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

SUMMONS FOR JUDGMENT NO.29 OF 2020
IN
COMMERCIAL SUMMARY SUIT NO.161 OF 2020

Tata Capital Financial Services Limited ...Plaintiff
vs.kashya
Williamson Financial Services Limited ...Defendant

Mr. Karl Tamboly a/w. Mr. Rohit Lalwani, Mr. Sanaya Dadachanji, Mr. Advait Raorane i/b. Manilal Kher Ambalal and Co., for the Plaintiff.
Mr. Rohaan Cama a/w. Mr. Anish Karande, Mr. Arshalan A.T. i/b. Mr. Vishal Shriyan, for the Defendant.

CORAM : N. J. JAMADAR, J.
RESERVED ON : 22nd SEPTEMBER, 2022
PRONOUNCED ON : 21st NOVEMBER, 2022

JUDGMENT:

1. This Commercial Division Summary Suit is instituted for recovery of a sum of Rs. 33,20,76,377.69/- along with interest at the rate of 18% p.a. from the date of the suit till payment and/or realization on the basis of a letter of undertaking/guarantee.

2. Shorn of unnecessary details, the plaintiff's case can be stated as under:-

a] Both the plaintiff and the defendant are the companies incorporated under the Companies Act, 1956. The plaintiff and defendant are also Non-Banking Finance Companies (NBFC) registered with Reserve Bank of India. McNally Bharat is also a public limited company. "McNally Bharat" is engaged in the business of executing turnkey projects and handling engineering and construction contracts. McNally Bharat is one of the group companies of Williamson Magor Group, of which the defendant is also a group company. All the group companies of the Williamson Magor Group, including McNally Bharat and the defendant, have a tight group structure with strong organizational and financial links.

b] McNally Bharat had approached the plaintiff seeking financial assistance to shore up its net worth and improve its debt/equity ratio. On the strength of the representations made by McNally Bharat and reputation of Williamson Magor Group, the plaintiff evinced interest in subscribing to Redeemable Preference Shares (RPS) of McNally Bharat subject to the terms and conditions set out in the sanction letter dated 30th November, 2012. Eventually, the plaintiff and McNally Bharat entered into a Subscription Agreement dated 28th February, 2013 for subscription of 6,25,000 cumulative Non-Convertible RPS of McNally Bharat at a face value of Rs. 100/- each issued at a premium of Rs. 540/- each for an aggregate consideration of Rs. 40 Crores in accordance with the terms and conditions incorporated therein.

3. The Subscription Agreement provided for, inter alia, payment of dividend on a cumulative basis calculated at a fixed rate of 11.50% p.a. payable quarterly on the face value of each of the preference shares commencing from the closing date i.e. 6th March, 2013. The tenure of RPS was 7 years and they were to be redeemed in 8 equal installments in the 5th, 6th and 7th year. At the end of 7th year and final redemption, McNally Bharat was to pay the redemption premium so that IRR on the investment came to 16%. The Subscription Agreement also provided for events of default. In the absence of event of default and no cause for early redemption, the redemption of RPS would have commenced from June, 2018 and completed by March, 2020. Certain supplementary documents like Non-Disposal Undertaking cum Agreement to Pledge dated 28th February, 2013 and Power of Attorney dated 28th February, 2013 were also executed.

4. The plaintiff avers McNally Bharat failed to infuse Rs. 35 Crores through its affiliates by way of equity/preference shares, as undertaken in the Subscription Agreement. It constituted an event of default. On 14th October, 2014 the credit rating of RPS of McNally

Bharat was downgraded to BBB (Minus). According to plaintiff, this also amounted to a further event of default under the terms of Subscription Agreement.

5. A lengthy correspondence, followed by meetings, proposals and counter proposals, ensued between plaintiff and McNally Bharat. The plaintiff asserts, in the process, various assurances were given by McNally Bharat, time and again. In the context of the issues which may arise for determination in this suit, especially the Summons for Judgment, it may not be necessary to delve elaborately into the sequence of events.

6. It would be suffice to note that, the plaintiff avers, during March/October, 2017 McNally Bharat identified various buyers for part redemption of RPS which led to the sale of a total 2,25,617 RPS held by the plaintiff for an amount of Rs. 23,59,23,382/-. Since McNally Bharat directly or through its affiliates or group companies could not complete the purchase of RPS, as assured at the time of taking unconditional approval for McNally's proposed Compulsory Convertible Preference Shares (CCPS) and Equity Issue, the plaintiff called upon McNally Bharat to pay outstanding redemption amount and liquidated damages of Rs. 36,32,07,895/- due as of 30th

June, 2018. The plaintiff further called upon McNally Bharat to create a first ranking pledge over the specified shares of McNally Sayaji Engineering Limited (MSEL).

