



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Order reserved on: 08 May 2023**
Order pronounced on: 30 May 2023

+ **CS(COMM) 592/2022 & I.A. 17546/2022, I.A. 17547/2022**

ARCELORMITTAL INDIA PVT LTD Plaintiff

Through: **Mr. Ashim Sood, Ms. Ananya Ghosh, Ms. Doel Bose and Mr. Velpula Auditya, Advs.**

Versus

JSC OGCC KAZSTROYSERVICE Defendant

Through: **None.**

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

ORDER

1. The instant summary suit referable to Order XXXVII of the **Code of Civil Procedure, 1908¹** has come to be instituted seeking the following reliefs: -

“a) pass a decree against the Defendant for a sum of INR 25,59,46,009 along with interest pendente-lite and future interest at the rate of 16% per annum till realization of the aforesaid amounts in full.

b) pass a decree for the cost of the present Suit to be awarded in favour of the Plaintiff and against the Defendant;”

¹ Code



2. The record would reflect that the plaintiff had, in light of the subject matter of the suit constituting a commercial dispute as per Section 2(1)(c)(i) of the **Commercial Courts Act, 2015**², complied with the pre-institution proceedings by moving the Delhi High Court Legal Services Committee for mediation. A non-starter notice came to be issued on 04 January 2022 whereafter the suit came to be instituted on 18 August 2022. On 29 August 2022, summons were issued to the defendant. As per the Affidavit of Service filed on 19 October 2022, service of summons along with suit papers was completed on 05 September 2022 vide email and 13 September 2022 by way of courier service.

3. In terms of Order XXXVII Rule 3(1) of the Code, the defendant was obliged to enter appearance within ten days of such service. On 15 October 2022, the defendant filed an application purporting to be under Order XXXVII Rule 3(3) of the Code for entering appearance along with an application for condonation of delay. Although notices were issued on the said application, the defendant chose not to attend to the proceedings which ensued thereafter on 07 December 2022, 31 January 2023 and 23 February 2023. In view of the aforesaid, the Court by its order of 23 February 2023 provided that the suit would continue *ex parte* the defendant.

4. In light of the above, it was submitted by Mr. Sood, learned counsel appearing for the plaintiff, that in terms of the provisions of

² The 2015 Act



Order XXXVII Rule 2(3) of the Code, the allegations and averments of the plaintiff would be deemed to be admitted and consequentially a decree is liable to be drawn in terms as prayed. Notwithstanding the above, Mr. Sood had invited the Court to go through the relevant material so as to be independently satisfied with regard to the entitlement of the plaintiff to the decree as prayed for.

5. For the aforesaid purposes, the following relevant facts may be noticed. On 27 April 2011, a **Sanction Letter**³ was issued by the Delhi branch of the **State Bank of Hyderabad**⁴ to **KSS Petron Pvt. Ltd.**⁵ sanctioning a principal loan of INR 25 crores⁶. In terms of the stipulations incorporated in the Sanction Letter, KSS Petron was also required to submit a corporate guarantee of the parent company, namely, the defendant here. Pursuant to the sanction of the said Credit Facility, a loan agreement was executed on 24 October 2011⁷ in Delhi between SBH and KSS Petron. For the purposes of securing the grant of credit by SBH, the defendant executed a **Corporate Guarantee dated 05 December 2011**⁸ in favour of the plaintiff.

6. It becomes pertinent to note that the defendant in Clause 1 of the Corporate Guarantee acknowledged its liability to take over the liabilities owed by KSS Petron. Clause 1 of the Corporate Guarantee reads thus: -

³ Sanction Letter

⁴ SBH

⁵ KSS Petron

⁶ Hereinafter to be referred to as the "Credit Facility"

⁷ Loan Agreement

⁸ Corporate Guarantee



“1. If at any time default shall be made by the Borrower in payment of the principal sum (not exceeding **Rs. 25,00,00,000/-**) together with interest, costs, charges, expenses and/or other monies for the time being due to the Bank in respect of or under the aforesaid credit facilities or any of them the Guarantor shall forthwith on demand pay to the Bank the whole of such principal sum (not exceeding **Rs. 25,00,00,000/-**) together with interest, costs, charges, expenses and/or any other monies as maybe then due to the Bank in respect of the aforesaid credit facilities and shall indemnify and keep indemnified the Bank against all losses of the said principal sum. interest or other monies due and all costs charges and expenses whatsoever which the Bank may incur by reason of any default on the part of the Borrower.”

