Il And Fs Financial Services Limited vs Anupama Agarwal And 4 Ors on 26 May, 2020

Equivalent citations: AIR 2020 BOMBAY 196, AIRONLINE 2020 BOM 669

Author: N.J. Jamadar

Bench: N.J. Jamadar

28 SJ-21-2009-J.doc

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

IN ITS COMMERCIAL DIVISION
SUMMONS FOR JUDGMENT NO. 21 of 2019
IN
COMMERCIAL SUMMARY SUIT NO. 396 OF 2019

IL & FS Financial Services Limited .. Applicant

In the matter between :

IL & FS Financial Services Limited
a company incorporated under the
provisions of the Companies Act, 1956,
having its registered address at :
The IL & FS Financial Centre,
Plot C-22, G Block, Bandra-Kurla Complex,
Bandra (E), Mumbai - 400 005 .. Plaintiff

Versus

1. Anupama Agarwal
Indian inhabitant,
Residing at 7-A/B, Somerset Place,
61-D, Bhulabhai Desai Road,
Sophia College Lane,
Mumbai- 400026.

2. Rishi Agarwal,
Indian Inhabitant,
Residing at 7-A/B, Somerset Place,
61-D, Bhulabhai Desai Road,
Sophia College Lane,
Mumbai- 400026.

3. G.C. Property Private Limited

(earlier known as Third Properties Private
Limited)
a company incorporated under the

provisions of the Companies Act, 1956,
having its registered address at :
5th floor, Bhupati Chambers,
13, Mathew Road, Mumbai - 400004.

4. Shivris Ventures Private Limited
a company incorporated under the
provisions of the Companies Act, 1956,
having its registered address at :
2nd floor, Bhupati Chambers,
13, Mathew Road, Mumbai- 400004.

5. Banal Investment and Trading
Private Limited
a company incorporated under the
provisions of the Companies Act, 1956,
having its registered address at :
5th floor, Bhupati Chambers,
13, Mathew Road, Mumbai - 400004. .. Defendants

Dr.Birendra Prasad, Senior Advocate a/w. Mr. Jay Sanklecha, Mr. Parag Khandhar and Mr.Nachiket Yagnik i/b DSK Legal for Plaintiff/Applicant.

Mr.Amrut Joshi a/w. Mr. Dinesh Bhatia i/b PAN India Legal for defendant Nos.1 to 5.

CORAM : N.J. JAMADAR, J
RESERVED FOR ORDERS ON : 6th March 2020
PRONOUNCED ON : 26th May 2020

JUDGMENT :

1. This Commercial Division Summary Suit is instituted for recovery of a sum of Rs.34,04,76,149/- with future interest on the basis of written contract 28 SJ-21-2009-J.doc and negotiable instrument.

The material averments in the Plaint can be summarized as under:

The Plaintiff is a non-banking finance company. It deals in the business of financial and advisory services. In the month of December, 2017 the Defendant No.1 had approached the Plaintiff for extending financial assistance. Pursuant to the representations made by the Defendant No.1 the Plaintiff had issued an offer letter incorporating the terms and conditions of the loan facility. The Defendant No.1 accepted the offer and thereupon a loan agreement came to be executed between the parties on 29th December, 2017. The loan agreement inter alia provided for the tenure of the loan, the interest on the amount to be advanced, the action to be initiated by the Plaintiff in the event of default, the securities to be provided by the Defendant and the guarantors. The Defendant No. 2 executed a letter of guarantee on 29th December, 2017 and irrevocably and unconditionally agreed to pay on demand the outstanding amount payable by the Defendant No. 1 along with interest and other charges. Likewise, the Defendant No. 3 executed a letter of guarantee of even date in the capacity of a corporate guarantor and undertook to discharge the liability of Defendant No. 1. Upon execution of the aforesaid documents the Plaintiff disbursed an amount of Rs. 29 Crores to the Defendant No.1 on 29th December, 2017. The Defendant Nos. 4 and 5, which are the companies incorporated under the Companies Act, have executed a 28 SJ-21-2009-J.doc Pledge Agreement in favour of the Plaintiff on 26th February, 2018 and thereby pledged 10000 shares of Defendant No. 3 Company held by them, with the Plaintiff. The Defendant Nos. 4 and 5 also undertook to discharge the liability as the principal debtors.