7. On 24th September, 2018 the plaintiff again reminded McNally Bharat of its non-fulfillment of the assurance of providing an undertaking or surety to the plaintiff to buy back the balance outstanding RPS. Pursuant thereto, a meeting was held on 26th September, 2018 between officers of the plaintiff and Mr. K.K. Baheti, one of the Directors of defendant, with a view to amicably resolve the dispute. In the said meeting, the plaintiff avers, defendant agreed to step in as a surety and guaranteed the purchase of balance outstanding RPS from the plaintiff for and on behalf of McNally Bharat. In furtherance of the said understanding, McNally Bharat also requested the defendant to step in as a surety by undertaking to purchase the balance RPS as per the following schedule set out in the letter dated 27th September, 2018.

Date (On or before)	**Amount of Purchase (Principal + Redemption Premium)**
29th September, 2018	5.00 Crores
25th October, 2018	9.20 Crores
25th November, 2018	9.20 Crores
25th December, 2018	9.20 Crores with additional redemption premium charges as applicable on the date of payment

8. Vide a separate letter dated 27th September, 2018, the plaintiff asserts, the defendant agreed to act as a Guarantor and to unconditionally purchase the entire outstanding RPS from the plaintiff pursuant to the decisions arrived at in the meeting held on 26th September, 2018 and the request of McNally Bharat in the letter dated 27th September, 2018, in accordance with aforesaid schedule.

9. The plaintiff avers the defendant did purchase the first tranche of RPS for a sum of Rs. 5 Crores in accordance with the terms of undertaking. In view of the default in purchase of balance outstanding RPS, the plaintiff called upon the defendant vide letter dated 7th November, 2019 to pay the outstanding amount. Despite service thereof there was no reply to the said notice.

10. The plaintiff has initiated arbitration proceedings against McNally Bharat. However, since the liability of McNally Bharat under the Subscription Agreement and that of the defendant under the letter of undertaking/guarantee dated 27th September, 2018 is distinct, this suit for recovery of the outstanding amount of RPS under a contract of guarantee.

11. It would be contextually relevant to note that the plaintiff instituted the suit availing leave under the clause XII of the Letters Patent granted by an order dated 20th January, 2020 in Leave Petition No. 8 of 2020.

12. Upon service of Writ of Summons, the defendant has entered appearance. Thereupon, the plaintiff has taken out a Summons for Judgment.

13. An affidavit in reply is filed on behalf of the defendant seeking an unconditional leave to defend the suit.

14. At the outset, the tenability of the suit without resorting to pre-institution mediation under section 12A of the Commercial Courts Act, 2015 (the Act, 2015) is assailed. Secondly, the defendant contends, the suit does not fall within the sphere of Order XXXVII of the Code of Civil Procedure, 1908 (the Code) as there is no debt or liquidated demand in money payable by the defendant to the plaintiff. According to the plaintiff the institution of the Summary Suit on the strength of the letter dated 27th September, 2018, wherein the defendant allegedly agreed to purchase the balance RPS, is wholly misconceived as it can not be construed as a

written contract within the meaning of Order XXXVII. Fourthly, since the plaintiff has commenced arbitration proceeding against McNally Bharat to recover the very same amount, the plaintiff cannot seek an identical relief against the defendant in this suit. Lastly, the jurisdiction of this Court to entertain, try and decide the suit is also called in question on the premise that no part of cause of action has arisen within the local limits of ordinary original civil jurisdiction of this Court. The defendant stated that it was in the process of filing an application seeking revocation of leave granted by this Court by order dated 20th January, 2020.

15. On the merits of the claim, the defendant contends that the letter dated 27th September, 2018, at best, amounts to a proposal to purchase RPS. It, however, remained in the realm of proposal only as there is no material to show that the said proposal was accepted by the plaintiff so at to give rise to a contract. In any event, the said letter of undertaking/ guarantee does not give rise to the contract of guarantee. Of necessity, the Court would be required to embark upon an inquiry to ascertain the intent of the parties from the contents of the said letter. That furnishes a justifiable ground to grant an unconditional leave to defend the suit. It is further contended that the said letter being un-stamped, cannot be taken

into account and relied upon until the said letter is impounded and requisite stamp duty along with penalty is paid thereon.

16. On the core of the issue, the defendant categorically denies that it had agreed to purchase the balance outstanding RPS at the behest of McNally Bharat, as a guarantor. The defendant controverts the claim of the plaintiff that the defendant had purchased the first tranche of RPS and had made payment of Rs. 5 Crores. No payment has been made or was required to be made by the defendant. On the contrary, the defendant claimed to have paid a sum of Rs. 5 Crores on 29th June, 2018 in respect of purchase of 42200 RPS from plaintiff and yet those shares had not been credited/ transferred by the plaintiff into the demat account of the defendant. On these, amongst other, grounds the defendant has prayed for an unconditional leave to defend the suit.

17. An affidavit in rejoinder is filed on behalf of the plaintiff. An additional affidavit has also been filed by the plaintiff. To the additional affidavit a copy of RTGS receipt is annexed which shows that a sum of Rs. 5 Crores was credited to the account of plaintiff on 29th September, 2018 from C Julie Developers and FL, another group Co. of Williamson Magor Group, like the defendant company.