7. In terms of Clause 6, the defendant agreed that the Corporate Guarantee would be enforceable against it notwithstanding the securities that may have been obtained by the SBH. Clause 6 reads as under: -

“6. The Guarantee herein contained shall be enforceable against the Guarantor notwithstanding the securities aforesaid or any of the them or any other collateral securities that the Bank may have obtained or may obtain from the Borrower or any other person shall at the time when proceedings are taken against the Guarantor hereunder be outstanding and/or not enforced and or remain unrealised.”

8. To similar effect was Clause 9 which is reproduced hereinbelow: -

“9. Notwithstanding the Bank's rights under any security which the Bank may have obtained or may obtain the Bank shall have fullest liberty to call upon the Guarantor to pay the principal sum not exceeding **Rs. 25,00,00,000/- (Rupees Twenty Five Crores only)** together with interest as well as the costs (as between advocate and client charges and expenses, and/or other monies for the time being due to the Bank in respect of or under the above mentioned credit facilities or any of them without requiring the Bank to realise from the Borrower the amount due to the Bank in respect of the above mentioned credit facilities and/or requiring the Bank to enforce any remedies or securities available to the Bank.”



9. Clause 11 provided that the guarantee would be irrevocable and enforceable against the defendant notwithstanding any dispute between SBH and KSS Petron. Of equal significance are Clauses 12, 13, 14, 17 and 19 and which are extracted hereinbelow: -

“12. The Guarantor affirm confirm and declare that any balance confirmation and/or acknowledgment of debt and /or admission of liability given or promise or part payment made by the Borrower or the authorised agent of the Borrower to the Bank shall be deemed to have been made and/or given by or on behalf of the Guarantor themselves and shall be binding upon each of them.

13. The Guarantor shall forthwith on demand made by the Bank deposit with the Bank such sum or security or further sum or security as the Bank may from time to time specify as security for the due fulfilment of their obligations under this Guarantee and any security of deposited with the Bank may be sold by the Bank after giving to the Guarantor a reasonable notice of sales and the said sum or the proceeds of sale of the securities may be appropriated by the Bank in or towards satisfaction of the said obligations and any liability arising out of non-fulfilment thereof by the Guarantor.

14. The Guarantor hereby agree that notwithstanding any variation made in the terms of the said Agreement of loan and / or any of the said security documents including reallocation / interchange of the individual limits within the principal sum variation in the rate of interest, extension of the date for payment of the instalments, if any, or any composition made between the Bank and Borrower to give time to or not to sue the Borrower, or the Bank parting with any of the securities given by the Borrower. the Guarantor shall not be released or discharged of their obligation under this Guarantee provided that in the event of any such variation or composition or agreement the liability of the Guarantor shall notwithstanding anything herein contained be deemed to have accrued and the Guarantor shall be deemed to have become liable on the date or dates on which the borrower shall become liable to pay the amount/amounts due under the said Agreement of Loan and/or any of the said security documents as a result of such variation or composition of agreement.



17. The Guarantor agree that if the Borrower being an individual becomes an insolvent or being a company enters into liquidation or winding up (whether compulsory or voluntary) or if the management of the undertaking of the Borrower is taken over under any law or if the Borrower and/or the undertaking of the Borrower is nationalised under any law or make any arrangement or composition with creditors the Bank may (notwithstanding payment to the Bank by the Guarantor or any other person of the whole or any part of the amount hereby secured) rank as creditor and prove against the estate of the Borrower for the full amount of all the Bank's claims against the borrower or agree to and accept any composition in respect thereof and the Bank may receive and retain the whole of the dividends, composition or other payments thereon to the exclusion of all the rights of the Guarantor in competition with Bank until all the Bank's claims are fully satisfied and the Guarantor will not be paying off the amounts payable by them or any part thereof or otherwise prove or claim against the estate of the Borrower until the whole of the Book's claims against the Borrower have been satisfied and the Bank may enforce and recover payment from the Guarantor of the full amount payable by the Guarantor notwithstanding any such proof or composition as aforesaid. On the happening of any of the aforesaid events, the Guarantor shall forthwith inform the Bank in writing of the same.

