

(2019) 07 DEL CK 0609

In the Delhi High Court

Case No : Civil Suits (COMM) No. 896 Of 2018

Rasmala Trade Finance Fund

APPELLANT

Vs

Raman Gupta

RESPONDENT

Date of Decision : 23-07-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Order 37, Order 6 Rule 2, Order 37 Rule 3, Order 39 Rule 4
Indian Stamp Act, 1899 — Article 5, 7
Indian Stamp Act, 1899 — Section 33, 35, 38
Indian Contract Act, 1872 — Section 23, 28, 128, 135
Evidence Act, 1872 — Section 45, 57, 57(1), 84

Citation : (2019) 177 DRJ 377

Hon'ble Judges : Prathiba M. Singh, J

Bench : Single Bench

Advocate : Rajeeve Mehra, Manish Jha, Raghav Sabharwal, Niti A. Sacchar, Anup Kumar D. Sayare, Anil Upadhyay

Final Decision : Disposed Of

Judgement

Prathiba M. Singh, J

I.As.8652/2018 (u/O XXXIX Rule 4 CPC) & 13231/2018 (for leave to defend)

1. The Plaintiff has filed the present suit under Order XXXVII CPC praying for decree for a sum of USD 14,025,783 along with past due profit and late payment charges @ 2% for each days' delay. One M/s Met Trade (UAE) FZC (hereinafter "Met Trade") had availed of a Murabaha Facility Agreement (hereinafter, "Murabaha Facility") with the Plaintiff on 2nd May, 2016. As per the said agreement, the Plaintiff had given a facility of USD 10 million to M/s Met Trade. The agreement was signed by Mr. Raman Gupta, one of the directors of Met Trade. He was duly authorised by way of a board resolution dated 14th April, 2016 by Met Trade to enter into the said agreement with the Plaintiff. The Defendant - Mr. Raman Gupta had also executed a personal guarantee in favour

of the Plaintiff in respect of this facility. Met Trade had also entered into an account pledge agreement dated 2nd May, 2016, as a condition for availing of the Murabaha Facility.

2. Various other agreements were also entered into along with the said facility agreement. The Murabaha facility agreement was amended on 27th October, 2016 by which the facility was increased to 20 million USD. The facility's maturity date was extended for a period of 365 days, vide amendment dated 2nd April, 2017. The remaining terms of the facility remained unchanged.

3. Various amounts which were to be repaid under the Facility agreement, availed by Met Trade, however, remained unpaid. This was notified by the Plaintiff on 17th July, 2017. Met Trade responded by stating that the payment would be delayed till the end of July, 2017 as there was a delay in receiving payments of certain supplies from customers. Thereafter, a meeting was held on 29th July, 2017 between the Plaintiff and Met Trade for discussion of overdue payments, however, no payments were made. The telephonic conversation with the Defendant also did not yield any favourable result in respect of the delayed payment. Accordingly, the Defendant agreed for submitting a refinancing proposal by 25th September, 2017. However, no such proposal was shared. The Plaintiff then issued a demand letter in terms of clause 16 of the Murabaha Facility to Met Trade on 19th October, 2017 for a total sum of USD 14,170,227.72. Thereafter, a meeting took place between the parties in Delhi on 24th October, 2014. Again, request was made for sharing of the refinancing proposal, but the same was not shared. The amounts remained outstanding. Finally, since the Defendant did not take any steps to clear the payments, on 20th March, 2018 a notice was issued by the Plaintiff to the Defendant invoking the personal guarantee of the Defendant. The Plaintiff has, thereafter, filed the present suit invoking the guarantee under the Murabaha facility agreement.

4. Since the suit was instituted under Order XXXVII CPC on 21st May, 2018, the summons were issued in the prescribed form and an order was also passed to the following effect.

"Issue summons in the prescribed form of the suit and notice of injunction application to the defendants by all modes on filing of PF/RC returnable before the Joint Registrar on 28.08.2018 for completion of pleadings. On service of summons the defendant to file an affidavit disclosing all his immovable properties and moveable properties and assets, including all bank accounts, Demat accounts, Funds, Shares, Bonds and all other assets of every description within four weeks."

