

# IL And FS Financial Services Limited vs Onaway Industries Ltd. 8 Ors on 22 June, 2022

**Author: A. K. Menon**

**Bench: A. K. Menon**

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION  
IN ITS COMMERCIAL DIVISION

SUMMONS FOR JUDGMENT NO.75 OF 2019  
IN  
COMMERCIAL SUMMARY SUIT NO.624 OF 2019

IL And FS Financial Services Ltd. .. Plaintiff  
v/s.  
Onaway Industries Ltd. & Ors. .. Defendants

Dr. Birendra Saraf, Senior Advocate, a/w Parag Khandar, Ms. Purvi Joshi  
& Ms. Saloni Shah i/b. DSK Legal for the plaintiff.

Mr. Amrut Joshi a/w Ms. Leona Furtado, Darshan Suvarna & Vijay More  
i/b. Pan India Legal Services Ltd. for the defendants.

CORAM: A. K. MENON, J.

DATED : 22ND JUNE, 2022.

P.C. :

1. This is the first in a group of four suits based on identical documentation and parties represented by the same Advocates who agree that the facts and issues in each of these cases are identical. The three other Summonses for Judgment will abide by the order in this Summons.

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2. The plaintiffs seek a judgment and decree against defendant nos.1, 2 & 9 in a sum of Rs.253,59,23,192/- and interest thereon. The claim arises out of a Term Loan Facility under which

the defendant no.1 was granted a loan of Rs.220 crores. Under the Loan Agreement dated 1st June, 2015 the defendant no.1 as borrower has agreed to repay the loan in accordance with the terms of the agreement. The agreement is in a standard form issued by the plaintiffs. On 29 th March, 2017, a Supplemental Loan Agreement was executed between the parties modifying the terms of the original loan. Defendant no.1 is also said to have executed a Demand Promissory Note for the said amount. Copies of the Loan Agreement, Supplemental Loan Agreement and Demand Promissory Note are annexed to the plaint at Exhibits 'A' 'B' and 'C'.

3. Repayment of the loan has been guaranteed by defendant no.2 vide a letter of guarantee dated 1 st June, 2015, personally guaranteeing repayment of the loan amount advanced to defendant no.1 on demand. Defendant no.9 has also similarly executed a personal guarantee undertaking to pay the amount under a Pledge Agreement as set out in the plaint. The Pledge Agreement is dated 27th March, 2017. Execution of these 901-75-19.doc (f).doc wadhwa documents is not in dispute. The particulars of claim reveal that the total amount said to be due and payable is Rs.253,59,23,192/- viz. principal sum of Rs.202 crores and interest at the rate of 18.50% p.a. as on 6th January, 2019 amounting to Rs.28,45,88,284/-.

4. On behalf of the plaintiffs Dr. Saraf has in the course of submissions pointed out that the liability is not disputed by defendant no.1 who is bound and liable to repay the amount advanced. A demand notice is said to have been issued on 2 nd July, 2018 to defendant no.1 and on 30th September, 2018 the plaintiffs invoked the personal guarantee and called upon the defendant no.2 to remit the outstanding amounts said to be in default. Likewise, on 26th December, 2018 the plaintiffs issued a legal notice inter alia addressed to the defendant no.9 calling upon her to honor the guarantee and pay the amount outstanding.

5. The record indicates that on 30 th November, 2018 the defendant no.5 Saharsh Mercantile Private Limited ('Saharsh') which has issued a corporate guarantee to secure dues of defendant no.1 addressed a letter to the plaintiffs relating to settlement of 901-75-19.doc (f).doc wadhwa outstanding debt and release of pledged securities and offered to make the payment of Rs.400 crores on certain conditions. Saharsh also obtained confirmation of the settlement proposal from defendant no.1 at the foot of Exhibit 'V' dated 30 th November, 2018. It is submitted on behalf of the plaintiff that pursuant to the legal notices addressed to each of these defendants, the response from Saharsh was duly affirmed inter alia by defendant no.1. There was no other response from defendant no.2 and/or 9 disputing liability under the respective guarantees. The principal debtor defendant no.1 not having paid the admitted liability had sought time to repay the amounts as set out in the correspondence.

