright ; Marles V. Philip Trant & Sons Ltd. (1954) 1 Q.B. 29, at p. 37, per Denning L.J, and that it would be a curious thing if the offender is to be punished twice, civilly as well as criminally (st. John Shipping Corporation Vs. Joseph Rank Ltd. (1957) 1 Q.B. 267, at p. 292, per Devlin J.). The main considerations from which the principle ex turpi causa arose can be seen in the reluctance of the courts to be instrumental in offering an inducement to crime or removing a restraint to crime: Beresford's Case (1938) A.C. at pp. 586; Amicable Society Vs. Bolland (1830) 4 Bligh (N.S) 194 at P. 211.

SJ30-19INCOMSS779-19+.DOC However, in the present case Parliament has provided a penalty which is a measure of the deterrent which it intends to operate in respect of non-compliance with Section 8 . In this case it is not for the court to hold that further consequences should fow, consequences which in fnancial terms could well far exceed the prescribed penalty and could even conceivably lead the plaintiff to insolvency with resultant loss to innocent lenders or with resultant loss to innocent lenders or investors. In saying this I am mindful that there could be a case where the facts disclose that the plaintiff stands to gain by enforcement of rights gained through an illegal activity far more than the prescribed penalty. This circumstance might provide a suffcient foundation for attributing a different intention to the legislature. It may be that the true basis of the principle is that the court will refuse to enforce a transaction with a fraudulent or immoral purpose : Bereford Vs. Royal Insurance Co. Ltd. (1937) 2 K.B. 197 at p. 220. On this basis the common law principle of ex turpi causa can be given and operation consistent with , through subordinate to, the

statutory intention, dying relief in those cases where a plaintiff may otherwise evade the real consequences of a breach of statutory prohibition." (emphasis added)

33. The aforesaid principles will clearly be applicable in the present case as well. The non-compliance of the directions issued by the Reserve Bank may result in prosecution/or levy of penalty under Section 46, but it cannot result in invalidation of any contract by the bank with the third party. If the contention of the Custodian is accepted it will result in invalidation of agreements by the banks, even where the third parties may not be aware of the directions which are being violated. To give an example if the Reserve Bank by confdential circulars fxes the limit in excess of which the banks cannot give any loan but, without informing the third party, the bank while exceeding its limit gives a loan which is then utilised by the bank's customer. It will be inequitable and improper to hold that as the directions of the Reserve Bank had not been complied with by the bank, the grant of loan cannot be regarded as valid and, as a consequence thereof, the customer must return the amount received even though he may have utilised the same in his business. Yet another instance may be where the bank advances loan by charging interest at a rate lower than the minimum which may have been fxed by the Reserve Bank, in a direction issued under Section 36 (1)(a). As far as the customer is concerned, it may not be aware of the direction fxing them minimum rate of interest. Can it be said, in such a case, that the advance of loan itself was illegal or that the bank would be entitled to receive the higher rate of interest ? In our opinion it will be wholly unjust and inequitable to hold that such transactions entered into by the bank with a customer, SJ30-19INCOMSS779-19+.DOC which transactions are otherwise not invalid, can be regarded as void because the bank did not follow the directions or instructions issued by the Reserve Bank of India.

34. The instructions which were issued by the said circulars were meant to complied with by the banking companies only and did not purport to, nor could they, be binding on the third parties. This being so, even if the appellant banks had been prohibited from entering into the buy-back arrangements in question, that by itself, would not invalidate the contracts though the infringement of the said directions may lead to action being taken under Section 46 of the Act." (emphasis supplied)

37. Reliance was also placed on the judgment of the Supreme Court in the case of Canara Bank and others vs. Standard Chartered Bank8. In the said case also, a defence was sought to be advanced that the transaction therein was contrary to the circulars of the Reserve Bank and opposed to public policy. The Supreme court after referring to its earlier judgment in the case of B.O.I. Finance (supra) observed that the instructions issued by the Reserve Bank of India were meant to be complied with only by the banking companies and could not be regarded as binding on the other parties. There was no evidence raised or sought to be raised in the said case which could possibly have led the Court to the conclusion that the transaction was opposed to public policy.

38. The exposition of the aforesaid legal position indicates that non-observance of the directives or the circulars of the Reserve Bank of India by the banking companies, though they are 8 (2002) 10 Supreme Court Cases 697.

SJ30-19INCOMSS779-19+.DOC statutorily enjoined to observe, does not necessarily lead to invalidation of the underlying transactions. The judgment of the High Court of Australia in the case of Yango Pastoral (supra) which was referred to in the case of B.O.I. Finance (supra), with approval, was in the backdrop of the direct breach of a statutory provision. There was a prohibition against carrying on the banking business without an express authority of the Reserve Bank. Yet, the Court held that despite absence of a requisite licence to carry on banking business, the transaction is not void or unenforceable.

39. In the case at hand, the infraction on the part of the plaintiff, is comparatively minor. What is found by SFIO is that the plaintiff went on to advance loan to other group companies so that the earlier loan could be repaid and the fnancial statements of the plaintiff could be shown in better health.

40. First and foremost, the purpose for which the loan was advanced. The offer letter annexed with the letter dated 17 th September, 2015 (Exhibit-A to the plaint) indicates the purpose of the loan facility. It reads as under:

> "The funds provided under the Facility would be utilized for any of the below specifed purposes:
>
> (a) SEZ development & associated infrastructure facilities.
>
> (b) Refnance of loans.
>
> (c) Loans and Advances to Group Companies.
>
> (d) General Corporate Purposes."

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41. The debtor was to utilise the facility made available for any of the aforesaid purposes. Evidently, refnance of loans and loans and advances to group companies were the purposes for which the facility could be utilised. Clause 11 of the said offer letter notes the existing facilities extended to SKIL Group. Two inferences become deducible. One, the parties were aware of the existing exposure of the plaintiff to SKIL Group companies. Two, the stated purposes for which the loan facility was to be utilised were the refnance of the loans and the loans and advances to group companies (which could be utilised for the repayment of the latter's loan).

42. Availing loan to retire existing debt is neither uncommon nor per se unlawful. The lenders often lend money beyond the creditworthiness of a debtor, by choice or unknowingly. For the debtor, in a straitened fnancial condition, availaing loan to repay the loan appears the easiest of the options. The hope of revival foats. But, often than not, the boat sinks, under the weight of over indebtedness.