5. As per the above order, the Defendant was to file an affidavit disclosing all his assets. The Defendant moved an application under Order XXXIX Rule 4 CPC on the ground that only the laws of UAE are applicable and this Court has no jurisdiction to deal with the matter. The Defendant also filed an application seeking leave to defend in the suit. Submissions were partly heard on the leave

to defend application. One of the objections taken by the Defendant was that the facility agreement was not properly stamped as per the Indian Stamp Act and the agreement is liable to be impounded. The second objection taken in the leave to defend is that this Court has no territorial jurisdiction. It is further submitted that the interest of 2% for each days' delay is resulting in charging of an exorbitant interest rate of 730% per annum which cannot be recognized or enforced by this Court.

6. On 27th February, 2019, Id. counsel appearing for the Plaintiff had submitted that the counsels have obtained the stamp for the personal guarantee and accordingly, the matter was placed before the Joint Registrar for examining the stamp duty payable on the said document. The. Id. Joint Registrar on 6th March, 2019, passed the following order.

"Admittedly personal guarantee filed in original by the plaintiff is unstamped. As per Article 5 & 37 of Indian Stamp Act this document is chargeable with stamp duty. As per rates of stamp duly in Delhi (copy of which produced before the Court by learned counsel for plaintiff) this document is chargeable with stamp duty of amount of Rs.50/-. Hence this personal guarantee filed by plaintiff is impounded. Ten times penalty i.e. Rs.500/- is levied on plaintiff.

Registry is directed to sent authenticated copy of personal guarantee (lying on page no.105-110 in part III Volume I) alongwith stamp papers already deposited by the plaintiff on 5.3.19 and certificate as per Section 38 of Indian Stamp Act to Collector of Stamp/SDM, 12/1, Jam Nagar House, Shahjahan Road, New Delhi-110011 for taking further necessary action.

Matter be put up before Hon'ble Court for further directions on date already fixed i.e. 14.3.19."

7. The Joint Registrar also certified that the stamp duty has now been deposited and the penalty has also been levied and paid. On 14th March, 2019, the affidavit of assets, which was filed pursuant to the order dated 21st May, 2018 was perused. It was found that the Defendant had not made full disclosure and further disclosures were directed to be made both by the Defendant and his family members, as it was found that M/s Met Trade and the main shareholder in Met Trade viz., was Meternere Limited which was also previously owned by the Defendant and his family members. The said order dated 14th March, 2019 was challenged before the Division Bench.

The Id. Division Bench passed the following orders in the two appeals:-

"(i) FAO(OS) (COMM) 70/2019, titled Raman Gupta vs. Rasmala Trade Finance Fund.

CM APPL.15660/2019 (exemption)

1. Exemption allowed, subject to all just exceptions.

FAO(OS) (COMM) 70/2019

2. Learned Senior counsel for the Appellant seeks leave to withdraw this appeal with liberty to file an application before the learned Single Judge before the next date of hearing explaining the difficulty in complying some of the directions issued in the impugned order. Dismissed as withdrawn with liberty as prayed for.

3. Copy of this order be given dasti under the signatures of Court Master.

(ii) FAO(OS) (COMM) 71/2019, titled Shrey Gupta vs. Rasmal Trade Finance Fund and Anr .

CM APPL.15661/2019 (exemption)

1. Exemption allowed, subject to all just exceptions.

FAO(OS) (COMM) 71/2019

2. Notice be issued to the Respondents for the next date.

3. Till the next date of hearing the impugned order to the extent it requires the details of proceedings initiated by banks against the present Appellant and any of the other family members of the defendant Raman Gupta and requiring the personal presence of the Appellant in Court shall remain stayed. The direction in the impugned order requiring disclosure of the moveable and immovable assets of the present Appellant and the entire family including the spouse and children of the Defendant, as well as requiring the production of their income tax returns for the last five years shall also remain stayed till the next date.

4. List on 23rd April 2019 before the Roster Bench.

5. Copy of this order be given dasti under the signatures of Court Master."

8. Mr. Rajeev Mehra, Id. Senior counsel for the Plaintiff submits that the Defendant himself is the main director of the company, which availed of the Murabaha facility and he had also given a personal guarantee. It is submitted that the Defendant has neither denied the acceptance of the agreement nor his signatures on the various documents. He has also not denied that sums were advanced under the Facility by the Plaintiff. It is further submitted that the objection as to jurisdiction is not maintainable as the Courts of UAE do not have exclusive jurisdiction.