19. The Guarantor agree that any admission or acknowledgement in writing signed by the Borrower of the liability or indebtedness of the Borrower or otherwise in relation to the above mentioned credit facilities and or any part payment as may be made by the Borrower towards the Principal, sum hereby guaranteed or any judgement, award or order obtained by the Bank against the Borrower shall be binding on the Guarantor and the Guarantor accept the correctness of any statement of account that may be served on the Borrower which is duly certified by any Officer of the Bank and the same shall be binding and conclusive as against the Guarantor also and the Guarantor further agree that in the Borrower making an acknowledgement or making a payment the Borrower shall in addition to his personal capacity be deemed to act as the Guarantor duly authorised agent in that behalf for the purposes of Sections 18 and 19 of the Limitation Act of 1963."

10. KSS Petron is stated to have defaulted under the Credit Facility



compelling SBH to issue a notice dated 31 October 2016 to the borrower as well as the defendant for repayment of the amounts due. SBH thereafter proceeded to file an application under Section 19 of the **Recovery of Debts and Bankruptcy Act, 1993**⁹ before the **Debts Recovery Tribunal-II, Delhi**¹⁰. During the pendency of the said application, SBH merged with the **State Bank of India**¹¹ and as a consequence of the said merger, the Credit Facility devolved upon SBI who stepped into the shoes of SBH and became the creditor under the Credit Facility and the beneficiary under the Corporate Guarantee.

11. On 01 August 2017, a **Corporate Insolvency Resolution Process**¹² commenced against KSS Petron under the provisions of the **Insolvency and Bankruptcy Code, 2016**¹³. SBI submitted a claim of INR 3,087,448,943/- with the Resolution Professional of KSS Petron. In proof of the claim so submitted, SBI also filed the Sanction Letter, the Loan Agreement as well as the Corporate Guarantee before the Resolution Professional. The Resolution Professional is stated to have admitted that claim to the extent of INR 13,438,909,671/- as being dues payable to financial creditors whose details were set out in List A. It becomes pertinent to note that the claim of SBI to the extent of INR 3,087,448,943/- was admitted and acknowledged in full. The Resolution Professional while setting out the security interest of SBI at Annexure VII also included the Corporate Guarantee which had

⁹ RDB Act

¹⁰ DRT

¹¹ SBI

¹² CIRP

¹³ IBC



been extended by the defendant here. This is clearly evident from a perusal of page 276 of the Documents Folder forming part of the digital record of the present suit.

12. The plaintiff in the meanwhile is also stated to have expressed its intent to be considered as an eligible Resolution Applicant of Essar Steel India Ltd, which too was facing proceedings under the **Insolvency and Bankruptcy Code, 2016**¹⁴. The issues arising out of those proceedings and the ineligibility as attaching to the plaintiff in terms of Section 29A of the IBC travelled up to the Supreme Court. The Supreme Court by its order of 04 October 2018 provided that the plaintiff would be obliged to ensure the liquidation of all final financial liabilities of KSS Petron which was one of the aspects which had rendered the plaintiff ineligible under Section 29A. This would be evident from paragraph 116 of the judgement of the Supreme Court in **Arcelormittal India Private Limited vs. Satish Kumar Gupta & Ors.**¹⁵ which is reproduced hereinbelow: -

“116. Since it is clear that both sets of resolution plans that were submitted to the Resolution Professional, even on 2.4.2018, are hit by Section 29A(c), and since the proviso to Section 29A(c) will not apply as the corporate debtors related to AMIPL and Numetal have not paid off their respective NPAs, ordinarily, these appeals would have been disposed of by merely declaring both resolution applicants to be ineligible under Section 29A(c). Shri Subramaniam, on behalf of the Committee of Creditors, requested us to give one more opportunity to the parties before us to pay off their corporate debtors’ respective debts in accordance with

¹⁴ IBC

¹⁵ (2019) 2 SCC 1



Section 29A, as the best resolution plan can then be selected by the requisite majority of the Committee of Creditors, so that all dues could be cleared as soon as possible. Acceding to this request, in order to do complete justice under Article 142 of the Constitution of India, and also for the reason that the law on Section 29A has been laid down for the first time by this judgment, we give one more opportunity to both resolution applicants to pay off the NPAs of their related corporate debtors within a period of two weeks from the date of receipt of this judgment, in accordance with the proviso to Section 29A(c). If such payments are made within the aforesaid period, both resolution applicants can resubmit their resolution plans dated 2.4.2018 to the Committee of Creditors, who are then given a period of 8 weeks from this date, to accept, by the requisite majority, the best amongst the plans submitted, including the resolution plan submitted by Vedanta. We make it clear that in the event that no plan is found worthy of acceptance by the requisite majority of the Committee of Creditors, the corporate debtor, *i.e.* ESIL, shall go into liquidation. The appeals are disposed of, accordingly.”