43. Undoubtedly, the plaintiff indulged in imprudent and risky fnancial business. As indicated in the report of SFIO, this might be with the full knowledge and understanding of the consequences. However, the non-observance of prudent lending SJ30-19INCOMSS779-19+.DOC norms does not imply that the very transaction is void. It is pertinent to note that the defence that the debt has become unenforceable because of the aforesaid practice of 'ever-greening of the loans' did not see the light of the day till the affdavit-in- reply came to be fled. None of the correspondence placed on record emanating from the defendants indicates that the defendants had ever resisted the extension of the facility. Thus, the mere fact that SFIO has carried investigation in the affairs of the plaintiff and found that the plaintiff indulged in the practice of ever-greening of the loans, may not justify an inference that the entire transaction is void. It is especially for the reason that the existence of liability of the SKIL group to the tune of about 700 Crore was acknowledged by the defendants. Thus, I am not persuaded to agree with the submission on behalf of the defendants that the defendants are entitled to an unconditional leave to defend the suit on account of the extension of loan facility in breach of RBI directives.

44. It may be apposite to deal with another facet of the submission of Mr. Seervai, at this stage. An endeavour was made to demonstrate that since the entire amount which was disbursed by the plaintiff came to be returned to the account of the plaintiff either directly or through the group companies on SJ30-19INCOMSS779-19+.DOC the date of advancement or soon thereafter, which fact is underscored by the SFIO Report in paragraph 4.46.1 (referred to above), the entire liability can be said to have been discharged and thus there is no subsisting debt.

45. The submission appears attractive at the frst blush. However, on judicious scrutiny, the submission does not merit countenance. It is indubitable that the fresh loan facility came to be extended to the defendants under the loan agreement. Disbursement and receipt of the said loan amount are incontestible. The fact that the said loan amount was utilised by the defendants in repayment of existing liabilities either of the defendants or its group companies does not negate the underlying consideration, since the purpose of the loan was refnance of the existing loans and extension of loans and advances to the group companies. The end use of the said loan amount thus cannot constitute a failure of consideration. If the submission on behalf of the defendants is taken to its logical conclusion, then the plaintiff can enforce neither the liability incurred by the defendants and/or group companies in respect of the previous debts nor under the transactions in question.

SJ30-19INCOMSS779-19+.DOC Defence based on non-invocation of pledged shares at an opportunate time:

46. It is the case of the defendants that the pledged shares were commanding optimum price in the month of December 2015. The shares of Pipavav Defence and Offshore Engineering Company Ltd. (now the Reliance Naval and Engineering Ltd.) commanded the price in the range of Rs.66-89. Whereas the shares of SKIL Infrastructure Ltd. commanded the price in the range of Rs.24-36. The plaintiff did not sell the pledged shares when their prices were high despite being called upon to do so. Had the pledged shares been sold in December 2015 and June 2016, the plaintiff could have realised a sum of Rs.250 Crore by the sale of approximately 3.93 Crore of RNEL alone. Instead, the plaintiff sold the shares of RNEL at a much lower price of Rs.27 per share (at about 45% of Rs.63 per

share), which was offered in the take over deal. This conduct on the part of the plaintiff, according to the learned Senior Counsel for the defendants, surely raises a triable issue.

47. Dr. Saraf the learned Counsel for the plaintiff, in contrast, submitted that the aforesaid contention of the defendants is factually incorrect and legally unsound. There is no clinching material on record to indicate that at a particular time the defendants had made a request to invoke the pledged shares. In SJ30-19INCOMSS779-19+.DOC view of the provisions contained in Section 176 of the Indian Contract Act, the pledgee is not bound to take recourse to the securities. Nor the pledgee can be blamed for not invoking the securities at a particular point of time. In view of this well recognised position in law, the defence of not invoking the pledged shares by the plaintiff does not raise a triable issue, urged Dr. Saraf.

48. In order to led support to the aforesaid submission Dr. Saraf placed reliance on a judgment of a Division Bench of this Court in the case of State Bank of India vs. Smt. Neela Ashok Naik and another9, wherein it was held that this Court was in agreement with a decision of the Delhi High Court in the case of Bank of Maharashtra vs. Racmann Auto (P) Ltd. 10, wherein it was enunciated that Section 176 of the Contract Act makes it clear that it is the discretion of the pawnee to sell the goods in case the pawnor makes default but if the pawnee does not exercise that discretion no blame can be put on the pawnee and pawnee has the right to bring a suit for recovery of the debt and retain the goods pledged as collateral security.

49. Reliance was also placed on another judgment of this Court in the case of Prime Broking Company (India) Ltd. vs. 9 AIR 2000 Bom 151.

10 AIR 1991 Delhi 278.

SJ30-19INCOMSS779-19+.DOC National Securities Clearing Corporation Ltd. 11, wherein it was inter alia observed that the pledgor cannot compel the pledgee to exercise power of sale of the pledged goods in order to discharge any debt or liability which may have crystalised. The pledgor's right, in such circumstances extends only to the following:

> (i) in case the Pledgee exercises the power of sale, to insist that it should be honestly and properly done and the sale proceeds applied to the debt;
>
> (ii) in case the pledgee does not exercise the power of sale, then the Pledgor can redeem the pledge on payment of the debt or such part of it that has remained unpaid; and
>
> (iii) in case the sale was improperly exercised, to get damages caused thereby."

50. Mr. Seervai, the learned Senior Counsel for the plaintiff fairly submitted that he has no qualms about the aforesaid proposition. However, according to Mr. Seervai, in the instant case, the situation is exacerbated by the fact that on the one hand the plaintiff did not invoke the shares of RNEL despite having given approval for the take over at a time when the price of the share of RNEL was

high. On the other hand, the plaintiff instead of invoking the pledged shares and releasing the outstanding amounts foisted a fresh loan upon the defendants. 11 (2017) 2 AIR Bom R 284.

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51. The aforesaid submission cannot be said to be without substance. The copies of the communication placed on record indicate that the defendants were raising the issue of sale of pledged shares much before the events of default were notifed. The issue of sale of the pledged shares to R-Infra was raised in a communication dated 11th May, 2016. On 21st June, 2016, also, the defendants requested the plaintiff to accept their request to sell the pledged shares to Reliance as it would have had reduced the loan exposure by approximately Rs.250 Crore. Of course, the said communication referes to certain further commitments to be performed by the defendants. The communication dated 28th June, 2016 also underscore the urgency of decision on the sale of the pledged shares to reduce the liability of the defendants. The aforesaid contention fnds support in the reply to the notice (issued by the plaintiff on 25th July, 2018) dated 16th August, 2018 by Chief Fiance Offcer of SKIL Infrastructure Limited. It is, inter alia, mentioned therein that despite having given approval to the take over deal the plaintiff failed to sell approximately 39.3 Crore RNEL shares at Rs.63 per share, aggregating to total consideration of approximately Rs.248 Crore in mid January 2016 to Reliance Group. Instead, the shares were sold at a much lower price (Rs.27/- per). This ground is SJ30-19INCOMSS779-19+.DOC agitated in the offer of one time settlement dated 20 th September, 2018, as well.