2. In accordance with the terms of the agreement the interest on the loan amount for the period 29th December, 2017 to 28th June, 2018 became payable on 28th June, 2018. The Defendant No. 1 committed default in payment of interest. Thereupon a demand notice came be issued on 30th July, 2018 calling upon Defendant No. 1 to pay the amount of accrued interest. In the said notice, the other events of default were also brought to the notice of Defendant No. 1. As Defendant No. 1 failed to pay the amount of interest in terms of the loan agreement, the Plaintiff was constrained to issue notice to Defendant Nos. 4 and 5 on 21st August, 2018 for invoking its rights under the Pledge Agreement. Another notice followed on 4th October, 2018 whereby the Plaintiff informed the Defendant Nos. 4 and 5 that it would exercise its rights under Clause 1.7 of the Pledge Agreement. Ultimately, vide notice dated 31st October, 2018 the Plaintiff called upon the Defendant to pay the entire outstanding amount of Rs. 32,42,20,000/-. However, the Defendants failed to pay the amount. Hence, the Plaintiff was constrained to institute suit for recovery of the aforesaid amount along with future interest.

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3. The Defendant Nos. 1 to 5 appeared in response to the writ of summons. Thereupon the Plaintiff has taken out the Summons for Judgment.

An affidavit in reply was filed by Defendant Nos. 1 to 5 on 26th April, 2019.

The Defendant Nos. 1 to 5 sought an unconditional leave to defend the suit.

4. The tenability of the suit was called in question as the Plaintiff has initiated the proceeding under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI Act'). It was contended that in view of the commencement of the proceedings under the SARFAESI Act there was a bar to institution of the suit. The Defendants Nos. 1 to 5 further contended that there were irreconcilable discrepancies in the claim in demand notice dated 31st July, 2018 and the subsequent notices dated 21st August, 2018 and 31st October, 2018 and thus the entitlement of the Plaintiff to recover the amount warranted adjudication. The claim of the Plaintiff of penal interest was also said to be not borne out by the contract between the parties. Resultantly, a summary suit for recovery of the said amount is not tenable.

5. The Defendant No. 1 filed an additional affidavit in reply on 19th December, 2019. The Defendant No. 1 contended that the financial assistance extended to Defendant No. 1 was a mere subterfuge. The 28 SJ-21-2009-J.doc Defendant No. 1 took a bold defence that the Plaintiff had extended the facility of Rs.29 Crore to Defendant No. 1 for the purpose of transferring the said amount to M/s. Vedraj Cement Ltd. The Defendant No. 1 had accordingly transferred the said amount of Rs. 29 Crore to M/s. Vadraj Cement Ltd. Thus the Defendant No. 1 was a mere conduit. The Defendant No.1 could not have been extended such a huge loan facility of Rs. 29 Crores as she had no financial credentials. Since the Plaintiff has become the defacto promoter of M/s. Vadraj Cement Ltd., consequent to latter's winding up, the Plaintiff cannot institute a suit for recovery of the amount which was in fact advanced to M/s.

Vadraj Cement Ltd. Thus according to Defendant No.1 there is no outstanding debt from Defendant No.1.

6. The additional affidavit of Defendant No. 1, the principal borrower is, in a sense, a complete and conclusive admission of transaction between the Plaintiff and Defendant No.1. The fact that the loan of Rs. 29 crore was advanced by the Plaintiff to Defendant No.1 is squarely admitted. The execution of the documents including furnishing of securities by Defendant No. 2 to 4 is not put in contest. The claim of Defendant No.1 is that the amount which was received from the Plaintiff was further advanced to M/s.