13. In compliance with the aforesaid direction, the plaintiff is stated to have cleared the entire outstanding of KSS Petron including monies owed to SBI and liabilities flowing from the Credit Facility and Corporate Guarantee. The debt of KSS Petron as well as the Corporate Guarantee ultimately came to be assigned in favour of the plaintiff in terms of the **Assignment Agreement dated 17 October 2018¹⁶** which forms part of the suit proceedings and has been marked as Document-11 in the digital record.

14. The Assignment Agreement was duly acknowledged by the Resolution Professional as would be evident from Document-13 of digital record, when the name of the plaintiff came to be substituted as the financial creditor and the same coming about by virtue of the

¹⁶ Assignment Agreement



assignment of the secured debt by the previous financial creditors. The Resolution Professional in unequivocal terms recorded and acknowledged the fact that the debts of the previous financial creditors had been assigned to the plaintiff pursuant to the Assignment Agreement noticed hereinabove.

15. Consequent to the plaintiff having cleared all debts owed to the SBI, the said financial institution proceeded to withdraw its application pending before the DRT. In the meanwhile, KSS Petron went into liquidation and in the course of those proceedings, the Liquidator recognised the plaintiff amongst the list of stakeholders and financial creditors who were admitted as entities owed monies by the company in liquidation. The Liquidator has acknowledged the debts owed to the plaintiff as is evident from Documents 18 and 19 of the digital record.

16. Since and as per the Assignment Agreement, the monies owed to SBI and SBH were not paid to the plaintiff, it proceeded to issue a notice on 20 October 2021 calling upon the defendant to pay the amount by 30 October 2021. The aforesaid demand was reiterated by another notice of 13 November 2021. However, since the defendant failed to acknowledge the same, the plaintiff came to institute the present suit.

17. There thus appears to be no dispute with respect to the assignment of the debt and all obligations flowing from the Sanction Letter, the Corporate Guarantee and all other related documentation



pertaining to the Credit Facility being liable to be enforced by the plaintiff. The debts due in terms of the above also appear to have been duly admitted both in the course of proceedings under the CIRP as well as during liquidation. No defence has been proffered by the defendant which may have even remotely cast a doubt on its liability to be held liable for the debt due and payable by KSS Petron.

18. While considering the entitlement of the plaintiff to a decree in terms as prayed for, the Court takes note of the submission of Mr. Sood who contended that the Corporate Guarantee and the underlying transaction would be clearly governed by the laws of India. Mr. Sood submitted that the Credit Facility was granted by SBH in India and to the Indian account of KSS Petron. It was also submitted that the issuance of the Corporate Guarantee was itself a mandatory precondition for the extension of credit facilities to KSS Petron and was so specified in the Sanction Letter.

19. Mr. Sood also placed reliance upon Clause 19 of the Corporate Guarantee which had specifically referred to the provisions of the **Limitation Act, 1963**¹⁷ for the purposes of determining acknowledgement of liability. In view of the aforesaid factors, Mr. Sood submitted that it would be evident that the defendant had acknowledged that its liabilities under the Corporate Guarantee would be governed by laws of India.

20. Insofar as the jurisdiction of the Court to try the suit itself, Mr.

¹⁷ The 1963 Act



Sood referred to the following circumstances. It was submitted that the Credit Facility was sanctioned by SBH at New Delhi and more particularly from its Branch situated in the city. It was pointed out that the Corporate Guarantee was submitted to the Branch Office of SBH in New Delhi. The plaintiff further averred that not only does it have its place of business in New Delhi, the notices of 30 November 2021 had also been issued from New Delhi calling upon the defendant to discharge its obligations.

21. It was submitted by Mr. Sood that the common law principle that the “debtor must seek the creditor” is one which has been duly accepted as being applicable by our courts and therefore the suit has been rightly presented before this Court. Mr. Sood placed reliance upon the following passages from the decision in **National Building Construction Corporation Ltd. vs. Vysya Bank Limited**¹⁸ in support of the aforesaid proposition: -

“10. On the question whether English common law doctrine that the debtor must seek the creditor applies to India, there is a wide divergence of opinion in the Indian courts. Broadly speaking, there are two school of thought. One school says that the English common law doctrine does not form part of the Indian law. This view is represented by the Punjab full bench decision in *Firm Hira Lal* (supra). That the English common law doctrine applies to India is the view of the other school of thought. This view is to be found in a division bench judgment of the Calcutta High Court reported as *State of Punjab v. A.K. Raha (Engineers) Ltd.*, AIR 1964 Calcutta 418(3) where Bachawat, J. applied the doctrine to a suit instituted in Calcutta by a contractor against the Punjab Government. In *S.P. Consolidated Engineering Co. (P) Ltd. v. Union of India*, AIR 1966 Calcutta 259(4), Mallick J.