52. The pledgee may not be under an obligation to track the movement of the scrips on the Exchange and sale them at a particular point of time, which in the hindsight, appears to be the maximum price commanded by the share at that point of time. However, where it is alleged that there was an approval to take over bid and the lender had agreed to release the pledged security at a particular price and failed to do so resulting in loss to the pledgor, it raises a triable issue.

Insuffciently Stamped Instrument:-

53. Consistently with the grounds in the affdavit-in-reply, Mr. Seervai strenuously urged that the aforesaid instruments under which the purported loan was advanced and secured, being indubitably insuffciently stamped, and executed at Delhi, the provisions contained in Sections 19 and 34 of the Stamp Act, 1958 are clearly attracted. Laying emphasis on the bar incorporated in Section 34 of the Stamp Act, 1958, it was urged that the prohibition is not only against admission of insuffciently stamped instruments in evidence but also 'acting upon' such instruments. In view of the proscription contained SJ30-19INCOMSS779-19+.DOC in Section 34, this Court cannot act upon the instruments and pass an order on the summons for judgment.

54. Elaborating the submission, Mr. Seervai would urge that the Court is enjoned to impound the document frst, send it for adjudication of the defcit stamp-duty along with penalty, as may be applicable, and act upon the instruments only when the plaintiff complies with Clause (a) of the proviso to Section 34. The insuffciency of stamp, according to Mr. Seervai, goes to the root of the matter and precludes the Court from looking into the instruments even while appreciating the

question of grant of leave, upon summons for judgment being taken out by the plaintiff.

55. Per contra, Dr. Saraf stoutly submitted that the endeavour of the defendants to press into service the ground of insuffciency of stamp on the instruments in question, is not a defence which warrants grant of leave. It is not a defence in the strict sense of the term within the contemplation of Order XXXVII. By a catena of judicial precedents, according to Dr. Saraf, it has been consistently held that a technical defence of insuffciency of stamps cannot be urged in support of the prayer of grant of leave to defend the suit. It being a revenue measure, once the defcit stamp-duty is paid, the instrument can be SJ30-19INCOMSS779-19+.DOC admitted in evidence. Thus, a defendant, who unquestionably owes the debt, cannot be permitted to derive an unfair advantage on the strength of a technical defence like insuffciency of stamp on the instrument under which the liability is incurred. Dr. Saraf further urged that such objections have been taken by the debtors in almost every other case and those objections have been consistently repelled, by the Courts.

56. To lend support to the aforesaid submission, Dr. Saraf, placed a strong reliance on a judgment of the Supreme Court in the case of Hindustan Steel Limited vs. Messrs Dilip Construction Company.12 The said case arose out of an award under Indian Arbitration Act, 1940. The award was unstamped. In the context of the provisions contained in Section 35 of the Indian Stamp Act, 1899, the Supreme Court observed as under:

> "5. An instrument which is not duly stamped cannot be received in evidence by any person who has authority to receive evidence, and it cannot be acted upon by that person or by any public offcer. Section 35 provides that the admissibility of an instrument once admitted in evidence shall not, except as provided in Section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.
>
> 7. The Stamp Act is a fscal measure enacted to secure revenue for the State on certain classes of instruments: It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The stringent provisions of the Act are conceived in the interest of the revenue once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of the initial defect in the instrument. Viewed in that light the scheme is clear. Section 35 of the Stamp Act operates as a 12 (1969) 1 SCC 597.
>
> SJ30-19INCOMSS779-19+.DOC bar to an unstamped instrument being admitted in evidence or being acted upon; Section 40 provides the procedure for instruments being impounded, sub-section (1) of Section 42 provides for certifying that an instrument is duly stamped, and sub-section (2) of Section 42 enacts the consequences resulting from such certifcation."

(emphasis supplied)

57. Dr. Saraf submitted that the pronouncement of the Supreme Court in the case of Hindustan (supra) has been relied upon in a number of judgments of this Court to reject the prayer of the defendants to grant leave to defend the suit on the basis of insuffciency of stamps. Reliance was placed on the judgment of a learned Single Judge in the case of Rupinder Singh Arora vs. Kapil Puri.13 In the said case, unconditional leave to defend the summary suit was sought on the ground that the settlement agreement on which the suit claim was based, was not stamped. Repelling the contention, the learned Single Judge observed that the grievance of insuffciency of stamp-duty on the instrument can be addressed if the instrument is impounded and sent for adjudication. The learned Single Judge drew support from the judgments which take the view recorded in Hindustan (supra). Paragraphs 10 and 11 are relevant, they read as under:

> "10. The Stamp Act is a fscal measure enacted with an object to secure revenue for the State on certain classes of instruments and it is not enacted to arm a litigant with a 13 2016 SCC Online Bom 12517.
>
> SJ30-19INCOMSS779-19+.DOC weapon of technicality to meet the case of his opponent. Once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of initial defect in the instrument. I fnd support in Hindustan Steel Limited v. Messrs Dilip Construction (Company), Neolite Polymer Industries Pvt. Ltd v. Standard Chartered Bank and Wolstenholme International Ltd. v. Twin Stars Industrial Corporation.
>
> 11. In my view, if the document is impounded and sent for adjudication, the technical defect alleged by the defendant has been taken care of. In view of the observations in these 3 judgments and in other judgments referred to in those judgments, the defendant cannot be given unconditional leave on such technicality."

(emphasis supplied)

58. The aforesaid judgment was carried in appeal in the case of Kapil Puri vs. Rupinder Singh Arora. 14 A Division Bench of this Court, after adverting to the challenge posed on the basis of inadequate stamp-duty recorded that the approach of the learned Single Judge in impounding the document and sending it for adjudication instead of granting leave on the sole count of insuffciency of stamp-duty on the instrument in question, was in consonance with law and, thus, warranted no interference. Paragraph 12 of the judgment reads as under:

> "12. In regard to the contention that the appellant was coerced to enter into a settlement agreement, also has no basis as there is not a semblance of material to support this contention. Further the contention as urged on behalf of the appellant that the settlement was not adequately stamped and which was a valid defence for an unconditional leave, we are in complete agreement with the observations of the learned Single Judge. The Supreme Court in the case Hindustan Steel Limited vs. Messrs Dilip construction (Company), (1969) 1 SCC 597, and the decision of this Court in Neolite Polymer Industries Pvt. Ltd. vs. Standard Chartered bank and ors.

2007 MhLJ Online 60 = 2007(6) 14 2019(3) Mh.L.J. 155.

SJ30-19INCOMSS779-19+.DOC Bom.C.R. 539 and Wolstenholme International ltd. vs. Twin Stars Industrial Corporation and ors. 2002(5) Mh.L.J. 121 = 2001 (4) Bom.C.R. 114, would recognise the legal principle that the Stamp Act is a fscal measure enacted with an object to secure revenue for the State on certain classes of instruments and it is not enacted to arm a litigant with a weapon of technicality to meet the case of the opponent. Adverting to the said principles of law, the learned Single Judge directed that the document be impounded and sent for adjudication and the technical defect alleged by the appellant can be taken care of. We fnd that the said approach of the learned Single Judge is completely in consonance with law requiring no interference."