Vadraj Cement Ltd. In order to lend support to this defence the Defendant No. 1 has pressed into service a copy of the loan agreement dated 29th 28 SJ-21-2009-J.doc December, 2017 executed between Defendant No.1 and M/s. Vadraj Cement Ltd. whereby the said amount of Rs. 29 crores was in turn advanced by Defendant No. 1 to M/s. Vadraj Cement Ltd. However, this further transaction between Defendant No. 1 and M/s. Vadraj Cement Ltd. does not bear upon the liability of the principal borrower to the Plaintiff from whom the said loan facility was unquestionably availed. In the offer letter dated 27th December, 2017 the purpose for which the said facility was extended includes the extending of loans and advances to investee companies. Thus, the fact that Defendant No.1 had, in turn, and, in fact, on the very day, transferred the said amount of Rs. 29

Crore to M/s. Vadraj Cement Ltd. does not absolve it of the liability to repay the said loan amount.

7. Faced with the aforesaid situation Mr. Amrut Joshi, learned counsel for the Defendants, would urge that despite clear and unequivocal admission of the transaction and the extension of loan facility by the Plaintiff to Defendant No. 1 there are two grounds on which an unconditional leave to defend the suit is required to be granted to Defendant Nos. 1 to 5. The learned counsel for Defendant No. 1 thus advanced a two-pronged submission which, according to him, is nested in legal provisions. First, the entire claim of the Plaintiff is based on the instruments i.e. the loan agreement, letters of guarantee and the Pledge Agreement which are not sufficiently stamped. In 28 SJ-21-2009-J.doc view of provisions contained in 34 of The Maharashtra Stamp Act, 1958 ('The Stamp Act, 1958') those instruments cannot be acted upon until the requisite stamp duty thereon is paid. In view of the bar envisaged by the provisions of the Stamp Act, 1958, the Court is enjoined to first impound those instruments and a summary suit on the strength of those instruments is not sustainable.

Two, the Plaintiff has invoked the pledge and exercised the voting rights. Thus a suit for recovery of the amount without giving credit for the value of the shares over which the Plaintiff professes to exercise the voting rights is not tenable.

8. In contrast to this, Dr. Saraf, the learned Senior Counsel for the Plaintiff submitted that none of the aforesaid submission warrants consideration. First and foremost, there is no pleading in any of the affidavits in support of the aforesaid submissions. On the contrary, the additional affidavit of defendant No.1, the principal borrower, indicates that there is no dispute about the transaction and the extension of loan facility by the Plaintiff to the Defendants.

In the circumstances, according to the learned Senior Counsel, the Defendants are not entitled to leave to defend the suit as there is no defence whatsoever and the Plaintiff is entitled to a Summons for Judgment. Even otherwise according to the learned Senior Counsel the first submission based on the insufficiency of stamp on the instruments in question has been 28 SJ-21-2009-J.doc consistently held by the Courts to be a technical defence and not worthy of granting leave. As regards the defence based on invocation of pledged shares, the learned Senior Counsel would counter by canvassing a submission that there is no material on record to indicate that the Plaintiff has sold the pledged shares and realized the amount and in the absence of such categorical material the submission based on the exercise of voting rights by the Plaintiff does not carry the matter any further.

9. As the second defence based on invocation of pledged shares and consequences thereof is of a more substantive nature, I deem it in the fitness of things to consider the same first. Indisputably the Defendant Nos. 4 and 5 have pledged 10000 shares of Defendant No. 3 Company G.C. Property Private Ltd. with the Plaintiff under the Pledge Agreement dated 26th February, 2018. There is not much controversy over the fact that the Plaintiff invoked the pledge of the equity shares of Defendant No. 3 Company by notice dated 4th October, 2018. The learned counsel for the Defendant Nos. 1 to 5 invited the attention of the Court to clause 7 of the Notice of Invocation of pledge, to bolster up the submission that, post the invocation of the pledged shares, the Plaintiff has

declared its animus that the Plaintiff will exercise 100% voting rights on all matters and affairs of GCC- the Defendant No. 3.