18. In the backdrop of the aforesaid pleadings, I have heard Mr. Tamboly, learned counsel for the plaintiff, and Mr. Cama, learned counsel for the defendant at some length. The learned counsel took the Court through the pleadings of the parties as well as the documents placed on record to substantiate their respective contentions.

19. Mr. Tamboly, learned counsel for the plaintiff, submitted that the defences sought to be raised on behalf of the defendant namely, interdict contained in section 12A of the Act, 2015, inadequate stamp duty on the letter of guarantee and the said letter, in substance, being in the nature of a mere proposal, are, in a sense, technical defences. Mr. Tamboly submitted that the defendant has made no endevour to meet the positive case of the plaintiff that the defendant, in the capacity of a member of Williamson Magor Group, had undertaken to discharge the liability of McNally Bharat. On the contrary, the execution of the letters dated 27th September, 2018 both by McNally Bharat and defendant is rather incontrovertible. Thus, the submission on behalf of the defendant that the said letter was in the nature of a mere proposal, is simply untenable.

20. In opposition to this, Mr. Cama, learned counsel for the

defendant, stoutly submitted that each of the grounds of defence raised by the defendant is sturdy enough to sustain an unconditional leave. Mr. Cama would urge that, first and foremost, the institution of the suit without resorting to pre-institution mediation under section 12A of the Act, 2015 is itself unsustainable.

21. Taking the Court through the pronouncements of the Division Bench of this Court in the case of **Deepak Raheja vs. Ganga Taro Vazirani**[1] and the judgment of the Supreme Court in the case of **M/s. Patil Automation Private Limited and Ors. vs. Rakheja Engineers Private Limited**[2]**,** Mr. Cama would submit that the mandatory nature of the requirement of pre-institution mediation under section 12A of the Act, 2015 has since been authoritatively pronounced, and the suit in question did not contemplate an urgent interim relief, it was not open to the plaintiff to institute the suit without resorting to pre-institution mediation.

22. Mr. Cama further submitted that from the very averments in the plaint, it becomes abundantly clear that no part of cause of action has arisen within the local limits of the jurisdiction of this Court. In such circumstances, merely because the plaintiff

1 2021 SCC Online Bom 3124.
2 AIR 2022 SUPREME COURT 3848.

succeeded in obtaining leave under clause XII is not of decisive significance and the defendant can very well demonstrate that this Court lacks territorial jurisdiction. If a triable issue arises as regards the territorial jurisdiction of this Court to entertain, try and decide the suit, the defendant deserves an unconditional leave to defend the suit.

23. On merits, according to Mr. Cama, even if the case of the plaintiff is taken at par and the letter dated 27th September, 2018 is construed rather generously, at best, it amounts to an undertaking to purchase the outstanding RPS. Mr. Cama submitted that there is a world of difference between a 'contract to purchase' and 'contract to pay money'. In the former case, in the event of breach, the remedy is, a suit for damages. There is no debt in presenti. At most, the letter dated 27th September, 2018 would furnish a cause of action for a suit for specific performance and damages. Such suits are clearly beyond the province of Order XXXVII of the Code, submitted Mr. Cama.

24. I have given careful consideration to the submissions canvassed across the bar.

25. To start with, it may be apposite to deal with the preliminary challenge to the tenability of the suit for not resorting to pre-institution mediation under section 12A of the Act, 2015. Indisputably, the transaction in question represents a commercial dispute. Section 12A of the Act, 2015, was brought on the statue book with effect from 30th May, 2018. Sub-section (1) of Section 12A of the Act, 2015 reads as under:

> "**Section 12-A(1) :-** A suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre-instituion mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government."

26. On a plain reading the text of section 12A(1) bars the very institution of the suit without exhausting the remedy of the pre-institution mediation, if the suit does not contemplate any urgent interim relief.

27. However, there was a divergence of opinion as regards the nature of the provisions contained in section 12A of the Act, 2015. In the case of **M/s. Patil Automation** (supra), the Supreme Court considered the question as to whether the statutory pre-litigation mediation contemplated under section 12A of the Act, 2015, as amended by the Amendment Act, 2018, is mandatory and whether

the Courts below erred in not allowing the application filed under Order VII Rule 11 of the Code, to reject the plaint filed by the plaintiffs in the respective suits without complying with the procedure under section 12A of the Act, 2015. After an elaborate analysis the Supreme Court ruled that section 12A is mandatory. However, having regard to the cleavage of judicial opinion on the interpretation of mandatory or directory nature of section 12A and the consequences the declaration that the said provision is mandatory entailed, the Supreme Court resorted to the device of prospective declaration.