¹⁸ 1981 SCC OnLine Del 222



expressly dissented from the Punjab full bench and followed the division bench ruling of this own Court where Bachawat J. had held that the English common law doctrine applied to India. In *M/s. Manohar Oil Mills v. M/s. Bhawani Din Bhagwandin*, AIR 1971 Allahabad 326(5) (DB) and in a very recent division bench ruling of the Kerala High Court reported as *Ramasubramoniam v. Ranganathan*, 1978 Kerala Law Times 906(6), the view has been taken that the English common law doctrine applies to India. Speaking for the court Poti J. in the Kerala case said:

“..... the place of payment could be determined, as observed by the Privy Council in *Soniram's case*, with reference to the terms of the contract, the attendant circumstances and the necessities of the case. It is in making such a proper determination that the Court is entitled to take notice of the rule of the obligation of the debtor to seek out his creditor. It is not a rule of law but is a rule of evidence and if it is so understood there is no scope for the conflicting views. That it is not a rule of law is evident from the fact that it is not of universal application irrespective of the circumstances of each case. The nature of the contract, the circumstances in which the parties are placed and the requirements of the case may indicate the absence of an obligation on the part of the debtor to seek out the creditor.”

Poti J. thought that the view of the Calcutta High Court is an “extreme view” because Bachawat J. treated the rule as a rule of law. A sensible view to take the doctrine will be to hold that it is a rule of evidence and not a rule of law universal application. It is no more than a sign post to guide our faltering footsteps on the difficult of jurisdiction when nothing else is in sight. Courts in India have taken differing views of the Privy Council case in *Soniram Jeetmul* (supra) and that is the reason for this sharp difference of opinion. (See *Audinarayana v. Lakshminarayana*, AIR 1940 Mad. 588(7) per *Varadchariar, J.*, *Bharumal v. Sakhawatmal*, AIR 1956 Bombay 111(8) per *Chagla C.J. and Dixit J.* and *Sobha Singh v. S.I. Foundry*, AIR 1968 Guj 276(9). The preponderant view appears in favour of the common law doctrine. (See also *Balloram & Anr. v. Firm Seth Uttamchand*, AIR 1961 Raj 93(10) and *Firm Shah Chandanmal v. Hazarilal*, AIR 1962 Raj 122 (11).



11. In my opinion it is not necessary to determine in this case whether the common law doctrine applies as a rule of law to India or not. One thing seems clear. Where there is no specific provision in the Indian Contract Act about the place of performance, the courts in India can apply the principle of the English common law that the debtor must seek the creditor. The Supreme Court in *Bhagwandas Goverdhandas Keida v. M's. Girdharlal Parshottamdas*, AIR 1966 Supreme Court 543(12) has said:

“In the administration of the law of contracts, the courts in India have generally been guided by the rules of the English common law applicable to contracts where no statutory provision to the contrary is in force.” (p. 549)

In the Contract Act, we have Section 49 which provides for the place of performance. To cases to which Section 49 does not apply, the courts have frequently applied common law doctrine, “not as a rule of law but as a rule of evidence”, as Allahabad and Kerala Judges have said. In order to ascertain the intention of the parties judges have applied this common law doctrine as a tentative working rule. All of our footsteps through life are guided by nothing better than tentative working rules. Following such a guide does indeed, involve risks, but it is a risk to which life has accustomed us. Like it or not, it is as justice Cardozo has told us “inevitable”. (*Nature of the Judicial Process* 1921 ed. p. 166).

12. The Common Law doctrine that the debtor must seek the creditor is a part of the English law of Contract. There is no statutory provision in India on the question as to what will be the place of performance where none is specified in the contract.

The courts in India have, in such cases, been guided by the common law doctrine. As Kapur J. said it is one of the factors to be taken into consideration for determining the place of performance of the contract. (*Pivarsing v. Bhagwandas*, AIR 1951 Punjab 33) (13). The Punjab full bench in *Firm Hira Lal* (supra) accepted his view. Sec 20 C.P.C., is no doubt the governing provision. But to say that the English doctrine as a rule of law does not apply to India is one thing. To say that in the totality of circumstances, the terms of the contract, the implications and inferences therefrom, the necessities of the cases, the residence of the creditor, the debtor's obligation to pay the creditor, have all to be taken into account, is quite another. In my opinion the Privy Council said



precisely this. We cannot banish the doctrine from India law. We cannot totally exclude its application.”