(emphasis supplied)

59. Reliance was also placed on another judgment of a Division Bench of this Court in the case of Morpheus Media Ventures Private Limited and others vs. Anthony Maharaj and others15 2017 (2) BCR 459. In the said case also, the refusal to grant an unconditional leave to defend the summary suit, on the ground that the documents were unstamped, by the learned Single Judge, was challenged in appeal. A submission was made that the plaintiff could not have been permitted to rely upon unstamped documents. In support of the said submission reliance was placed on the judgment of the Supreme Court in the case of SMS Tea Estates Pvt. Ltd. Vs. Chandmari Tea Co. Pvt. Ltd.16

60. The Division Bench, after a detailed analysis of the provisions of the Stamp Act, 1958 and the relevant provisions of Indian Stamp Act, 1899, as well, rejected the submission on 15 (2017) 2 Bom CR 459.

16 (2011) 14 SC 66.

SJ30-19INCOMSS779-19+.DOC behalf of the defendants. The Division Bench expressly approved the approach of the learned Single Judge to impound the instrument and, thereafter, pass a conditional order for grant of leave to defend the suit. The Division Bench observed in paragraph 24 as under:

"24. We do not agree with Mr. Chinoy further. We must not forget that the Stamp Act envisages a duty on the instrument. The Stamp Act is concerned with the Instrument and not the transaction embodies or contained in it. The underlying transaction, therefore, does not enter into consideration while determining the proper stamp duty, adjudicating it and pass an order for ensuring payment of the same. Thus, the above mattes are not with which the Court is concerned and it can in appropriate cases such as the one before us proceed with the merits of the matter by ensuring that the proper stamp duty is adjudicated and paid. The learned single Judge has precisely ensured that. He has not allowed the appellants to rely on a technical plea and of the nature referred above. The course adopted by him, in the facts and circumstances of

> the case, cannot be faulted. We have found that in all the instruments based on which the suit has been laid and particularly those required by Order XXXVII there is 'an admission of' the liability. There is no denial on the execution of these documents. None of the defendants have ever questioned the contents thereof nor is there an interpretation other than the one placed by the plaintiffs on the contents thereof and which can be deduced from the defences raised. In such circumstances, allowing a just and legitimate claim to be defeated and frustrated by taking recourse to the fscal measure was not permitted by the learned single Judge."

(emphasis supplied)

61. In support of the aforesaid view, the Division Bench placed reliance on the judgment of the Supreme Court in the case Hindustan (supra) which was followed in Dr. Chiranji Lal (D) by LRs. v. Hari Das (D) by LRs.17 17 AIR 2005 (5) SC 2564.

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62. Mr. Seervai urged with tenacity that the aforesaid judgments are of no assistance to the plaintiff. The position which is expounded in the aforesaid judgments cannot be said to be correctly laid, in view of the recent pronouncement of the Supreme Court in the case of Garware Wall Ropes Ltd. Vs. Coastal Marine Constructions and Engineering Ltd.18 Amplifying the submission, Mr. Seervai would urge that the approach adopted by the learned Single Judges of refusing to grant leave on the count of insuffciency of stamp on the instruments in question, and instead impound and send them for adjudication simultaneously with passing a conditional order for leave to defend, on other counts, and which has been approved by the Division Benches in the judgments referred to above, is no longer a legally sustainable option. In view of the pronouncement of the Supreme Court in the case of Garware (supra) in clear and explicit terms that the contract contained in a document which is insuffciently stamped is unenforceable in law, the insuffciency of the stamps on the instrument in question cannot be relegated to the stage post consideration of leave to defend. The instrument which is insuffciently stamped cannot be simply acted upon.

18 2019 SCC Online SC 515.

SJ30-19INCOMSS779-19+.DOC

63. A strong reliance was placed on the observations of the Supreme Court in paragraphs 27 to 29 of the judgment in the case of Garware (supra). They read as under:

> "27. Looked at from a slightly different angle, an arbitration agreement which is contained inan agreement or conveyance is dealt with in Section 7(2) of the 1996 Act. We are concerned with the frst part of Section 7(2) on the facts of the present case, and therefore, the arbitration clause that is contained in the sub-contract in question is the subject matter of the present appeal. It is signifcant that an arbitration agreement may be in the form of an arbitration clause "in a contract".

28. Sections 2(a), 2(b), 2(g) and 2(h) of the Indian Contract Act, 1872 ["Contract Act"] read as under:

> "2. Interpretation clause. - In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:
>
> (a) When one person signifes to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal;
>
> (b) When the person to whom the proposal is made signifes his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;
>
> xxx xxx xxx
> (g) An agreement not enforceable by law is said to be void;
> (h) An agreement enforceable by law is a contract;
> xxx xxx xxx
>
> 29. When an arbitration clause is contained "in a contract", it is signifcant that the agreement only becomes a contract if it is enforceable by law. We have seen how, under Indian Stamp Act, an agreement does not become a contract, namely, that it is not enforceable in law, unless it is duly stamped. Therefore, even a plain reading of Section 11(6A), when read with Section 7(2) of the 1996 Act and Section 2(h) of the Contract Act, would make it clear that an arbitration clause in an agreement would not exist when it is not enforceable by law. This is also an indicator that SMS Tea Estates (supra) has, in no manner, been touched by the amendment of Section 11(6A)."

(emphasis supplied) SJ30-19INCOMSS779-19+.DOC

64. Mr. Seervai strenously canvassed a submission that the import of the judgment in the case of Garware (supra) is not restricted to the proceedings under the Arbitration and Conciliation Act, 1996, in general, and the arbitration agreement, in particular. The proposition enunciated in the case of Garware (supra) apply with equal force to all the instruments which are chargeable with duty under the Stamp Act, 1958 or Indian Stamp Act, 1899. Mr. Seervai would thus urge that the judgments on which reliance is placed on behalf of the plaintiff, especially, the pronouncement in the case of Morpheus (supra) is of little assistance as the Supreme Court did not approve the view of the Full Bench of this Court in the case of Gautam Landscapes Pvt. Ltd. Vs. Shailesh Shah 19, in which the judgment in the case of Morpheus Media (supra) was extensively referred to.

65. In the case of Gautam Landscapes (supra) this Court has considered the following questions in the backdrop of the objection that the document containing arbitration clause is either unstamped or insuffciently stamped.

| Sr No. | Question | Answer |
|---|---|---|
| 1 | Whether a court, under the Arbitration and Conciliation Act, 1996, can entertain and | |

19 2019 SCC Online Bom 563.



grant any interim or ad-interim relief in an application under Section 9 of the said Act In the Affrmative when a document containing arbitration clause is unstamped or insuffciently stamped?