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10. Clause 7 of the notice dated 4th October, 2018 reads as under:

> "7 Accordingly, in furtherance of our invocation, we hereby notify GCC and the Pledgors that, pursuant to Clause 1.7, on the form the date of this letter, IFIN shall exercise 100% voting rights on all matters and affairs of GCC."

11. Laying emphasis on the aforesaid assertion in the notice of invocation of pledge, Mr. Amrut Joshi strenuously urged that this claim of exercise of 100% voting rights constitutes the exercise of dominion over the pledged shares and the Plaintiff is enjoined to account for the value of the pledged shares and only thereafter institute a suit for recovery of the amount which remains in balance. The Pawnee cannot appropriate the pledged goods and simultaneously institute the suit for recovery of the entire debt, urged Mr. Joshi.

12. In order to lend support to this submission Mr. Joshi placed a strong reliance upon a judgment of the Supreme Court in the case of Lallan Prasad vs Rahmat Ali & Anr.1 In the facts of the said case following two questions arose for consideration before the Supreme Court :

> 2 Two questions arise in this appeal : viz., 1 AIR 1967 SC 1322.
>
> 28 SJ-21-2009-J.doc (1) whether the first respondent pledged certain quantity of aero scraps purchased by him from military authorities at Bamrauli Depot, Allahabad and delivered possession thereof to the appellant under an agreement of pledge entered into between them" ; and (2) whether the appellant was entitled to any relief when his case was that the first respondent never delivered to him the said goods and the said agreement never ripened into a pledge?."

13. In the aforesaid case, the trial Court had held that there was no completed contract of pledge as the first Respondent had failed to deliver the said goods. On an Appeal, the High Court held that the said goods were delivered to the Appellant and the said agreement did not rest at a mere agreement to pledge but ripened into a pledge and that the Appellant was not entitled to any relief in view of his stand that the said goods were never pledged with him and were therefore not in his possession.

14. The Supreme Court, after analyzing the facts and evidence, adverted to the second question, extracted above, and enunciated the legal position in the following words:

> 16 .....The pawner however has a right to redeem the property pledged until the sale. If the pawnee, sells, he must appropriate the proceeds of the sale towards the pawner's debt, for, the sale proceeds are the pawner's monies to be so applied and the pawnee must pay to the pawner any surplus after satisfying the debt. The

> pawnee's right of sale is derived from an implied authority from the pawner and such a sale is. for 28 SJ-21-2009-J.doc the benefit of both the parties. He has a right of action for his debt notwithstanding possession by him of the goods pledged. But if the pawner tenders payment of the debt the pawnee has to return. the property pledged. If by his default the pawnee is unable to, return the security against payment of the debt, the pawner has a good defence to the action.(2) This being the position under the common law, it was observed in Trustees of the Property of Ellis & Co. v. Dixon-Johnson(3) that if a creditor holding security sues for the debt, he is under an obligation on payment of the debt to hand. over the security, and that if, having improperly made away with the security he is unable to return it to the debtor he cannot have judgment for the debt."

(emphasis supplied)