22. The Court may additionally note that the aforesaid precept has also been duly recognised in a subsequent decision rendered by a learned Judge of the Court in **Maya Jain vs. Yash Chhabra**¹⁹ where the following observations came to be made:-

“7. Reference may also be had to another judgment of the High Court in the case of *L.N. Gupta v. Tara Mani*, 24 (1983) DLT 184 : where this Court held as follows:

“(1) The respondent plaintiff Tara Mani, a widow living in D-II/160, Kaka Nagar, New Delhi, filed a suit in Delhi against the petitioners defendants on the basis of a pronote which was made and delivered on 9-6-1978 in Bangalore in her favor by the petitioners defendants payable on demand ‘at Bangalore or any part of India’. In New Delhi she was living with her relative and attorney B.S. Gupta. On 12-3-1981 B.S. Gupta wrote from New Delhi to the petitioners to remit the amount due to her within 30 days. On 11-5-1981 her advocate upon instructions from Smt. Tara Mani by a notice called upon the petitioners to pay the amount due within seven days. Since no payment was forthcoming, the present suit was filed on 28-5-1981.

....

(7).....In State of Punjab v. A.K. Raha (Engineers) Ltd. AIR 1964 Cal 418, it was observed:“WHERE no place of payment is specified in the contract either expressly or impliedly, the debtor must seek the creditor; the obligation to pay the debt involves the obligation to find the creditor and to pay him at the place where he is when the money is payable.”

(8) The position of law could not have been stated more categorically than it was done in *S.P. Consolidated Engineering Co. (P) Ltd. v. Union of India*, AIR 1966 Cal 259. The learned Judge said:

¹⁹ 2015 SCC OnLine Del 9078



“The English Common Law Rule that ‘a debtor must seek the creditor’ is universal in its application, since it is founded on justice and equity. It is surely not a technical rule of English law, wrongly made applicable to India. It is a beneficent rule, inflexible and is of universal application. The rule cannot be said to be nothing more than a presumption rebuttable by contrary evidence. When there is evidence to indicate the place where the parties to a contract intended that the debt was payable, then the court will hold that such place of payment has been indicated in the contract itself, though not expressly but by implication. The occasion for applying the rule, as a rule of justice, equity and good conscience, would arise only when the court finds that no place of payment is expressly stated in the contract nor is it possible to find such place of payment indicated in the contract by necessary implication, on the relevant evidence on record.”

(9) Following *Bharumal v. Sekhawatmal*, AIR 1956 Bom 111, it was held in *Shoba singh and Sons v. Saurashtra Iron Foundry and Steel Works (Pvt.) Ltd.*, AIR 1968 Guj 276, that the common law rule that the debtor should find the creditor and pay the debts where the creditor resides, applied in India in fit cases. I am in respectful agreement with this reiteration.”

The receipt is silent about the place where the defendant has to return the money. As the said term is not specifically stated in the documents, defendant in view of the above legal position was obliged to refund the amount in Delhi. In the present case the plaintiffs have sent a legal notice through counsel from Delhi demanding payment. The facts are akin to the case of *Mrs. Shradha Wassan v. Mr. Anil Goel* (supra). Hence defendant was obliged to pay the amount to the plaintiff in Delhi. Hence, this Court would have the territorial jurisdiction.”

23. It was then pointed out that the plaintiff in its notice of 01 October 2021 had also set out the details of the bank accounts to which the amounts owed may be remitted by the defendant.



According to Mr. Sood, the existence of the bank accounts within the jurisdiction of the Court is yet another factor which must be accepted as being relevant for the purposes of answering the question of cause of action and jurisdiction. Mr. Sood placed reliance upon the following pertinent observations as enunciated by the Supreme Court in **A.B.C. Laminart (P) Ltd. vs. A.P. Agencies**²⁰:-