28. The observations in paragraphs 83 and 84 are instructive and hence extracted below.

> 83] The statute which has generated the controversy is the Amending Act of year 2018. We have noticed that there is undoubtedly a certain amount of cleavage of opinion among the High Courts. The other feature which is to be noticed is that, this is a case where the law in question, the Amending Act containing certain Section 12A is a toddler. The law necessarily would have teething problems at the nascent stage. The specified value has been lowered drastically from Rs.1 crore to Rs.3 lakhs. The imperative need to comply with the mandate of Section 12A which we have unravelled if it has not been shared by the parties on the advice they received or on the view prevailing in the High Courts would necessarily mean that unless we hold that the law, we declare is prospective such suits must perish. The court fee paid would have to be written off. In a fresh suit which would be otherwise barred by limitation, shelter can be taken only under Section 14 of the Limitation Act. The availability of the power under

> Section 14 itself may have to be decided by the court.
>
> 84] Having regard to all these circumstances, we would dispose of the matters in the following manner. We declare that Section 12A of the Act is mandatory and hold that any suit instituted violating the mandate of Section 12A must be visited with rejection of the plaint under Order VII Rule 11. This power can be exercised even suo moto by the court as explained earlier in the judgment. We, however, make this declaration effective from 20.08.2022 so that concerned stakeholders become sufficiently informed. Still further, we however direct that in case plaints have been already rejected and no steps have been taken within the period of limitation, the matter cannot be reopened on the basis of this declaration. Still further, if the order of rejection of the plaint has been acted upon by filing a fresh suit, the declaration of prospective effect will not avail the plaintiff. Finally, if the plaint is filed violating Section 12A after the jurisdictional High Court has declared Section 12A mandatory also, the plaintiff will not be entitled to the relief.

29. In paragraph 83 the Supreme Court adverted to the consequences which the declaration that the provision is mandatory would entail. Thus, in paragraph 84, to address the situation which may arise on account of such declaration, which would otherwise relate back to the date of Amendment Act, 2018, the Supreme Court made the declaration effective from 20th August, 2022 so that concerned stake holders become sufficiently informed. This prospective declaration was also made subject to three caveats. First, in case plaints have been already rejected and steps have not been taken within the period of limitation, the matter cannot be reopened on the basis of said declaration. Second, if the

order of rejection has been acted upon by filing a fresh suit the declaration of prospective effect will not avail the plaintiff. Third, if the plaint is filed violating section 12A after the jurisdictional High Court declared section 12A mandatory, the plaintiff will not be entitled to the relief.

30. Whether the third exception governs the case at hand ? In the case of **Ganga Taro Vazirani** (supra) by a judgment and order dated 1st October, 2021, this Court declared section 12A mandatory. It is imperative to note that the instant suit came to be lodged on 13th March, 2020. Evidently, on the date of the institution of the suit, there was no declaration by this Court that section 12A is mandatory. Consequently, the instant suit can not be said to have been instituted after the provisions contained in section 12A were declared mandatory by the jurisdictional High Court.

31. Mr. Cama would however urge that aforesaid prospective declaration is of no assistance to the plaintiff. Mr. Cama premised his submission on the basis that section 12A, post its introduction on the statute book by the Amendment Act, 2018, cannot be so construed as if it was not on the statute book. On a plain reading of section 12A, which uses the peremptory expression ‘shall’, the

mandatory nature of the said provision is borne out. Therefore, according to Mr. Cama, the fact that in case of **Patil Automation** (supra), the Supreme Court has made the declaration prospective does not imply that the suits which were instituted flouting the express legislative mandate can be said to have been validly instituted.

32. I am afraid to accede to the aforesaid submission. I have extracted the observations in paragraph Nos. 83 and 84 on purpose. In fact, the Supreme Court has in paragraph Nos. 76 to 84 elaborately expounded the reasons which weighed with the Court in resorting to the device of prospective declaration drawing support and sustenance from the doctrine of 'prospective overruling'. After adverting to the pronouncement of the Supreme Court in the cases of **M/s. Somaiya Organics (India) Ltd. vs. State of Uttar Pradesh**[3]**;** **P.V. George and Others vs. State of Kerala and Others**[4]**;** and **Harsh Dhingra vs. State of Haryana and Others**[5]**,** the Supreme Court enunciated that the doctrine of prospective overruling may not be confined to a straight jacket. The ambit of the doctrine of prospective overruling is co-extensive with the equity of a situation whereunder on the law being pronounced it is likely to intrude into

3 AIR 2001 SC 1723
4 AIR 2007 SC 1034
5 (2001) 9 SCC 550

or reopen settled transactions. Thus, the Supreme Court made the declaration about mandatory nature of section 12A prospective.

33. Mr. Tamboly was justified in canvassing a submission that the Supreme Court made the declaration (that section 12A is mandatory) itself prospective by directing that the said declaration will be effective from 20th August, 2022. It is pertinent to note that in paragraph 76 the Supreme Court expressly recorded that the declaration of law by Supreme Court would relate back to the date of Amendment Act, 2018 and, thereafter, considered the consequences which such declaration would entail and the necessity for making the declaration prospective.

34. I am, thus, not inclined to agree with the submission of Mr. Cama that the plaintiffs in the suits instituted during the period commencing from insertion of section 12A of the Act, 2015 (30th May, 2018) to the declaration thereof as mandatory by the Division Bench in the case of **Ganga Taro Vazirani** (supra) (1st October, 2021), are not entitled to the benefit of prospective declaration of law by the Supreme Court in the case of **Patil Automation** (supra).