15. It was further observed that :

> "Once the pawnee by virtue of his right under section 176 sells the goods the right of the pawner to redeem them is of course extinguished. But .as aforesaid the pawnee is bound to apply the sale proceeds towards ,satisfaction of the debt and pay the surplus, if any, to the pawner. 'So long, however, as the sale does not take place the pawner is entitled to redeem the goods on payment of the debt. It follows therefore that where a pawnee files a suit for recovery of debt, though he is entitled to retain the goods he is bound to return them on payment of the debt. The right to sue on the debt assumes that he is in a position to redeliver the goods on payment of the debt and therefore 'if he has put himself in a position where he is not able to redeliver the goods he cannot obtain a decree. If it were otherwise, the result would be that he would recover the debt and also retain the goods pledged and the pawner in such a case would be placed in a position where he incurs a greater liability than he bargained for under the, contract of pledge. The pawnee therefore can sue on the debt retaining the pledged goods as collateral security. If the debt is ordered to be paid he has to return the goods or if the goods are sold with or without the assistance of the court appropriate the sale proceeds towards the debt. But if he sues on the debt denying the pledge, and it is found that he was given 28 SJ-21-2009-J.doc possession of the goods pledged and had retained the same, the pawner has the right to redeem the goods so pledged by payment of the debt. If the pawnee is not in a position to redeliver the goods he cannot have both the payment of the debt and also the goods. Where the value of the pledged property is less than the debt and in a suit for recovery of debt by the pledgee, the pledgee denies the pledge or is otherwise not in a position to return the pledged goods he has to give credit for the value of the goods and would be entitled then to recover only the balance."

(emphasis supplied)

16. Reliance was also placed on a judgment of Delhi High Court in the case of GTL Ltd. vs. IFCI Ltd. and Ors.2 wherein an identical proposition was expounded.

17. There can be no quarrel with the proposition that once the Pawnee invokes the pledge and sells the security the Pawnee is in law bound to give credit to the Pawner of the value of the sale proceeds. If the value of the sale proceeds exceeds the amount of debt the Pawnee is bound to refund the said excess amount to the Pawner. He would be entitled to institute an action to recover the balance amount of debt only.

2 2011 (126) D.R.J. 3 1994 28 SJ-21-2009-J.doc

18. The crucial question which warrants consideration is whether the aforesaid proposition governs the facts of the instant case. Recourse to the relevant provision contained in the Pledge Agreement provides a legitimate answer. Clause 1.7 of the Pledge Agreement reads as under:

> "1.7 During the continuance of the Pledge hereby created all voting rights in respect of the Pledged Securities shall be exercisable by the Pledgors but not in any manner prejudicial to the interest of IFIN or the Security hereby created. Provided however that, in the event of enforcement of the Pledge hereby created, the voting rights in respect of Pledged Securities shall automatically stand transferred to and be exercisable by IFIN."

19. From a bare perusal of the aforesaid clause, it becomes evident that during the subsistence of the pledge the voting rights in respect of the pledged securities were to be exercised by Defendant Nos. 4 and 5. However, once the pledge was invoked the voting rights in respect of the pledged securities were to be transferred and exercisable by the Plaintiff. This stipulation by itself does not amount to the sale of the pledged securities. It is nobody's case that the Plaintiff has in fact sold the pledged securities and realized the value thereof. The aforesaid pronouncements on which a strong reliance was placed by Mr. Amrut Joshi, do not advance the cause of the submission on behalf of Defendant Nos. 1 to 5 as in those cases there was material to indicate that the Pawnee had in fact sold the pledged security and realized the value thereof. A mere stipulation in the agreement of pledge that after the invocation of the 28 SJ-21-2009-J.doc pledge, the Pawner would exercise the rights in respect of the pledged securities does not ipso facto amount to sale of the pledged securities by the Plaintiff unto itself. Hence, in my considered view the aforesaid pronouncements do not govern the facts of the present case.

20. This propels me to the defence of the instruments being insufficiently stamped. The learned counsel for Defendant Nos. 1 to 5 urged with a degree of vehemence that the insufficiently stamped instruments cannot be clothed with the character of a written contract envisaged by the provisions contained in Order 37 Rule 1(2)(b)(i). The instruments which are insufficiency stamped, according to learned counsel for Defendant Nos.1 to 5, do not satisfy the requirement of the contract as they are not legally enforceable till the requisite stamp duty is paid thereon. Mr. Joshi, would urge that the course adopted by this Court in a series of judgments of impounding the insufficiently stamped instruments and granting a conditional leave to defend the suit is not legally sustainable.