6. Dr. Saraf has invited my attention to an order dated 18 th February, 2020 passed by a co-ordinate bench of this court (N.J.Jamadar J.) in a group of Summonses for Judgment in which all the defences including the defence in the present affidavit in reply had been considered by the court. The plaintiff in those set of suits is the plaintiff in these four suits and it is contended that the very defences set up in this suit had been urged and conditional leave has been granted after having considered all these submissions at the great length. Dr. Saraf has invited my attention to the relevant 901-75-19.doc (f).doc wadhwa paragraphs of the said order in support of his contention

that the only defence that is sought to be urged on behalf of the defendant is that of inadmissibility of the documents in evidence due to insufficiency of stamps on the documents forming subject matter of the plaint.

7. My attention is also invited to an order dated 5 th May, 2022 in Summons for Judgment no.25 of 2019 in Commercial Summary Suit no.559 of 2019. Dr. Saraf submits in that suit similar issues had been urged on behalf of the defendant and the court was pleased to grant conditional leave against deposit of the amounts in question. As far as the defendant nos.2 and 9 are concerned, my attention is invited to a third order dated 26 th May, 2022 passed in Summons for Judgment no.21 of 2019 in Commercial Summary Suit no.396 of 2019 wherein defendant no.9 in the present suit was the first defendant and the 2 nd defendant in the present suit was the second defendant, the plaintiffs being common in the present suit and Commercial Summary Suit no.396 of 2019.

8. The defences on behalf of these two defendants also have been brought to the attention of the court and in that matter as well the 901-75-19.doc (f).doc wadhwa court had granted conditional leave to defendants on deposit of the amount specified in the order. It is therefore contended that the documentation being identical to the present set of suits and the defences being identical, there is no occasion to take a different view and grant unconditional leave as sought by the defendants.

9. Dr. Saraf also relies on Rupinder Singh Arora v/s. Kapil Puri<sup>1</sup> wherein a single Judge has considered the aspect of stamping and the fact of agreements not being stamped and therefore being inadmissible in evidence and held on facts that the whole contract was not void. It appears that the aforesaid orders in the case of Rupinder Arora (supra) carried in appeal and the appeal court has dismissed the appeal upholding the view of the single Judge. He therefore submits that the contention that agreement has not been stamped under Section 35 of the Act and therefore not admissible and cannot be acted upon is in question in the facts of the present case has no merit.

10. All the defendants are represented by the same set of Advocates, however, since this summons is now restricted to 1 2016 SCC OnLine Bom 12517 901-75-19.doc (f).doc wadhwa defendant nos.1, 2 and 9, Mr. Joshi has opposed the Summons for Judgment by relying on the affidavit of defendant no.2 seeking leave to defend. The affidavit dated 30 th January, 2020 is thus filed on behalf of three defendants against whom the summons is now being prosecuted.

11. Mr. Joshi has submitted that a Summary Suit is not maintainable. According to him, the documents on which the suit is based are inadmissible in evidence in view of the fact that they are not sufficiently stamped. In that respect, he submits that although the documentation has been initially prepared on stamp paper purchased in the name of the defendant(s), if the plaintiff proposes to enforce the documents to recover these monies and based on these documents, it is the duty of the plaintiff as a financial institution, to pay the requisite stamp duty by virtue of Section 30A of the Maharashtra Stamp Act, 1958. Duty not having been paid, Mr. Joshi submits the suit is not maintainable as a Summary Suit and therefore all the four suits are liable to be dismissed.

12. Mr. Joshi invites my attention to the provisions of Section 34 of the Maharashtra Stamp Act, 1958 in this behalf urges the court 901-75-19.doc (f).doc wadhwa to reject the plaint and dismiss the

Summons for Judgment since the documents in question are not adequately stamped. In support of this contention, Mr. Joshi has filed a statement setting out the 10 documents that have been relied upon by the plaintiffs in the suit. Although the documents which pertain to the claim against the defendant nos.2 and 9 and their capacity as guarantors are Exhibits 'D', 'E' and 'F'. According to Mr. Joshi, all the documents referred and relied upon by the plaintiff in the present suit are not sufficiently stamped. He has sought to demonstrate it by specifying the amount of duty payable and what is actually paid in a tabulated form.