35. This propels me to the second count of challenge based on

purported lack of jurisdiction. Amplifying the challenge, Mr. Cama would urge that no part of cause of action has arisen within the local limits of the jurisdiction of this Court nor the defendant resides within the said limits. Though this Court by an order dated 20th January, 2020 in Leave Petition No. 8 of 2020 granted leave to institute the suit under clause XII of the Letters Patent yet, the issue of lack of jurisdiction, which is essentially rooted in facts, gives rise to a triable issue.

36. Per contra, Mr. Tamboly, submitted that the challenge on the count of lack of jurisdiction is equally infirm. Inviting the attention of the Court to the stated case of the defendant in the affidavit in reply that the defendant was in the process of filing an application seeking, inter alia, revocation of the leave granted by this Court, Mr. Tamboly submitted that the said course of action is legally impermissible. Thus, at this stage, according to Mr. Tamboly it is not open for the defendant to question the jurisdiction of this Court to entertain, try and decide the suit.

37. Mr. Tamboly as well as Mr. Cama banked upon the pronouncement of the Supreme Court in the case of **Isha Distribution House Private Limited vs. Aditya Birla Nuvo Limited**

and Another[6], albeit to bolster up their respective submissions. In the case of **Isha Distribution** (supra) the Supreme Court was confronted with a question whether, leave under clause XII of the Letters Patent having been granted, the Court on an application of the defendant can revoke the leave granted to the plaintiff. After adverting to the pronouncement of the Supreme Court in the case of **Indian Mineral & Chemicals Company vs. Deutsche Bank**[7], wherein the observations of Rankin, C.J. in **Secretary of State for India in Council vs. Golabrai Paliram**[8] were held to correctly represent the law as to how the Court should approach the application for revocation of leave, the Supreme Court held that the following observation in **Golabrai** (supra) is now the law laid down by the Supreme Court in view of its affirmation in the case of **Indian Mineral** (supra).

> "…. I do really protest against questions of difficulty and importance being dealt with by an application to revoke the leave under Clause 12 of the Letters Patent and to take the plaint off the file. Normally it is well settled that the proper way to plead to the jurisdiction of the Court is to take the plea in the written statement and as a substantive part of the defence. Except in the clearest cases that should be the course."

38. Mr. Cama would, however, urge that aforesaid statement of law that an application for revocation of leave can not be

6 (2019) 12 Supreme Court Cases 205
7 (2004) 12 SCC 376.
8 1931 SCC OnLine Cal 88

entertained post grant of such leave and the proper course is to raise the issue of jurisdiction in the written statement, does not preclude the defendant from agitating the issue of jurisdiction while seeking an unconditional leave to defend the suit. Mr. Cama strenuously submitted that an issue of jurisdiction is primarily rooted in facts and the defence raised by the defendants of bar of jurisdiction poses a mixed question of law and fact. Reliance was placed on the following observations of the Supreme Court in the case of **Isha Distribution** (supra),

> 19] In our opinion, a plea of territorial jurisdiction is essentially a mixed question of law and fact. It is for this reason, the respondents(defendants) should be allowed to raise such plea in the written statement to enable the Court to try it on its merits in accordance with law in the light of the requirements of Order 14 of the Code of Civil Procedure, 1908 and other relevant provisions governing the issue on merits.
>
> ....
>
> 22] On such written statement being filed, the Single Judge will frame appropriate issues arising in the suit and proceed to answer them in accordance with law keeping in view the procedure laid down in Order 14 of the Code of Civil Procedure.

39. The aforesaid pronouncement clearly forecloses an application for revocation of leave granted under clause XII of the Letters Patent. It is, however, open for the defendant to raise the issue and if the issue really arises for determination, the Court is enjoined to determine the same at the trial. I am, therefore, not

persuaded to jettison away the challenge for the sole reason that the defendant claimed in the affidavit in reply that it was in the process of filing an application for revocation of leave.

40. On the factual premise, it is the case of the plaintiff that money was to be paid to the plaintiff at Mumbai. Secondly, the letter of undertaking/guarantee was purportedly received by the plaintiff from the defendant, at Mumbai. The plaintiff claimed to have called upon the defendant to make payment in accordance with the terms of the undertaking/ guarantee by addressing a letter from Mumbai.

41. In the circumstances, the Court having considered all the relevant aspects while granting leave to defend in its order dated 20th January, 2020 in Leave Petition No. 8 of 2020, including the fact that the registered and other offices of the defendant were beyond the local limits of the jurisdiction of this Court, at this stage, I am impelled to hold that the material on record is not of such a nature that it can be recorded without risk of contravention that no material part of cause of action has arisen within the local limits of this Court.

42. This takes me to the core challenge based on the construction

of the letter of undertaking/ guarantee dated 27th September, 2018. Mr. Cama urged with a degree of vehemence that the said letter, even if construed rather generously, does not constitute a contract of guarantee and reflect a *debt in praesenti.* At best, it was a promise to purchase the RPS. To appreciate the aforesaid submission in a correct perspective, it may be advantageous to extract the said letter dated 27th September, 2018 in verbatim.