“15. In the matter of a contract there may arise causes of action of various kinds. In a suit for damages for breach of contract the cause of action consists of the making of the contract, and of its breach, so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed and the breach occurred. The making of the contract is part of the cause of action. A suit on a contract, therefore, can be filed at the place where it was made. The determination of the place where the contract was made is part of the law of contract. But making of an offer on a particular place does not form cause of action in a suit for damages for breach of contract. Ordinarily, acceptance of an offer and its intimation result in a contract and hence a suit can be filed in a court within whose jurisdiction the acceptance was communicated. The performance of a contract is part of cause of action and a suit in respect of the breach can always be filed at the place where the contract should have been performed or its performance completed. If the contract is to be performed at the place where it is made, the suit on the contract is to be filed there and nowhere else. In suits for agency actions the cause of action arises at the place where the contract of agency was made or the place where actions are to be rendered and payment is to be made by the agent. Part of cause of action arises where money is expressly or impliedly payable under a contract. In cases of repudiation of a contract, the place where repudiation is received is the place where the suit would lie. If a contract is pleaded as part of the cause of action giving jurisdiction to the court where the suit is filed and that contract is found to be invalid, such part of cause of the action disappears. The above are some of the connecting factors.”

²⁰ (1989) 2 SCC 163



The Court thus on an overall consideration of the aforesaid material comes to the firm conclusion that it would have the jurisdiction to try the suit and the same has been validly presented before this Court.

24. The aspect of the suit being within limitation also does not appear to raise any challenges. The Court firstly notes that the 1963 Act does not specifically prescribe a period of limitation in respect of suits for enforcement of a guarantee. The limitation for such a suit would thus consequently have to be considered bearing in mind the residual provisions contained in Article 113 and the suit, therefore, being presented within three years from the date when the right to sue first arose. The right to sue insofar as the present plaintiff is concerned would appear to have arisen on 17 October 2021 when the Assignment Agreement came to be executed and at a time while the debt was still due and payable. The Court would also additionally have to bear in mind the orders passed by the Supreme Court on **Suo Motu Writ Petition (Civil) No. 3 of 2020** and which had suspended the march of limitation during the period when the Covid-19 pandemic had gripped the nation. If the aforesaid factors are borne in consideration, it would appear that the suit when filed on 18 August 2022 was within limitation.

25. In addition to the above, the Court also finds merit in the submission of Mr. Sood who had contended that the period of limitation in any case stood extended in light of the acknowledgement



of debt by the principal debtor, namely, KSS Petron. Mr. Sood had also relied upon Clauses 12 and 19 of the Corporate Guarantee in terms of which the defendant had affirmed that any balance confirmation or acknowledgement of debt if made by the borrower would be deemed to have been made and submitted by and on behalf of the guarantor itself and be treated as binding upon each of them.

26. It was pointed out by learned counsel that SBH had called upon defendant to discharge its obligations under the Corporate Guarantee in terms of the notice dated 31 October 2016 [Document-6]. Consequent to the defendant's failure to comply with the said demand, SBH had proceeded to institute proceedings before the DRT. Mr. Sood drew the attention of the Court to the following acknowledgements which came to be made in the meanwhile: -

"DATE"	EVENT
16.10.2018	KSS Petron (through its RP) acknowledged and admitted its liability to SBI through list of creditors, thereby extending the limitation period by 3 years i.e. till 16.10.2021.
02.02.2019	KSS Petron (through its RP) acknowledged and admitted (within limitation) its liability <i>qua</i> the Plaintiff (pursuant to the Assignment Agreement) through list of creditors, thereby extending the limitation period by 3 years i.e. till 02.02.2022.
20.02.2020	KSS Petron (through its Liquidator) acknowledged and admitted (within limitation) its liability <i>qua</i> the Plaintiff



	(pursuant to the Assignment Agreement), thereby extending the limitation period by 3 years i.e. till 20.02.2023.
14.07.2021	KSS Petron (through its Liquidator) acknowledged and admitted (within limitation) its liability <i>qua</i> the Plaintiff (pursuant to the Assignment Agreement) through List of Stakeholders, thereby extending the limitation period by 3 years i.e. till 14.07.2024.
06.04.2022	KSS Petron (through its Liquidator) acknowledged and admitted (within limitation) its liability <i>qua</i> the Plaintiff (pursuant to the Assignment Agreement) through List of Stakeholders, thereby extending the limitation period by 3 years i.e. till 06.04.2025.”

27. The Court finds merit in the aforementioned assertions and thus comes to hold that the suit clearly appears to have been filed before this Court within the period of limitation as prescribed.

28. That then takes the Court to the principal relief as claimed by the plaintiff and to consider whether the suit is liable to be decreed in terms of the Order XXXVII of the Code. As is manifest from the recordal of facts hereinbefore, the right of the plaintiff to sue the defendant accrued on 17 October 2018, when the Assignment Agreement came to be executed. The amounts due under the Credit Facility and as so claimed by SBI was duly acknowledged by the Resolution Professional of KSS Petron.