2 Whether, inter alia, in view of Section 11(6A) of the Arbitration and Conciliation Act, 1996, inserted by Arbitration and Conciliation (Amendment) Act, 2016, it would be necessary for the Court before considering In the Negative. and passing fnal orders on an application under Section 11(60 of the Act to await the adjudication by the stamp authorities, in a case where the document objected to, is not adequately stamped?

66. In the case of Garware (supra), the Supreme Court adverted to the aforesaid Full Bench Judgment and held that question no.2 (extracted above) having been answered contrary to the judgment of the Supreme Court, was incorrectly decided.

67. Dr. Saraf joined the issue by advancing a submission that the pronouncement of the Supreme Court in the case of Garware (supra) cannot be read de hors the issue which arose for consideration before the Supreme Court in the said case. Dr. Saraf made an earnest endeavour to demonstrate that the question posed before the Supreme Court was essentially, whether Section 11(6A) of the Arbitration and Conciliation Act, 1996 introduced by Arbitration and Conciliation (Amendment) Act, 2015, has removed the basis of the judgment in the case of SMS Tea (supra) wherein it was, inter alia, held that where an arbitration clause is contained in an unstamped SJ30-19INCOMSS779-19+.DOC agreement, the Judge hearing Section 11 application shall impound the agreement and ensure that stamp-duty and penalty are paid thereon before proceeding with the said application. It was submitted that endeavour of the defendants to draw support and sustenance from the aforesaid pronouncement in the case of Garware (supra) to seek leave to defend on the count of insuffciency of stamp-duty, is legally impermissible.

68. The Supreme Court has framed the question which arose for its consideration in Garware (supra), in paragraph 4, as under:

> "4. The question raised inthis appeal is as to what is the effect of an arbitration lause contained in a contract which requires to be stamped. This court, in SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66 ["SMS Tea Estates"], has

> held that where an arbitration clause is contained in unstamped agreement, the provisions of the Indian Stamp Act, 1899, ["Indian Stamp Act"] require the Judge hering the Section 11 application to impound the agreement and ensure that stamp duty and penalty (if any) are paid thereon before proceeding with the Section 11 application. The question is whether Section 11(6A), which has been introduced by way of the Arbitration and Conciliation (Amendment) Act, 2015 [" Amendment Act, 2015"], has removed the basis of the judgment, so that the stage at which the instrument is to be impounded is not by the Judge hearing the Section 11 application, but by an arbitrator who is appointed under Section 11, as has been held by the impugned judgment."

(emphasis supplied)

69. Dr. Saraf further submitted that the proposition expounded in Garware (supra) is restricted to an application under Section 11 becomes explicitly clear if the observations of SJ30-19INCOMSS779-19+.DOC the Supreme Court in paragraph 26 are considered. Paragraph 26 reads as under:

> "26. It will be seen that neither in the Statement of Objects and Reasons nor in the Law Commission Report is there any mention of SMS Tea Estates (supra). This is for the very good reason that the Supreme Court or the High Court, while deciding a Section 11 application, does not, in any manner, decide any preliminary question that arises between the parties. The Supreme Court or the High Court is only giving effect to the provisions of a mandatory enactment which, no doubt, is to protect revenue. SMS Tea Estates (supra) has taken account of the mandatory provisions contained in the Indian Stamp Act and held them applicable to judicial authorities, which would include the Supreme Court and the High Court acting under Section 11. A close look at Section 11(6A) would show that when the Supreme Court or the High Court considers an application under Section 11(4) to 11(6), and comes across an arbitration clause in an agreement or conveyance which is unstamped, it is enjoined by the provisions of the Indian Stamp Act to frst impound the agreement or conveyance and see that stamp duty and penalty (if any) is paid before the agreement, as a whole, can be acted upon. It is important to remember that the Indian Stamp Act applies to the agreement or conveyance as a whole. Therefore, it is not possible to bifurcate the arbitration clause contained in such agreement or conveyance so as to give it an independent existence, as has been contended for by the respondent. The independent existence that could be given for certain limited purposes, on a harmonious reading of the Registration Act, 1908 and the 1996 Act has been referred to by Raveendran, J. in SMS Tea Estates (supra) when it comes to an unregistered agreement or conveyance. However, the Indian Stamp Act, containing no such provision as is contained in Section 49 of the Registration Act, 1908, has been held by the said judgment to apply to the agreement or conveyance as a whole, which would include the arbitration clause contained therein. It is clear, therefore, that the introduction of Section 11(6A) does not, in any manner, deal with or get over the

basis of the judgment in SMS Tea Estates (supra), which continues to apply even after the amendment of Section 11(6A)."

(emphasis supplied)

70. It was further submitted that this Court in the judgments pronounced after Garware (supra) has held that Garware (supra) is restricted to an application under Section 11 of the SJ30-19INCOMSS779-19+.DOC Act. Dr. Saraf placed reliance on the judgment of this Court in the case of Saifee Developers Private Ltd vs. Sanklesha Constuctions and others (G.S. Kulkarni, J) dated 15th July, 2019 in Commercial Arbitration Petiton (L) No.627 of 2019, wherein it was, inter alia, observed that the decision of the Supreme Court in Garware (supra) is rendered in the context of Section 11 of the Arbitration and Conciliation Act, 1996 and not in a proceeding under Section 9 of the Act. The decision of the Full Bench in the case of Gautam Lanscapes (supra) holds feld so far as the application under Section 9 of the Act.

71. Reliance was also placed on the judgment of another learned Single Judge in the case of IREP Credit Pvt. Ltd. Vs. Tapasvi Mercantile Pvt. Ltd. & Anr. (G. S. Patel, J.) dated 20 th December, 2019, in Comm Arbitration Petiton (L) No.1501 of 2019, wherein the judgment in the case of Saifee Developers (supra) was followed. In the case of IREP Credit (supra) the learned Single Judge, inter alia, observed that, "I do not believe the decision of the Supreme Court was meant to arm dishonest borrowers to delay legitimate recovery actions in this fashion".

72. In order to properly appreciate the ratio and import of the judgment of the Supreme Court in the case of Garware (supra), of necessity, it is imperative to consider the controversy which SJ30-19INCOMSS779-19+.DOC arose in SMS Tea (supra) and the law laid down therein. In the case of SMS Tea (supra) the dispute arose out of termination of long term lease in respect of Tea Estate. The Lease Deed therein contained an arbitration clause. When the lessee invoked the arbitration, in the petition under Section 11 of the Arbitration and Conciliation Act, an objection was taken that the Lease Deed was invalid and unenforceable for want of registration and not being duly stamped. The following questions arose for consideration before the Supreme Court.

(i) Whether an arbitration agreement contained in an unregistered (but compulsorily registerable) instrument is valid and enforceable?