9. Insofar as the objection that the claims are barred by limitation is concerned, the Plaintiff submits that the Defendant has agreed to waive the six month's limitation under Article 1092, of the UAE Civil Code, which is the law of limitation prescribed under the UAE laws. It is submitted that the said provisions allow waiver of limitation, which is permissible under the UAE laws and thus, the six months' limitation period does not apply. The Plaintiff relies upon two decisions of the UAE Courts and two legal opinions from the firms namely M/s Al Tamimi & Co. and M/s. Baker Mckenzie.

10. Insofar as the stamping of the document is concerned, it is submitted that the same is a technical defect, which is curable and has, in fact, been cured. Mr.

Mehra relies on the judgment in SRM Exploration Pvt. Ltd. vs. N&S&N Consultants S.R.O, 2012 (129) DRJ 113 to argue that even if the declaration of guarantee breaches foreign exchange laws prevalent in the country, the appellant may be prosecuted for the same, but does not render the guarantee as null and void. Reliance is also placed on the UAE Civil Code, specifically on Articles 1056, 1077 & 1078.

11. It is further, submitted by Mr. Mehra that the principal borrower need not be impleaded, as the liability of the guarantor is co-extensive with that of the principal borrower. Reliance is placed on various provisions of the UAE Civil Code, in support of his submissions. It is further submitted that the principal borrower need not actually be impleaded as the guarantor's liability is co-extensive with the principal borrower and that Article 1056 of the UAE Civil Code, is consistent with Section 128 of the Indian Contract Act. Reliance is also placed on clause 2.4 of the personal guarantee, which clearly provides that Plaintiff is not obliged to take action against the principal borrower before proceeding against the guarantor.

12. Finally, it is submitted that though the contract is governed by UAE laws, unless any contradiction is shown between the laws of UAE and India, there is a legal presumption that the said foreign law is similar to Indian law. The non-stamping of the document does not by itself make the personal guarantee unenforceable. In any event, if the document is admitted, non-stamping of the same does not entitle the Defendant for leave to defend. The following judgements are relied upon.

? Hindustan Steel Ltd. vs. Dilip Construction Co., reported as (1969) 1 SCC 597

? Nutan Chadha & Ors. vs. Mukesh Chander Saini & Ors. (RFA No.797/2017 decided on September 18, 2017) by Delhi High Court

? SRM Exploration Pvt. Ltd. vs. N&S&N Consultants S.R.O, reported as 2012 (129) DRJ

? Unity Infraprojectrs Limited vs. L&T Finance Ltd., reported as 2016 (2) BomCR 395

? Chilakuri Gangulappa vs. Revenue Divisional Officer, Mdanpalle and Ors. (2001) 4 SCC 197

13. The submissions on behalf of the Defendant, in the leave to defend, is that the agreement is governed by UAE laws. Judicial notice cannot be taken under Section 57(1) of the Indian Evidence Act, 1872 of foreign law and on a point of foreign law, expert evidence would need to be led. It is argued, on the basis of Section 84 of the Evidence Act, that only the genuineness of the books/laws and judgements, which are to be under authority of any country, can be relied upon by the Court and unauthentic translations cannot be relied upon. Interpretation of Article 1092 of the UAE Code has to be, therefore, done on the basis of expert opinion, which can only be done in evidence. Opinion of an English law firm

rendering services in UAE cannot be a valid opinion.

14. Further, the Plaintiff has not proceeded against Met Trade, which is the principal borrower. Since the selected forum by the parties from the various agreements executed between them is the Courts of Dubai, this Court does not have jurisdiction. Even if this Court has jurisdiction, the Courts of UAE/Dubai would be a more convenient form. The claim of the Plaintiff is barred by limitation and there can be no waiver of such statutory provisions. Such a waiver would also be not recognized under Indian Law in view of Section 28 of the Contract Act. Since the waiver clause would be in direct contradiction with Section 28, the said waiver clause would not be enforceable. It is submitted that the invocation of Order XXXVII CPC is oppressive and vexatious as there is no summary procedure available in the laws of UAE.