21. To buttress this submission, the learned counsel for Defendant Nos. 1 to 5 placed a very strong reliance on a recent judgment of the Supreme Court in the case of Garware Wall Ropes Ltd. vs. Coastal Marine Constructions and Engineering Ltd.3. The learned counsel for Defendant Nos. 1 to 5 led 3 2019 (3) M.L.J. 405 28 SJ-21-2009-J.doc special emphasis on the observations of the Supreme Court in Para 19 of the judgment, which read as under:

> "19. When an arbitration clause is contained "in a contract", it is significant that the agreement only becomes a contract if it is enforceable by law. We have seen how, under the 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)."

22. The learned counsel for Defendant Nos. 1 to 5 also placed reliance on the full Bench judgment of this Court in the case of Jyotsna K. Valia vs T.S. Parekh And Co.4, wherein the connotation of the term "written contract" was expounded to mean an agreement enforceable by law as is provided by section 2(i) of the Indian Contract Act.

23. Dr. Saraf joined the issue by putting forth a submission that in summary suits, the defence of insufficiently stamped instruments has been consistently held by this Court to be a technical defence and not worthy of consideration for grant of leave to defend the summary suit.

4 2007 (3) BomCR 772 28 SJ-21-2009-J.doc

24. In view of the provisions contained in section 34 of the Stamp Act, 1958 any instrument which is not adequately stamped can be admitted in evidence on payment of duty and penalty as may be applicable thereon. Thus, it is not an incurable irregularity. Consequently, the view adopted by this Court in a series of judgments including the Division Bench judgment of Morpheus Media Ventures Private Limited & Ors. vs. Anthony Maharaj & Ors.5 of impounding the instrument for the purpose of determination of the adjudication of the stamp duty and penalty thereon and simultaneously granting the conditional leave to defend the suit is legally sound and justifiable. The learned senior counsel further submitted that this Court has in the case of IL & FS Financial Services Ltd. Vs. SKIL Infrastructure Limited & Ors. 6 has recently considered this point elaborately and adopted the same course of action.

25. Mr. Amrut Joshi submitted that the view taken by this Court in the case of I.L.F.S. (Supra) requires re-consideration as the attention of this Court was not brought to a judgment of the learned single judge of this Court in the case 5 2017 (2) Bombay C.R. 459 6 SJ/30/2019 in COMSS/779/2019 & connected matters dt.18-02-2020 28 SJ-21-2009-J.doc of Yogendra Patwardhan vs. Handelwal Hermann Electronics Ltd. 7 wherein this Court had observed as under:

> "5 What is to be noted is that a Summary Suit is a suit on a document. Therefore, if the document itself is not admissible or cannot be acted upon, for want of proper stamp, no Summary Suit can lie. There is a basic different between an ordinary suit in which a document is to be tendered in evidence, and a Summary Suit which is a suit on the document itself. In all ordinary suits, documents may be tendered and the question of admissibility of documents would then arise and the Court will then decide the question according to the Stamp Act. But in a summary suit at the time of the filing of the suit, the document itself upon for want of requisite stamp, the suit is not maintainable as a summary Suit. That is why in a summary suit, if there is no defence to the suit, on production of the document itself, a decree is passed without recording any evidence as such. But the document must be such as can be acted upon."

26. Mr.Amrut Joshi further urged that in view of the clear and explicit observations of the Supreme Court in para 19 in the case of Garware Wall Ropes Ltd. (supra) extracted above, the law enunciated therein cannot be construed in a restricted sense as has been done by this Court in the case of I.L.F.S. (Supra)

27. In the case of I.L.F.S. (Supra), I had an occasion to consider the challenge based on insufficiently stamped instrument in a greater detail. After adverting to the rival submissions and various pronouncements of this Court 7 1989 Mh.L.J. 310 28 SJ-21-2009-J.doc as well as of the Supreme Court in in the cases of SMS Tea Estates Pvt. Ltd and Garware Wall Ropes Ltd.