(ii) Whether an arbitration agreement in an unregistered instrument which is not duly stamped, is valid and enforceable?

(iii) Whether there is an arbitration agreement between the appellant and the respondent and whether an arbitrator should be appointed?

73. While answering question (ii), the Supreme Court in the context of the provisions contained in Section 35 of the Indian Stamp Act expounded the legal position in paragraphs 19 and 20, which read as under:

"19. Having regard to Section 35 of the Stamp Act, unless the stamp duty and penalty due in respect of the instrument is paid, the court cannot act upon the instrument, which means that it cannot act upon the arbitration agreement also which is part of the instrument. Section 35 of the Stamp Act is distinct and different from Section 49 of the Registration Act in regard to an unregistered document. Section 35 of the Stamp Act, does not contain a proviso like Section 49 of the registration Act enabling the instrument to be used to establish a collateral transaction.

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20. The Scheme for Appointment of Arbitrators by the Chief Justice of Gauhati High Court, 1996 requires an application under Section 11 of the Act to be accompanied by the original arbitration agreement or a duly certifed copy thereof. In fact, such a requirement is found in the scheme/rules of almost all the High Courts. If what is produced is a certifed copy of the agreement/contract/instrument containing the arbitration clause, it should disclose the stamp duty that has been paid on the original. Section 33 casts a duty upon every court, that is, a person having by law authority to receive evidence (as also every arbitrator who is a person having by consent of parties, authority to receive evidence) before whom an unregistered instrument chargeable with duty is produce, to examine the instrument in order to ascertain whether it is duly stamped. If the court comes to the conclusion that the instrument is not duly stamped, it has to impound the document and deal with it as per Section 38 of the Stamp Act."

74. The Supreme Court also summed up the procedure to be adopted, if the document containing the arbitration clause is not duly stamped.

"22. We may therefore sum up the procedure to be adopted where the arbitration clause is contained in a document which is not registered (but compulsorily registerable) and which is not duly stamped:

22.1. The court should, before admitting any documet into evidence or acting upon such document, examine whether the instrument/document is duly stamped and whether it is an instrument which is compulsorily registerable. 22.2. If the document is found to be not duly stamped, Section 35 of the Stamp Act bars the said document being acted upon. Consequently, even the arbitration clause therein cannot be acted upon. The court should then proceed to impound the document under Section 33 of the Stamp Act and follow the procedure under Sections 35 and 38 of the Stamp Act.

22.3. If the document is found to be duly stamped, or if the defcit stamp duty and penalty is paid, either before the court or before the Collector (as contemplated in Section 35 or 40 Section of the Stamp Act), and the defect with reference to defcit stamp is cured, the court may treat the document as duly stamped.

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75. The aforesaid pronouncement makes it abundantly clear that the proper stage for determination of the question of insuffciency of stamp on a document containing an arbitration clause is consideration of the application under Section 11 of the Act. The Court dealing with such application was held to be enjoined to examine the aspect of instrument being duly stamped, and, if found to be defcient, the instrument be impounded and the procedure under Sections 35 and 38 of the Stamp Act, 1899, be thereafter followed. It was in terms held that even the arbitration clause in the said instrument cannot be acted upon by the Court, at that stage.

76. In the case of Garware (supra), the controversy arose as in the case of Coastal Marine Construction and Engineering Ltd. vs. Garware Wall Ropes Ltd.20, this Court, in the context of the amendment to the Arbitration and Conciliation Act, 1996, by the Amendment Act, 2015, especially the insertion of sub-section (6A) in Section 11 of the principal Act, which prescribed that the Court shall confne itself to examination of the existence of an agreement, held that the question of impounding of the instrument unstamped or insuffciently stamped need not be considered by the Judge who is hearing Section 11 application, but by an Arbitrator, who is appointed under Section 11. 20 2018(3) Mh.L.J. 22.

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77. It would be contextually relevant to note that the Full Bench of this Court in the case Gautam Landscapes (supra) has also considered the impact of the legislative change brought about by insertion of sub-section (6A) and held that the issue as to whether suffciency or otherwise of the stamp-duty on the agreement can be left to the decision of the Arbitral Tribunal (paragraph 102). The Full Bench further observed in 'paragraph 110' that even the decision in SMS Tea (supra) cannot be made applicable to the application fled after 23 rd October, 2015. On the aforesaid premise, the Full Bench held that before passing fnal order on an application under Section 11(6) of the Act, the Court was not required to await the adjudication by the stamp authorities where there is an objection as to subject document being not adequately stamped.

78. In Garware (supra), the Supreme court was principally dealing with the question as to whether the decision in SMS Tea (supra) has also been done away by the expression, "notwithstanding any judgment, decree or order of any Court", contained in Section 11(6A).

79. In paragraph 26, the Supreme Court, after adverting to the provisions of the Amendment Act, 2015, concluded that introduction of Section 11(6A), does not in any manner deal with SJ30-19INCOMSS779-19+.DOC or get over the basis of the judgment in SMS Tea (supra) and the said judgment continues to apply even after the amendment of Section 11 (6A). The Supreme Court, inter alia, observed that the Supreme Court or the High Court when impounding an unstamped or insuffciently stamped document which contains an arbitration clause is only giving effect to the provisions of a mandatory enactment which, no doubt, is to protect the revenue.

80. Undoubtedly, the Supreme Court, in paragraphs 27 to 29, considered the enforceability of an agreement contained in an unstamped or insuffciently stamped instrument through the prism of the provisions contained in the Indian Contract Act and ruled that even on a plain reading of Section 11(6A) when read with Section 7(2) of the Act, 1996 and Section 2(h) of the Contract Act, makes it clear that an arbitration clause in the agreement would not exist when it is not enforceable by law. The Supreme Court further observed that the said aspect is also a factor that SMS Tea (supra) has not in any manner been touched by the amendment of Section 11(6-A).

81. In my considered view, and understanding of the aforesaid judgment, the principal question considered and determined by the Supreme Court is the continued applicability of the SJ30-19INCOMSS779-19+.DOC judgment in the case of SMS Tea (supra) that the question of an inadequate stamp-duty on an instrument containing an arbitration clause has to be determined by the Court at the hearing of an application under Section 11 of the Act, 1996 and the said aspect cannot be relegated to be determined by the Arbitral Tribunal, as was held by the learned Single Judge in the case of Coastal Marine (supra) and the Full Bench of this Court in the case of Gautam Landscapes (supra).

82. It is trite that a decision is an authority for what it decides and not what can logically be deducted therefrom. A proftable reference in this context can be made to the decision of the Constitution Bench in the case of Union of India vs. Chajju Ram (dead) By LRs. and others21, wherein the Supreme Court in paragraph 23 has observed thus:

> "23. It is now well settled that a decision is an authority for what it decides and not what can logically be deducted therefrom. It is equally well settled that a little difference in facts or additional facts may lead to a different conclusion."