> To,
> Tata Capital Financial Services Ltd.
> Penninsula Business Park, 12th Floor, Tower A
> Ganpat Rao Kadam Marg, Lower Parel,
> Mumbai 13.
>
> K.A.: **Mr. Nitin Dharma.**
>
> Dear Sir,
> In response to your letter dated 24.09.2018 to McNally Bharat Engineering Company Ltd. (MBECL) and meeting with Mr. Venkatesh K. and Mr. Mahendra Pradhan on 26.09.2018 with MR. K.K. Baheti on the subject to resolve the matter at the earliest, on behalf of MBECL, we have purchased Rs. 20.00 Crore Redeemable Preference Shares (RPS) of MBECL held by TCFSL and undertake to purchase the balance outstanding RPS from TCFSL as per the following schedule:

Date (On or before)	Amount of Purchase (Principal + Redemption Premium)
29.09.2018	5.00 Cr
25.10.2018	9.20 Cr
25.11.2018	9.20 Cr
25.12.2018	9.20 Cr with additional redemption premium, charges as applicable on the date of payment

> Thanking you.
> For Williamson Financial Services Ltd.
> Authorized Signatory
>
> CC: Mr. Amitabh Guha Sarkar
> Williamson Financial Services Ltd.
> Mangalam Building, 2nd Floor, Room No. 210,
> A wing, 24- Hemanta Basu Sarani,
> Kolkata- 700 001.

43. Mr. Cama would urge that the later part of the sentence above the table makes it abundantly clear that the undertaking was to purchase the balance outstanding RPS from the plaintiff as per within mentioned schedule. In contrast, according to Mr. Cama, there is no guarantee as claimed by the plaintiff.

44. If there is a dispute as to the very nature of the transaction, an unconditional leave to defend must follow, as that would warrant adjudication of the nature of the transaction and the instrument which evidences the same, urged Mr. Cama. To lend support to the aforesaid submission, Mr. Cama placed a strong reliance on the observations of the Supreme Court in the case of **Rai Duggal vs. Ramesh Kumar Bansal**[9] wherein the tests to determine the grant of leave to defend were enunciated in the following words:-

> 3] Leave is declined where the court is of the opinion that the grant of leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defences. The test is to see whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established there would be a good or even a plausible defence on those facts. If the court is satisfied about that leave must be given. If there is a triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witnesses leave should not be denied. Where also, the defendant shows

9 1991 Supp (1) Supreme Court Cases 191

> that even on a fair probability he was a bona fide defence, he ought to have leave. Summary judgments under Order 37 should not be granted where serious conflict as to matter of fact or where any difficulty on issues as to law arises. The court should not reject the defence of the defendant merely because of its inherent implausibility or its inconsistency.
> (emphasis supplied)

45. Mr. Cama further submitted that the defendant, at the most, can be attributed with breach of contract to purchase RPS. Breach of contract gives rise to a claim for damages. Conversely, a breach of contract does not give rise to a *debt in praesenti.* In case of breach of contract, entitlement for damages as well as the quantum thereof are the matters for adjudication, urged Mr. Cama.

46. To buttress the aforesaid submission, Mr. Cama placed reliance on a judgment of this Court in the case of **Iron and Hardware (I) Co. vs. Shamlal and Brothers**[10]**.** In the said case, the nature of the right which accrues on a breach of contract to the party who complains of the breach, was expounded as under:-

> "....... .... It is well settled that when there is a breach of contract the only right that accrues to the person who complains of the breach is the right to file a suit for recovering damages. The breach of contract does not give rise to recover damages is not assignable because it is not a chose in action. An actionable claim can be assigned, but in order that there should be an actionable claim there must be a debt in the sense of an existing obligation. But inasmuch as a breach of

10 1954 The Bombay Law Reporter, Vol LVI, 473.

> contract does not result in any existing obligation on the part of the person who commits the breach, the right to recover damages is not an actionable claim and cannot be assigned.
>
> ………… ………
>
> As already stated, the only right which he has the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the flat of the Court. Therefore no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore when damages are assessed it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which already existed."

47. Reliance was also placed on the judgment of the Supreme Court in the case of **Union of India vs. Raman Iron Foundry**[11] wherein it was enunciated that,

> 11]……. When there is a breach of contract, the party who commits the breach does not *eo instanti* incur any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages.

48. In the case of **Raman Iron Foundry** (supra) the Supreme Court approved the afore-extracted statement of law in the case of **Iron and Hardware** (supra), as laying down the correct legal position. It was, thereafter, observed that a claim for damages for

11 (1974) 2 Supreme Court Cases 231.

breach of contract is, therefore, not a claim for a sum presently due and payable.