(Supra), the legal position was enunciated as under :

> "72. In order to properly appreciate the ratio and import of thejudgment of the Supreme Court in the case of Garware (supra), of necessity, it is imperative to consider the controversy which 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 8 (2011) 3 CompLJ 666 28 SJ-21-2009-J.doc Section 49 of the registration Act enabling the instrument to be used to establish a collateral transaction.

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 certified 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 certified 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 document 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 28 SJ-21-2009-J.doc 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 deficit 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 deficit stamp is cured, the court may treat the document as duly stamped. ----------"

75. The aforesaid pronouncement makes it abundantly clear that the proper stage for determination of the question of insufficiency 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 deficient, 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 confine itself to examination of the existence of an agreement, held that the question of impounding of the instrument unstamped or insufficiently stamped need not be considered by the Judge who is hearing Section 11 application, but by an Arbitrator, who is appointed under Section 11.

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 28 SJ-21-2009-J.doc to whether sufficiency 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 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 insufficiently 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 insufficiently 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 28 SJ-21-2009-J.doc determined by the Supreme Court is the continued applicability of the 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 profitable 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 others 21 , 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 insufficiency 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 instrument and written contracts etc. Indisputably, adjudication of deficit 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 finally 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:

> 28 SJ-21-2009-J.doc "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 specifically 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."

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 28 SJ-21-2009-J.doc 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 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 insufficiently 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 insufficiently 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 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 insufficiently 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 28 SJ-21-2009-J.doc 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 deficit 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 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 finally adjudicated by the authorities under the Act, the object with which the summary procedure is envisaged may not be advanced."

28. I am of the considered view that in the case of I.L.F.S (Supra) this Court has considered all the submissions including the one now sought to be canvassed. The reasons for adopting the course of impounding the instrument and granting conditional leave to defend the suit including the necessity of harmonizing the provisions contained in Order 37 of the Code and Section 34 of the Stamp Act, 1958 have been spelled out. I am not impelled to accede to the submission that the points urged by Mr. Joshi in this case warrant re-

consideration of the aforesaid view. Thus the course adopted by this Court in the case of I.L.F.S. (Supra) can be legitimately adopted in this case as well.

29. The conspectus of the aforesaid consideration is that none of the legal submissions sought to be urged by Mr. Joshi warrant an unconditional leave 28 SJ-21-2009-J.doc to defend the suit. On facts, as indicated above, the claim of the Plaintiff of extension of the loan facility is explicitly admitted.

30. The pronouncement of the Supreme Court in the case of IDBI Trusteeship Service Limited Vs. Hubtown Limited 9 , especially the proposition expounded in para 17.6 that, "if any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court" governs the facts of the case. Thus I am persuaded to grant a conditional leave to defend the suit subject to deposit of the principal amount of Rs. 29 Crore and interest of Rs.3,94,71,781/- at the agreed rate of 13.50% p.a. as of 10th January, 2019 :

ORDER

(i) Leave to defend the suit is granted to defendant Nos.1 to 5 subject to deposit of a sum of Rs.32,94,71,781/- in the Court within twelve weeks from today.

(ii) In the event of deposit of the aforesaid amount, the defendant nos.1 to 5 shall file the written statement, within four weeks of the deposit.

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(iii) If the defendants do not deposit the aforesaid amount within said period, the suit be listed for directions after 14 weeks.

(iv) The loan agreement dated 29th December, 2017, the letters of guarantee dated 29th December 2017 and the Pledge Agreement dated 26th February, 2018, stand hereby impounded.

(v) The Prothonotary and Senior Master is directed to forward all the above impounded documents to the 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.

(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.

(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.

The Summons for Judgment stands disposed of accordingly.

(N.J. Jamadar, J.)