15. The Defendant also pleads concealment and submits that the legal notice dated 20th March, 2018 was duly replied to by the Defendant on 18th

May, 2018. However, the same was not disclosed by the Plaintiff. It is further averred that as against the approved limit of 20 million USD, only 13.57 million USD was extended to the Defendant and the non-release of the remaining amount of 6.43 million USD gradually resulted in blockage of working capital for the Defendant. The email dated 2nd July, 2017 of the Plaintiff is relied upon, which is claimed to have been concealed by the Plaintiff. Since the acceptance of Foreign Law and provisions thereof have to be proved as a matter of fact, leave to defend ought to be granted. The Defendant also contends that reconciliation of accounts is required, which would also entail trial and hence a summary suit under Order XXXVII CPC is not maintainable. Non-joinder of the principal borrowers is not avoidable in the suit and the transactions relating to subsequent sale events numbers 36-37 shows that it is the Plaintiff, which is in breach. It is claimed that the Defendant is only 1% shareholder of Met Trade and cannot be considered as an alter ego of the Defendant.

16. Insofar as M/s. Metenere - one of the shareholders of M/s. Met Trade, is concerned, the said company has been unnecessarily dragged in by the Plaintiff. It is claimed that since the draw down requests were not disbursed in time by the Plaintiff, it interrupted the business cycle of the principal borrower, leading to financial losses. The fact, that the facility was increased from 10 million dollars to 20 million dollars, shows that the Plaintiff had enormous trust with the Defendant and the principal borrower. The manner in which Murabaha transactions were structured, as per the Defendant was that the amount of USD 20 million was made available by the Plaintiff for Defendant to draw down whenever it needed the money. On the basis of the draw down facility, the Defendant made commitments to its suppliers. Customers of the Defendant did make payments during the month of June 2017 and more than 2 million USD was available for the Defendant to utilise but since the Plaintiff suddenly stopped the draw down facility, further fund availability became uncertain, leading to a break in the supply chain for the Defendant. This led to losses to the Defendant. Reliance is

placed on email dated 2nd July, 2017 to argue that the Plaintiff had admitted in the said email that they had shortage of funds. Thus, the non-disbursement of the additional sums led to the principal borrower being unable to fulfil its obligation for sale and delivery of the final products resulting in financial loss and loss of reputation to the principal borrower.

17. In the present leave to defend application and summons of judgement application, various issues arise for consideration, which are as under:-

- 1) Whether this Court has the jurisdiction to try and entertain the present suit?
- 2) Whether the non-stamping of the agreement and the personal guarantee render the same unenforceable?
- 3) Whether in a suit filed under Order XXXVII CPC, if the agreement is governed by foreign law, leave to defend would be liable to be granted?
- 4) Whether the claims of the Plaintiff are time-barred?
- 5) Whether the suit is bad for non-joinder of the principal borrower?
- 6) Whether interest at the rate of 2% per day is exorbitant and hence unenforceable under Indian Law?
- 7) Whether the agreement is admitted and if so, what relief is the Plaintiff is entitled to?

18. The above issues are considered here in below: -

- 1) Whether this Court has the jurisdiction to try and entertain the present suit?

19. The Murabaha facility agreement is an admitted document and it contains the following clauses for jurisdiction:-

"26. Governing Law

This Agreement and any non-contractual obligations arising out of or in connection with it shall be governed by the laws of Dubai, and to the extent not inconsistent, the federal laws of the UAE.

27. Jurisdiction

The Customer irrevocably agrees for the benefit of the Seller that the Courts of the UAE (excluding the Courts of the DIFC) shall have jurisdiction to hear and determine any suit, action or proceeding, and to settle any disputes which may arise out of or in connection with this Agreement and the Finance documents and, for such purposes, irrevocably submits to the jurisdiction of such courts."

20. The personal guarantee has the following clause for jurisdiction:-

"13. LAW

"13.1 This Guarantee shall be governed by the laws of United Arab Emirates with

the courts of Dubai (excluding the courts of Dubai Financial Centre) having jurisdiction to hear all disputes related to this Guarantee.

13.2 The submission to such jurisdiction shall not (and shall not be construed so as to) limit the right of the Financier to take proceedings against the Guarantor in the courts of any other competent jurisdiction nor shall the taking of proceedings in any one or more jurisdictions preclude the taking of the proceedings in any other jurisdiction, whether concurrently or not."