13. In respect of the Loan Agreement of Rs.220 crores, the total duty payable under Article 5(h)(A)(iv)(b) of the Maharashtra Stamp Act is Rs.44 lakhs whereas only Rs.100/- has been paid. Thus, according to Mr. Joshi deficit stamp duty and penalty is payable by the plaintiff. Likewise, in respect of the Guarantee and Demand Promissory Note, the stamp duty payable is also Rs.44 lakhs but the document reveals that stamp duty of only Rs.100/- has been paid. As far as the letter of guarantee executed by defendant no.2 is concerned, Mr. Joshi has contended that as against the liability to pay Rs.44 lakhs being the 0.2% of the value 901-75-19.doc (f).doc wadhwa of the loan, only a sum of Rs.150/- has been paid. In the case of defendant no.9 as well, the duty is paid is shown to be grossly insufficient. He therefore contended that the plaintiff not having paid stamp duty commensurate with the amount of the loan, a Summary Suit is clearly not maintainable.

14. In this behalf Mr. Joshi invited my attention to the decision of this court in Yogendra Patwardhan v/s. Khandelwal Hermann Electronics Ltd.<sup>2</sup> Furthermore, reliance is placed on the decision of the full bench of this court in the case of Jyotsna K. Valia v/s. T.S. Parekh And Co.<sup>3</sup> Mr. Joshi has relied upon observations of the full bench in paragraph 12 which inter alia holds that if the document is not duly stamped, it is inadmissible in evidence but it can be admitted in evidence only after payment of stamp duty and penalty. Mr. Joshi therefore submits that in the present case the duty is being insufficient it is not curable and hence the question of impounding these documents for payment of deficit stamp duty as has been done in the earlier matters (SKIL Group of suits) does not arise.

15. Mr. Joshi submitted that the co-ordinate bench hearing the 2 1989 Mh.L.J. 316 3 2007 (4) Mh.L.J.517 901-75-19.doc (f).doc wadhwa matters of the SKIL Group had not taken into consideration Yogendra Patwardhan (supra) or Jyotsna Valia (supra) and appears to have placed reliance on Hindustan Steel Ltd. v/s. Dilip Construction Company<sup>4</sup> in holding that the Stamp Act is a fiscal measure to secure revenue and not to arm a litigant with the weapon of technicality. Mr. Joshi further submitted that the co-ordinate bench had also not taken into consideration the decision of Bombay High Court in Kapil Puri v/s. Rupinder Singh Arora<sup>5</sup> which was upheld by the Division Bench that Rupinder Arora was dealing with promissory notes and therefore distinguishable. Most importantly both these decisions of Rupinder Arora had not taken into consideration Yogendra Patwardhan or Jyotsna Valia.

16. Mr. Joshi has further submitted that the principles laid down in IDBI Trusteeship Services Ltd. v/s. Hubtown Ltd.<sup>6</sup> can be applied only after the threshold of maintainability of the suit was crossed but in the instant case, the suit is not maintainable since the documents are not admissible in evidence. Referring to the set of judgments which Dr. Saraf relied upon in the case of the plaintiff

IL & FS Financial Services Ltd. v/s. ARM Telecom Services 4 (1969) 1 SCC 597 5 (2019) 3 Mh.L.J. 1150 6 (2017) 1 SCC 568 901-75-19.doc (f).doc wadhwa Ltd., Mr. Joshi did not take into consideration Yogendra Patwardhan and Jyotsna Valia.

17. Mr. Joshi has also relied upon the decision of the Supreme Court in N.N. Global Mercantile Private Limited v/s. Indo Unique Flame Limited and Others<sup>7</sup>. Inviting my attention to paragraph 10.6, Mr. Joshi submits that N. N. Global did not contemplate of insufficiency of stamps. In that case there was a written agreement the validity and its admissibility of which has been called into question and it incorporated an arbitration agreement. The application was under Section 11 seeking appointment of an arbitrator. The Supreme Court had held that the aspect of stamping can be considered later and not at the stage of appointment of an arbitrator since the arbitration agreement was a separate agreement. Mr. Joshi therefore submitted that no benefit can be gained by the plaintiff from the decision of N.N.Global (supra) which has been pressed into service by the co-ordinate bench's in the other matters of the present plaintiffs and to which I have referred above. Mr. Joshi submitted that in the instant case, it was absolutely essential that the document is stamped before the suit is filed and before Summons for Judgment can be moved in the matter, he suggests that this court is entitled 7 (2021) 4 SCC 379 901-75-19.doc (f).doc wadhwa to and therefore must take a different view and is not bound by the co-ordinate bench decision in the SKIL group of matters. In this behalf he relied upon the decision of the Division Bench of this court in Sheetal Shivkant Chavan v/s. State of Maharashtra and others<sup>8</sup> which holds that if any co-ordinate bench of the same strength is takes a contrary view taken by earlier bench without referring to the larger bench it would not legally binding. Mr. Joshi's reliance on Sheetal Chavan (supra) alludes to a suggestion that the issue be referred to a larger bench. In my view no such issue arises.