29. In terms of the Assignment Agreement and more particularly



Clause 2.1.1, the plaintiff stood assigned all loans which had been chronicled in the Assignment Agreement. It also obtained a right to sue upon the Corporate Guarantee by virtue of the Assignment Agreement as also all security interests as defined in Clause 1.1(j) thereof. The fact that the Corporate Guarantee has been repeatedly acknowledged has already been noticed in the preceding parts of this judgement. Undisputedly, the liability of the guarantor is co-extensive and co-terminus with that of the principal debtor. The Court thus finds that the claim of the plaintiff here would be clearly covered under Order XXXVII Rule 1(2)(b)(iii) of the Code.

30. That only leaves the Court to consider one final aspect and which arises from certain documents which were circulated for and on behalf of the defendant upon learned counsels appearing for the plaintiff. Mr. Sood in his characteristic fairness apprised the Court that on 23 March 2023, although the defendant went unrepresented before the Court in the scheduled hearing, it had proceeded to file certain documents. Mr. Sood pointed out that the aforesaid documents had been circulated under the cover of an index without any supporting affidavit. It becomes pertinent to note that aforesaid documents are still lying in defect and thus do not form part of the record of the present proceedings.

31. Notwithstanding the above, the Court takes note of certain orders stated to have been passed on a suit filed by one Oreon Management, LLP, a purported shareholder of the defendant in



Kazakhstan seeking cancellation of the Corporate Guarantee. *An ex parte* interim order dated 22 December 2022 appears to have been passed on the said suit restraining the defendant from paying under the Corporate Guarantee and also restraining the plaintiff from enforcing the same.

32. It must at the outset be noted that those documents should neither be countenanced nor taken note of since the defendant has failed to enter appearance in accordance with Order XXXVII. The applications which were moved by the defendant in the suit for condonation of the delay caused in its appearance have not been pressed. In fact, none had appeared to press the applications itself. In any case, the Court had by its order of 23 March 2023, put down the suit for proceeding *ex parte*. It would thus be manifest that the defendant has abjectly failed to comply with the provisions of Order XXXVII. It may only be additionally observed that Order XXXVII does not entitle the defendant to file documents or defend a summary suit in the manner in which it has chosen to do.

33. While closing, it may be additionally noted that India and Kazakhstan are bound by the Treaty on Mutual Legal Assistance in Civil Matters and which in terms of Article 14(3) clearly appears to indicate that interim orders or measures passed by courts in Kazakhstan are neither binding nor enforceable in India. Article 14(3) reads thus: -

“3. This Treaty shall not apply to interim or provisional measures, or decrees passed in cases, in creditors' claims related to



bankruptcy as taxes, levies, fines collection.”

34. In any case, even if the order of the Kazakhstan Court were to be adjudged on the anvil of Section 44A of the Code, it cannot possibly be said to have any impact since it is only final and conclusive orders of foreign courts which could be enforced. The said provision does not extend to interim orders. The aforesaid position as flowing from Section 44A has been duly explained by the Court in **Shanghai Electric Group Co. Ltd. vs. Reliance Infrastructure Ltd.**²¹. The Court deems it apposite to extract paragraph 80 of that decision where the legal position was explained as under: -

“80. From the above discussion and analysis of the caselaw it emerges that the emergency award/foreign interim orders cannot be enforced directly. In the present case, the arbitration is based on UNCITRAL Law, which permits parties to approach the Courts for interim relief - which means courts other than those of Singapore. SEGCL cannot approach the seat court (in this case, Singapore), as there is no provision for execution of an interim order passed by a foreign court under the Code of Civil Procedure (which contemplates for execution of foreign decrees under Section 13 read with Section 44A). In fact, any meaningful provisional reliefs such as attachment of RELIANCE's assets and properties, including bank guarantees and directions to third-parties could only be granted by a court of competent jurisdiction in India, and not by the Arbitral Tribunal or a foreign court, since there is no provision corresponding to Section 17 for enforcement of interim orders.”

35. On an overall conspectus of the aforesaid, the present suit shall stand decreed. The plaintiff is held entitled to a decree against the defendant for a sum of INR 25,59,46,009/- along with interest pendente-lite and future interest at the rate of 16% per annum till

²¹ 2022 SCC OnLine Del 2112



realization of the aforesaid amounts in full. The plaintiff is additionally held entitled to the costs of the present suit.

YASHWANT VARMA, J.

MAY 30, 2023

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