83. The aspect of insuffciency of stamp-duty and the bar incorporated by the provisions of Section 34 of the Stamp Act, 1958, is required to be considered in the backdrop of the special procedure prescribed in Order XXXVII of the Code for expeditious resolution of disputes based on negotiable 21 (2003) 5 SCC 568.

SJ30-19INCOMSS779-19+.DOC instrument and written contracts etc. Indisputably, adjudication of defcit stamp-duty is within the province of the authorities under the Stamp Act, 1958. The adjudication orders are amenable to appeals and revisions. Can the Court stay its hands off and not consider the aspect of grant of leave till the question of proper stamp-duty is fnally adjudicated?

84. An answer to aforesaid question warrants a harmonious construction of the provisions contained in Section 34 of the Stamp Act and the provisions contained in Order XXXVII of the Code. Even in the case of Garware (supra) the Supreme Court adverted to the principle of harmonious construction. The Supreme Court thus observed in paragraph 37 as under:

> "37. One reasonable way of harmonising the provisions contained in Section 33 and 34 of the Maharashtra Stamp Act, which is a general statute insofar as it relates to safeguarding revenue, and Section 11(13) of the 1996 Act, which applies specifcally to

speedy resolution of disputes by appointment of an arbitrator expeditiously, is by declaring that while proceeding with the Section 11 application, the High Court must impound the instrument which has not borne stamp duty and hand it over to the authority under the Maharashtra Stamp Act, who will then decide issues qua payment of stamp duty and penalty (if any) as expeditiously as possible, and preferably within a period of 45 days from the date on which the authority receives the instrument. As soon as stamp duty and penalty (if any) are paid on the instrument, any of the parties can bring the instrument to the notice of the High Court, which will then proceed to expeditiously hear and dispose of the Section 11 application. This will also ensure that one a Section 11 application is allowed and an arbitrator is appointed, the arbitrator can then proceed to decide the dispute within the time-frame provided by Section 29-A of the 1996 Act."

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85. A useful reference, in this context, can be made to a judgment of the Supreme Court in the case of Indian Bank vs. Maharashtra State Cooperative Marketing Federation Ltd.22, wherein the principle of harmonious construction was applied in the context of the provisions contained in Order XXXVII of the Code and Section 10 of the Code which warrant the stay of the trial of the subsequent suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit. After considering the object of Section 10 of the Code and the object of the special scheme envisaged by Order XXXVII of the Code, it was, inter alia, held that considering the objects of both the provisions i.e. Section 10 and Order XXXVII wider interpretation of the word "trial" is not called for and the word "trial" in Section 10, in the context of summary suit, cannot be interpreted to mean the entire proceedings starting with institution of the suit by lodging a plaint. In a summary suit, the "trial" really begins after the Court or the Judge grants leave to contest the suit. Therefore, the Court or Judge dealing with the summary suit can proceed up to the stage of hearing the summons for judgment and passing the judgment in favour of the plaintiff if (a) the defendant has not applied for leave to defend and/or if such application has been made and refused 22 (1998) 5 SCC 69.

SJ30-19INCOMSS779-19+.DOC or if (b) the defendant who is permitted to defend fails to comply with the conditions on which leave to defend is granted.

86. Placing heavy reliance upon the aforesaid proposition, it was urged by Dr. Saraf that at the stage of summons for judgment, it is not peremptory to defer the consideration where the instrument is either unstamped or insuffciently stamped. The said objection, in the backdrop of the nature of the summary procedure, wherein at the stage of the summons for judgment the Court has to consider the nature of the defence sought to be put-forth by the defendant, cannot be stated to be a defence in the strict sense of the term and constitutes a mere technical objection. Thus, the course adopted by the learned Single Judges, in the cases referred to above, of impounding the document and sending it for adjudication simultaneously with the passing of order of grant of leave, cannot be said to be unsustainable. Nor it would cause any prejudice to the defendants.

87. Undoubtedly, Section 34 of the Act precludes the Court from even acting upon unstamped or insuffciently stamped instrument. However, the fact that the measure is indisputably for protection of the revenue as the recovery of the stamp-duty on the instrument and penalty for its non-payment, where-ever SJ30-19INCOMSS779-19+.DOC chargeable is practicable, where the Court or authority before which the instrument is tendered holds seisin of the matter, cannot be lost sight of.

88. In a summary suit, while deciding a summons for judgment, the options which the Court exercises, equip the court to ensure that the requisite stamp-duty is recovered, wherever the instrument is either unstamped or insuffciently stamped. If the Court grants an unconditional leave to defend, the Court can very well direct that the instrument be impounded and the procedure prescribed under Section 37 of the Act be resorted to. Even when the Court grants conditional leave, the Court can issue such directions. In a case, where the Court comes to the conclusion that the defendant is not entitled to leave to defend the suit and, conversely, the plaintiff is entitled to a judgment, still, the Court would be within its right in impounding the instrument and directing the adjudication and payment of the requisite stamp-duty with penalty, if any. The compliance can be ensured by a direction that the decree shall not be drawn and executed till the defcit stamp-duty is adjudicated and paid. In none of the aforesaid contingencies, where the Court impounds the instrument, it can be said that the Court has acted upon the instrument without ensuring the SJ30-19INCOMSS779-19+.DOC compliance of the statutory requirement of payment of stamp-duty.

89. In contrast, if the consideration of the summons for judgment and the question of grant of leave to defend a summary suit is deferred till the question of stamp-duty is fnally adjudicated by the authorities under the Act, the object with which the summary procedure is envisaged may not be advanced.

90. In the peculiar facts of the case, the aforesaid objection as to the insuffciency of the stamp-duty on the documents, in question, namely, the Loan Agreement and Guarantee Agreement and Pledge Agreement cannot be said to be of determinative signifcance as well. Apart from the said Loan, Guarantee and Pledge Agreements, there are other documents which fall within the ambit of the provisions contained in sub-rule (2) of Rule 1 of Order XXXVII. As indicated above, apart from the said agreement, defendant no.1 has executed a promissory note in favour of the plaintiff, there is a balance confrmation letter executed on 15th May, 2018, confrming the balance due of 248,70,00,000/-. In each of the suits also, there is such a balance confrmation to the extent of principal amount. Moreover, in the OTS proposal submitted on SJ30-19INCOMSS779-19+.DOC 16th January, 2018 and 21st February, 2018 there is clear acknowledgment of liability of SKIL Group to the tune of Rs.700 Crore. In view of the pronouncement of Full Bench in the case of Jyotsna K. Valia vs. T. S. Parekh & Co. 23 a summary suit can be instituted on the basis of a balance confrmation statement and settled accounts.