18. Mr. Joshi also invites my attention to the decision of the Supreme Court in State Bank of Hyderabad v/s. Rabo Bank <sup>9</sup>. in which the court observes that if the question of maintainability of suit under Order XXXVII itself is in question that arises grant of leave to defend may be permissible. Mr. Joshi has relied upon the decision of the Apex Court in SMS Tea Estates Pvt. Ltd. v/s. Chandmari Tea Co. Pvt. Ltd.<sup>10</sup> wherein the Supreme Court had occasion to hold that absent proper stamping of the agreement, the agreement itself could not be acted upon although the said 8 2018(6) Mh.L.J. 546 9 (2015) 10 SCC 521 10 (2011) 14 SC 66 901-75-19.doc (f).doc wadhwa decision is under the Arbitration and Conciliation Act.

19. The other defence that has been urged by Mr. Joshi is that under the Contract Act, 1872, the present set of documents are not "contracts" since they are only agreements and they are not enforceable at law for want of payment of appropriate duty. The learned counsel for the defendant has thus submitted that a Summary Suit under Order XXXVII Rule 1(2) can only be maintained on certain terms and in the present case the suit is not only based on the Promissory Notes since provision of Order XXXVII Rule 1 (2) specify that an Order XXXVII applies to a particular class of suits viz Bills of exchange and in this Promissory Notes that suits seeking to recover a debt in the form of a liquidated sum of money payable on a written contract. The suit does not fall within the ambit of Order XXXVII. He therefore submits that on the basis of aforesaid decisions that the agreements between the parties are not contracts since they are not enforceable in law; being inadmissible in evidence. Mr. Joshi therefore submits that the defendant be granted unconditional

leave. The suit therefore must be dismissed. In the alternative, it is contended that the defendant nos.1, 2 and 9 are entitled to unconditional leave in view of the fact that there are triable issues 901-75-19.doc (f).doc wadhwa that arise. No other aspect has been urged before me.

20. Having heard the learned counsel for the parties at length and having gone through the decisions dated 18 th February, 2020, 5th May, 2022 and 26th May, 2020, I do not find any reason to take a different view. The mainstay of Mr. Joshi's consistent defence is the decision in Yogendra Patwardhan (supra). In Yogendra Patwardhan (supra), the Summary Suit was filed on the basis of a document which was found to be inadmissible in evidence for want of proper stamp. The document in question was a writing whereby the defendant had undertaken that would the defendant be in their employment till 30 th November, 1987 and that he will not leave the services of plaintiff without their consent failing which the defendant would have to pay a specified sum of money to the plaintiff. It appears that the writing was not "properly stamped". Yogendra Patwardhan (supra) in my view does not consider an insufficiently stamped document. Mr. Joshi does not dispute the fact that in this suit some stamp duty has been paid by the defendant. The defendant no.1 being the borrower had purchased the stamp paper but his case is that as long as applicable stamp duty is not paid, the Summons for Judgment and the Suit cannot be entertained. This he seeks to 901-75-19.doc (f).doc wadhwa take advantage of his own wrong. While that may be easier said in view of the mandate of Section 30A of the Stamp Act the defendant cannot now sent the plaintiff on that ground since the defect is curable.

21. In Jyotsna (supra) the full bench has clearly considered these aspects and in paragraph 12 while dealing with the aspect of a document not being duly stamped and has observed thus;

"Dealing with the issue of the effect of a document not being duly stamped, it is submitted that the document which is not duly stamped is admissible in evidence. A document may in certain circumstances be admitted in evidence after payment of stamp duty and penalty. However, bills of exchange and promissory notes, if not duly stamped, cannot at all be admitted in evidence, as the defect is incurable (See section 34 of the Bombay Stamp Act, 1958 and section 35 of the Indian Stamp Act, 1899). Consequently, no summary suit would be maintainable on the Bill of Exchange or promissory note not duly stamped. Insofar as other documents are concerned, if a document is not property stamped by following the procedure it would be admitted in evidence. If the document is 901-75-19.doc (f).doc wadhwa not duly stamped and the defect is curable a summary suit will be maintainable. However, if the defect is incurable on account of not being duly stamped, the summary suit will not be maintainable."