49. The aforesaid pronouncements, in my view, would assist the cause of the submission on behalf of the defendant only when this Court finds that, afore-extracted letter of undertaking/ guarantee is a mere promise to purchase the RPS and, consequently, the plaintiff's remedy is in damages. On the contrary, if the Court draws an inference that the jural relationship between the parties, brought about by the aforesaid letter, is one of creditor and surety, the aforesaid pronouncements would not govern the facts of the case.

50. A contract of guarantee, it is trite, is a tripartite agreement which contemplates a principal debtor, creditor and the surety. Undoubtedly, a contract of guarantee is a matter of construction. However, it is not necessary that there must be a simultaneous tripartite contract between all the three parties, i.e. principal debtor, creditor and the guarantor. Once a contract between principal debtor and creditor is formed, the contract between the surety and the creditor whereby the surety guarantees the debt can also spring in existence. Consideration for such contract of

guarantee may move either from the creditor or the principal debtor or both. A contract of guarantee is required to be interpreted having due regard to the relative position of the contracting parties and attendant circumstances. It is, however, well recognized that a surety, being a favoured debtor, cannot be made liable to discharge the liability beyond his bargain.

51. A useful reference in this context can be made to a judgment of the Supreme Court in the case of **State of Maharashtra vs. Dr. M. N. Kaul (dead)**[12] wherein it was enunciated that whether a guarantee is enforceable or not, depends upon the terms under which the guarantor bound himself. The Supreme Court referred to the principle of contra proferentem. The observations of the Supreme Court in paragraph 6 are instructive and hence extracted below:-

> 6] The question is whether this guarantee is enforceable. That depends upon the terms under which the guarantor bound himself. Under the law he cannot be made liable for more than he has undertaken. It is often said that a surety is a favoured debtor, for in the expressive phrase of Lord Westbury L. C. in Blest v. Brown (1862 4 De.G F. & J. 367 at 376.
>
> "you bind him to the letter of his engagement,
>
> Beyond the proper interpretation of that engagement you have no hold upon him."
>
> These observations have been recalled in cases of

12 AIR 1967 Supreme Court 1634

guarantee and suretyship by the Judicial Committee and also this Court. Sea for example Pratapsing Moholalbhai v. Keshavlal Harilal Setalvad. 62 Ind App 23 at p.33 = (AIR 1933 PC 21 at p 24) and M.S. Anirudhan v. Thomco's Bank Ltd., 1963 Supp 1 SCR 63 at p. 77 = (AIR 1963 SC 746 at p. 752). To this there are some exceptions. In case of ambiguity when all other rules of construction fail the Courts interpret the guarantee contra proferentem, that is, against the guarantor or use the recitals to control the meaning of the operative part where that is possible. But whatever the mode employed, the cardinal rule is that the guarantor must not be made liable beyond the terms of his engagement.

(emphasis supplied)

52. In the case of **Punjab National Bank Ltd. vs. Sri Bikram Cotton Mills Ltd. And Another**[13] the distinction between a contract of indemnity and contract of guarantee was expounded as under:-

> 10] A promise to be primarily and independently liable for another person's conduct may amount to a contract of indemnity. A contract of guarantee requires concurrence of three persons-the principal debtor, the surety and the creditor--the surety undertaking an obligation at the request express or implied of the principal debtor. The obligation of the surety depends substantially on the principal debtor's default; under a contract of indemnity liability arises from loss caused to the promise by the conduct of the promisor himself or by the conduct of another person.

53. On the aforesaid touchstone, reverting to the facts of the case, it is imperative to note that the existence of a contract between the plaintiff and McNally Bharat to purchase RPS is incontestible. Thus, the jural relationship of creditor and principal debtor between the plaintiff and McNally Bharat is rather indubitable.

13 AIR 1970 SUPREME COURT 1973.

54. The inquiry now proceeds to next stage to ascertain the existence of a contract of guarantee between the plaintiff and defendant. Here again, the execution of the letters dated 27th September, 2018 by McNally Bharat and the afore-extracted letter by the defendant are not in dispute. In the first letter addressed on behalf of McNally Bharat, a request was made to the defendant to purchase the balance RPS. The said letter not only referred to the discussion which preceded the said proposal but also the schedule of purchase. Though it is not peremptory to have an express request on the part of the principal debtor to the guarantor, in every case of a valid contract of guarantee, in the case at hand, there is indeed such an express request by McNally Bharat to the defendant to perform the former's obligation.

55. Keeping in view the aforesaid attendant factors, the afore-extracted letter dated 27th September, 2018 addressed by the defendant to the plaintiff, is required to be construed. Evidently, aforesaid letter is more elaborate than the request letter of McNally Bharat. It refers to the letter dated 24th September, 2018 addressed on behalf of the plaintiff to McNally Bharat and also the meeting which the parties had on 26th September, 2018 in which the defendant was represented by Mr. K.K. Baheti. It also refers to the

fact that on behalf of McNally Bharat, the defendant had purchased 20 Crore worth RPS of McNally Bharat from the plaintiff. With this prelude, the letter records that the defendant undertakes to purchase the balance outstanding RPS in accordance with the very schedule as proposed by McNally Bharat.