91. The position which, thus, emerges is that apart from the instruments which are objected to on the ground of insuffciency of funds there are other documents which would sustain the suit under the provisions of sub-rule (2) of Rule 1 of Order XXXVII. In this view of the matter, the consideration on the aspect of the summons for judgment cannot be deferred on the count that few

of the documents are insuffciently stamped. Even if those documents are eschewed from consideration, at this stage, still the summons for judgment would be sustainable on the basis of the demand promissory note, balance confrmation letter and the acknowledgment of the liability.

92. In the aforesaid view of the matter, the submission that an unconditional leave be granted on the ground of insuffciency of the stamp on the instruments in question, does not merit acceptance. However, the instruments are undoubtedly required to be impounded and sent for adjudication.

23 2007(3) Bom.C.R. 772.

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93. The conspectus of the aforesaid consideration is that in the backdrop of the material on record, including the SFIO Report, the extent to which the plaintiff would be entitled in law to enforce the liabilities, especially as regards the quantum of interest, when the creditworthiness of the debtor was in a serious doubt, warrants consideration. Whether the infraction on the part of the plaintiff is totally immaterial or inconsequential and the plaintiff is entitled to recover the entire loan amount alongwith interest as if the transaction is in conformity with all the norms? Can the plaintiff be permitted to recover the loan amount along with interest at the agreed rate at 16% p.a., with additional interest, penal interest, delayed payment interest at 2% p.a., each, de hors the circumstances in which the transactions were entered into? These are the questions, which warrant adjudication. The defence of alleged in-action on the part of the plaintiff in not invoking the shares at a specifed time, despite agreeing to do so, resulting in loss to the defendants also raises an issue which requires consideration.

94. The aforesaid factors, however, are required to be appreciated in the backdrop of the fact that there are clear admissions of the debt to the extent of the principal amount, in SJ30-19INCOMSS779-19+.DOC the least. The defendants do not profess to plead that the loans were not advanced and disbursed. There are balance confrmation letters. Aliunde, there are admissions in writing in the form of OTS proposals acknowledging the aggregate liability to the tune of Rs.700 Crore.

95. Thus, the proposition 17.6 of the judgment of the Supreme Court in the case of IDBI Trusteeship Services Limited vs. Hubtown Limited24, which envisages that whether 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, governs the facts of the instant case. What should be the amount which the defendants be directed to deposit? The SFIO report indicates that interest which would have accrued was deducted upfront in respect of the line of credit extended to SKIL Infrastructure Ltd and Gujarat-Dwarka Portwest Ltd. In my view it would be appropriate to direct the defendants to deposit the amount which was actually disbursed to the 'borrower company' in each of the suits. Hence, the defendants are entitled to conditional leave to defend the suit; 24 (2017)1 Supreme Court Cases 568.

SJ30-19INCOMSS779-19+.DOC subject to deposit of the principal amount which came to be disbursed in each of the transactions.

96. Hence the following order:

Summons for Judgment 30 of 2019 in Comm Summary Suit No.779 of 2019:

(I) (i) Leave to defend the suit is granted to defendant nos.1 to 8 subject to deposit of a sum Rs.233,16,04,691/- in the Court within eight weeks from today.

(ii) In the event of deposit of the aforesaid amount, the defendant nos.1 to 8 shall fle the written statement, within four weeks of the deposit.

(iii) If the defendants do not deposit the aforesaid amount within said period, the suit be listed for directions after 10 weeks.

(iv) The plaintiff has tendered the original Loan Agreement dated 28th September, 2015, the letters of guarantee dated 28th September, 2015 and the Pledge Agreement dated 28th September, 2015. These documents are hereby impounded.

SJ30-19INCOMSS779-19+.DOC Summons for Judgment 37 of 2019 in Comm Summary Suit No. 886 of 2019:

> (II) (i) Leave to defend the suit is granted to defendant nos.1 to 9 subject to deposit of a sum of Rs.239,69,86,301/- in the Court within eight weeks from today.
>
> (ii) In the event of deposit of the aforesaid amount, the defendant nos.1 to 9 shall fle the written statement, within four weeks of the deposit.
>
> (iii) If the defendants do not deposit the aforesaid amount within said period, the suit be listed for directions after 10 weeks.
>
> (iv) The plaintiff has tendered the original Loan Agreement dated 28th September, 2015 and the letters of guarantee dated 28th September, 2015.

These documents are hereby impounded.

Summons for Judgment 83 of 2019 in Comm Summary Suit No. 923 of 2019:

(III) (i) Leave to defend the suit is granted to defendant nos.1

to 4 subject to deposit of a sum of Rs.43,00,00,000/- in the Court within eight weeks from today.

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(ii) In the event of deposit of the aforesaid amount, the defendant nos.1 to 4 shall fle the written statement, within four weeks of the deposit.

(iii) If the defendants do not deposit the aforesaid amount within said period, the suit be listed for directions after 10 weeks.

(iv) The plaintiff has tendered the original Loan Agreement dated 26th October, 2016, the letters of guarantee dated 26th October, 2016 and the Pledge Agreement dated 26th October, 2016. These documents are hereby impounded.

Summons for Judgment 84 of 2019 in Comm Summary Suit No. 887 of 2019:

> (IV) (i) Leave to defend the suit is granted to defendant nos.1 to 4 subject to deposit of a sum of Rs.100,89,22,511/- in the Court within eight weeks from today.
>
> (ii) In the event of deposit of the aforesaid amount, the defendant nos.1 to 4 shall fle the written statement, within four weeks of the deposit.
>
> (iii) If the defendants do not deposit the aforesaid amount within said period, the suit be listed for directions after 10 weeks.

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(iv) The plaintiff has tendered the original Loan Agreement dated 30th December, 2014, the letters of guarantee dated 22nd December, 2014 and 30th December, 2014 and the Pledge Agreement dated 28 th September, 2015. These documents are hereby impounded.

(V) The Prothonotary and Senior Master is directed to forward

all the above impounded documents to

Superintendent of Stamps / Collector of Stamps, Mumbai for adjudication. Copy of the forwarding letter be sent to the Advocate for the plaintiff and the defendants, in the respective suits.

(VI) The Superintendent of Stamps / Collector of Stamps, Mumbai is directed to adjudicate the stamp-duty and penalty, if any, within six weeks from the date of the receipt of the impounded

documents from the Prothonotary and Senior Master, High Court, Bombay. (VII) Upon adjudication, the Authority shall communicate the order to the Prothonotary and Senior Master with a copy to the Advocate for the Plaintiff and Defendants, in the respective suits.

SJ30-19INCOMSS779-19+.DOC (VIII) The plaintiff shall pay the amount of stamp-duty along with penalty, if any, to be adjudicated within two weeks of receiving the copy of the order, in each of the suits. The Summonses for Judgments stand disposed of accordingly.

[N. J. JAMADAR, J.]