22. The full bench therefore was clearly of the view that if the document is not duly stamped and the defect is curable, a Summary Suit is maintainable. However, if the defect is incurable and that document being not stamped, the Summary Suit will not be maintainable. In the present set of facts, the Pledge Agreement and the Guarantees are all documents which appear to be insufficiently stamped but the defect is curable. The document can be impounded and sent to the Collector of Stamps, Mumbai for adjudication of duty. I am of the view that the defence has no merit since the

insufficiency in stamping can be cured by impounding the document and sending the document to the Collector of Stamps for curing the defect by payment of requisite stamp duty and penalty.

23. Mr. Joshi's contention that the interpretation clause in Section 2(h) of the Contract Act provides that only an agreement enforceable by law is a contract is misconceived. Section 10 901-75-19.doc (f).doc wadhwa forming part of Chapter II of the Act provides as follows;

"Section 10 - What agreements are contracts All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in India and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to registration of documents."

24. On a fair reading of Section 10 all agreements are contracts if they are made with free consent of parties and consideration and objects are not unlawful. In the present case the question is not of enforcement of the contract but one of admissibility of the same in evidence prior to its enforcement and it is at that stage that the objections to insufficiency of stamps will attach. The insufficiency of stamps cannot be stretched to the extent of requiring the court to hold at this stage that the Loan Agreement and the allied documents are not enforceable at law and requiring the suit to be rejected as canvassed by Mr. Joshi. The argument of 901-75-19.doc (f).doc wadhwa Mr. Joshi that the agreements are not contracts must therefore be rejected because this is not a case where the parties are not competent to contract or where there is no free consent nor is it a case that the consideration is unlawful or the objects are not lawful. Hence, there is no question of holding that the agreement in question was void and unenforceable. This is one other aspect that must be held against the defendant inasmuch as the sums are also due and payable under personal guarantees. The fact that such a debt is owing is not disputed by the first defendant. On the other hand, the first defendant has admitted liability and has jointly with defendant no.5 offered to settle the dues.

25. Perusal of the reply to demand notice Exhibit D, E and F reveals an offer to settle all dues. As far as defendant nos.2 and 3 are concerned, demand notice has not been complied. It is only in the affidavit in reply that the 2 nd defendant has on behalf of defendant nos.1, 2 and 9 taken up the common defence that the plaintiff had not come to the court with clean hands, that the documents in question are not sufficiently stamped and that the suit is not maintainable and is liable to be rejected.

26. In these circumstances, I am unable to accept Mr. Joshi's 901-75-19.doc (f).doc wadhwa contention that the suit is not maintainable as a Summary Suit and that is liable to be rejected for the reasons canvassed at the hearing of the Summons for Judgment. I am not persuaded to take a different view to the one that the Co-ordinate bench has taken. Moreover, I find that the defence urged before me is not even a plausible defence. In the circumstances, I am of the view that there is no occasion to grant an unconditional leave. The defendant nos.1, 2 and 9 appeared to have no defence on merits. Conditional leave must be granted. More so since the agreements are apparently

insufficiently stamped. I am of the view that the defendant nos.1, 2 & 9 can be permitted to defend the suit if they deposit the principal sum of the loan amounts as reflected in the suit especially since the insufficiency of stamps is also not disputed by the plaintiff and hence does not amount to a triable issue.

27. Accordingly, I pass the following order;

(i) Subject to deposit of Rs.202.50 crores within a period of twelve weeks from today, leave is granted to defend the suit.

(ii) If the amount is deposited, written statement shall be filed within a period of two weeks thereafter. 901-75-19.doc (f).doc wadhwa

(iii) If the amount is not deposited, it will be open for the plaintiffs to seek appropriate directions in the matter subject to payment of deficit stamp duty on the documents comprising Exhibits A to J.

(iv) Upon such deposit, Prothonotary and Senior Master shall send the documents to the Collector of Stamps for appropriate orders of adjudication and upon such adjudication duty will be paid within a period of four weeks from the date of such adjudication.

(v) If the deposit is made, the same shall be invested by the Prothonotary and Senior Master in a Fixed Deposit in a nationalised bank initially for a period of one year and shall continue to renew from year to year till further orders. In the event the suit is settled out of court, the deposit shall not be released to the plaintiff unless stamp duty as finally adjudicated is paid by the plaintiff.

(vi) Summons for Judgment against defendant nos.1, 2 and 9 are disposed in the above terms.

(A. K. MENON, J.) 901-75-19.doc (f).doc wadhwa