56. The submission of Mr. Cama that the later part of the letter,

> "undertake to purchase the balance outstanding RPS from Tata Capital Financial Services Ltd. as per the following schedule........"

is a mere promise to purchase the RPS, in my considered view, proceeds on a very constricted view of the matter. It losses sight of all the surrounding circumstances and the relative position of the parties. It is premised as if there were no attendant circumstances, including the persistent default on the part of McNally Bharat to purchase the RPS, and for the first time the defendant promised to purchase the RPS from the plaintiff. The material on record shows to the contrary.

57. McNally Bharat, which is a group company of Williamson Magor Group, like the defendant, the principal debtor, had already incurred the liability to purchase the RPS. Events of default had occurred. In the past as well the defendant had purchased RPS from

the plaintiff on behalf of McNally Bharat. The parties negotiated for an early resolution of the dispute. Pursuant to the discussion in the meeting held on 26th September, 2018, the principal debtor made an express request to the defendant to discharge the liability. Thereupon, the defendant, after recording all the developments, undertook to purchase the balance outstanding RPS, as per the agreed schedule.

58. In the totality of the circumstances, in my view, an inference that the defendant agreed to discharge the liability of McNally Bharat post default on the part of the McNally Bharat, is rather inexorable. I am, therefore, persuaded to hold that the jural relationship brought about by the transaction evidenced by aforesaid letter dated 27th September, 2018 is in the nature of a contract of guarantee.

59. Mr. Cama submitted that the aforesaid letter, if it is construed to be a letter of guarantee, cannot be acted upon as it has not been properly stamped. This objection need not detain the Court from deciding the Summons for Judgment.

60. In the case of **IL & FS Financial Services Ltd. vs. Skil**

Infrastructure Limited and Ors.[14], I had an occasion to deal with an objection based on inadequate stamp duty on the instrument in question. In the said case, this Court had resorted to the mechanism of impounding the instrument and sending the same for adjudication of stamp duty by the authorities under Maharashtra Stamp Act, 1958.

61. In the case at hand as well, the plaintiff can be directed to tender the original letter dated 27th September, 2018 and thereupon the said instrument would stand impounded and forwarded to the Collector of Stamps for adjudication of stamp duty and penalty, if any, thereon.

62. The conspectus of the aforesaid consideration is that, the defendant had undertaken to discharge the liability of McNally Bharat and purchase the balance outstanding RPS from the plaintiff. Though the question as to whether the defendant had acted upon the said undertaking by purchasing the first lot of RPS in accordance with the schedule by paying a sum of Rs. 5 Crore on 29th September, 2018 was put in contest, by disputing the fact that such payment was made by the defendant. Yet, to the additional affidavit the plaintiff has annexed an RTGS payment receipt to show

14 SJ.No.30/2019 in Comss No.779/2019 Dt.18/02/2020

that on 29th September, 2018 a sum of Rs. 5 Crore was credited to its account by C Julie Developers and FL, a group company of Williamson Magor Group, like the defendant. A determinative finding on this aspect, at this stage, is not warranted for the reason that even if the payment is disputed, it does not detract materially from the liability incurred under the afore-extracted letter.

63. In the circumstances, even if it is assumed that the defendant has raised a triable issues as regards the jurisdiction and construction of the contract of guarantee yet, in my view, the defendant cannot be granted an unconditional leave to defend the suit in the face of clear and explicit undertaking for purchase the RPS and to make the payment. It would, therefore be expedient to grant leave to the defendant to defend the suit on the condition of depositing of the principal value of balance RPS aggregating to Rs. 27,60,00,000/- as undertaken vide aforesaid letter.

Hence, the following order.

ORDER

1] Leave to defend the suit is granted to the Defendant subject to deposit of the sum of Rs.27,60,00,000/- within a period of six weeks from today.

2] If the aforesaid deposit is made within the stipulated period, this suit shall be transferred to the list of Commercial Causes and the Defendant shall file written statement within a period of four weeks from the date of deposit;

3] If this conditional order of deposit is not complied with, within the afore stipulated period, the Plaintiff shall be entitled to apply for an *ex-parte* decree against the Defendant after obtaining a non-deposit certificate from the Prothonotary and Senior Master of this Court.

4] The plaintiff shall produce the original letter dated 27^{th} September, 2018 before the Prothonotary and Senior Master of this Court within one week from today. Thereupon, the said letter would stand impounded. Thereafter, the Prothonotary and Senior Master is directed to forward the said instrument to the Collector of Stamps, Mumbai for adjudication. A copy of forwarding letter be sent to the advocate for the plaintiff and the defendant.

5] The 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 document from the Prothonotary and Senior Master, High Court, Bombay.

6] Upon adjudication, the authority shall communicate the order to the Prothonotary and Senior Master of this Court and the advocate for the plaintiff and defendant.

7] The plaintiff shall pay the amount of stamp duty and penalty, if any, to be adjudicated by the Collector of Stamps within two weeks of receiving a copy of such order.

8] Summons for Judgment stands disposed of in the aforesaid terms.

(N. J. JAMADAR, J.)