21. A perusal of the above two clauses shows that while the facility agreement provides for the Courts of UAE to have jurisdiction, the personal guarantee executed by the Defendant has a clear stipulation that the financier i.e., the Plaintiff would have right to take proceedings against the guarantor, i.e., the Defendant in any other Court of competent jurisdiction. The clause in the facility agreement does not confer exclusive jurisdiction in the UAE Courts. The legal position in this regard is clear from the recent judgment of the Supreme Court in Ahmed Abdulla Ahmed Al Ghurair and Others vs. Star Health and Allied Insurance Company Limited and Others, AIR 2019 SC 413, in which the Court has considered the previous authorities including A.B.C Laminart Pvt. Ltd. vs. A.P. Agencies, Salem, (1989) 2 SCC 163 and Kusum Ingots and Alloys Ltd. vs. Union of India, (2004) 6 SCC 254 and held that in the said case that since most of the parties were residents of Dubai, the Indian Courts did not have jurisdiction. In ABC Laminart (supra), the Supreme Court had clearly laid down that a Court where the cause of action arises would have jurisdiction to entertain the proceedings, so long as the parties have not conferred exclusive jurisdiction on a particular Court. ABC Laminart (supra), was again considered in Swastik Gases Pvt. Ltd. vs. Indian Oil Corporation Ltd., (2013) 9 SCC 32 wherein the Supreme Court has held as under:-

"31.The question is, whether parties by virtue of Clause 18 of the agreement have agreed to exclude the jurisdiction of the courts at Jaipur or, in other words, whether in view of Clause 18 of the agreement, the jurisdiction of the Chief Justice of the Rajasthan High Court has been excluded?

32. For answer to the above question, we have to see the effect of the jurisdiction clause in the agreement which provides that the agreement shall be subject to jurisdiction of the courts at Kolkata. It is a fact that whilst providing for jurisdiction clause in the agreement the words like "alone", "only", "exclusive" or "exclusive jurisdiction" have not been used but this, in our view, is not decisive and does not make any material difference. The intention of the parties-by having Clause 18 in the agreement-is clear and unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like Clause 18 in the agreement, the maxim *expressio unius est exclusio alterius* comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the

parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts. A clause like this is not hit by Section 23 of the Contract Act at all. Such clause is neither forbidden by law nor it is against the public policy. It does not offend Section 28 of the Contract Act in any manner.....

34. In view of the above, we answer the question in the affirmative and hold that the impugned order does not suffer from any error of law. The civil appeal is, accordingly, dismissed with no order as to costs. The appellant shall be at liberty to pursue its remedy under Section 11 of the 1996 Act in the Calcutta High Court."

22. Thus, even if words such as 'only' 'exclusive' etc., are not used, the same can be read by the court to be exclusive jurisdiction. However, the clause in the present case is clearly distinguishable on facts. In the personal guarantee, it has been clearly agreed between the parties that the Plaintiff would have the right to initiate proceedings against the guarantor in any 'other' Court of competent jurisdiction - any court other than Dubai which has jurisdiction. Admittedly, the Defendant is a resident of Delhi, his assets are also in Delhi. He lives with his family in Delhi. The company - M/s Met Trade, though a Dubai based company, one of the shareholders of the said company is an Indian company - Metenere Limited which is primarily held by the Defendant and his family members. Thus, in view of the clear clause in the personal guarantee executed by the Defendant and both, the agreement and the personal guarantee being admitted documents, it is held that this Court has the jurisdiction to entertain the present suit.

2) Whether the non-stamping of the agreement and the personal guarantee make the same non-enforceable?

23. This is one of the major defences raised by the Defendant in the leave to defend application. The submission of the Defendant is that since the facility agreement is not duly stamped, the same is unenforceable. While, there is no doubt that an agreement of which enforcement is sought, requires to be stamped under Section 35 of the Indian Stamp Act, 1891, the defect of non-stamping can be cured. In *Omprakash v. Laxminarayan and Ors.*, 2013 (12) SCALE 441, the Supreme Court has held as under:-

"12. From a plain reading of the aforesaid provision, it is evident that an authority to receive evidence shall not admit any instrument unless it is duly stamped. An instrument not duly stamped shall be admitted in evidence on payment of the duty with which the same is chargeable or in the case of an instrument insufficiently stamped, of the amount required to make up such duty together with penalty. As we have observed earlier, the deed of agreement having been insufficiently stamped, the same was inadmissible in evidence. The court being an authority to receive a document in evidence to give effect thereto,

the agreement to sell with possession is an instrument which requires payment of the stamp duty applicable to a deed of conveyance. Duty as required, has not been paid and, hence, the trial court rightly held the same to be inadmissible in evidence. The view which we have taken finds support from a decision of this Court in *Avinash Kumar Chauhan v. Vijay Krishna Mishra* [(2009) 2 SCC 532] , in which it has been held as follows:

21. It is not in dispute that the possession of the property had been delivered in favour of the appellant. He has, thus, been exercising some right in or over the land in question. We are not concerned with the enforcement of the said agreement. Although the same was not registered, but registration of the document has nothing to do with the validity thereof as provided for under the provisions of the Registration Act, 1908.

22. We have noticed hereto before that Section 33 of the Act casts a statutory obligation on all the authorities to impound a document. The court being an authority to receive a document in evidence is bound to give effect thereto. The unregistered deed of sale was an instrument which required payment of the stamp duty applicable to a deed of conveyance. Adequate stamp duty admittedly was not paid. The court, therefore, was empowered to pass an order in terms of Section 35 of the Act."

24. From the above, it is clear that a non-stamped agreement cannot be received in evidence, however, if the amount of duty along with the penalty is paid, then the same can be admitted in evidence. Further, in *Hindustan Steel Ltd. vs. Dilip Construction Co.*, (1969) 1 SCC 597 the Supreme Court has also held that the non-stamping of a document is a curable defect: -

"7. The Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instruments: It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The stringent provisions of the Act are conceived in the interest of the revenue once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of the initial defect in the instrument....."

25. As observed earlier, upon the objection of non-stamping having been raised by the Defendant, the matter was placed before the Joint Registrar on the request of the Id. counsel for the Plaintiff. Order dated 27th February, 2019 reads as under:-

"Learned counsel for the Defendant has concluded his arguments on the leave to defend application. One of the objections raised by the learned counsel is that the personal guarantee executed by the Defendant is a document which is required to be stamped under the Indian Stamp Act. Mr. Rajeeve Mehra, learned Senior Counsel for the Plaintiff submits that the Plaintiff has, in the meantime, obtained the stamp for the said personal guarantee, without prejudice to his rights and contentions.

The affidavit of assets filed by the Defendant, as directed vide order dated 25th May, 2018, has been filed in a sealed cover. Let the same be put up before Court on the next date of hearing.

List before the Joint Registrar for examining the stamp duty on the document and for passing of appropriate orders in respect thereof on 6th March, 2019. List before Court on 14th March, 2019."

26. Vide order dated 6th March 2019, the Joint Registrar submitted a certificate to the following effect:-

"CERTIFICATE

This is to certify that the plaintiff in whose favour personal guarantee has been executed has deposited stamp duty of Rs. 3500/-. Amount of the duty on this instrument is Rs. 50/- and amount of penalty levied is Rs. 500/-.

SD/-

Anil Kumar (DHJS)

JOINT REGISTRAR (JUDICIAL)

MARCH 08, 2019"

27. Thus, the present guarantee which has been invoked by the Plaintiff in the present case was duly stamped with the duty as also the penalty being paid. In view of the above, the objection as to non-stamping no longer survives.

3) Whether in a suit filed under Order XXXVII, agreement is governed by foreign law, leave to defend would be liable to be granted?

4) Whether the claims of the Plaintiff are time-barred?

28. A perusal of the clauses in the agreement shows that the facility agreement and the personal guarantee are governed by the laws of UAE. The Plaintiff has relied upon provisions of the UAE Civil Code in respect of aspects including limitation, co-extensive nature of the liability of the guarantor etc., In support thereof, the Plaintiff has also placed on record legal opinions from two law firms to elaborate on the legal position under the UAE Civil Code. The said opinions are relied upon by the Plaintiff to argue that the suit is not barred by limitation under Article 1092 of the UAE Civil Code, which prescribes six months as the limitation period and that the said limitation period can also be waived, which the Defendant had agreed to do.

29. The fact that the Plaintiff relies upon these legal opinions for interpretation of the UAE Civil Code clearly shows that the present suit raises questions as to the legal position in the UAE. Under Section 57 of the Indian Evidence Act, 1872 the Court has to take judicial notice of all Indian laws as also Acts passed by Parliament etc. Relevant extracts of Section 57 are as under:-

"57. Facts of which Court must take judicial notice. - The Court shall take judicial notice of the following facts:-

(1) All laws in force in the territory of India;

(2) All public Acts passed or hereafter to be passed by Parliament [of the United Kingdom], and all local and personal Acts directed by Parliament [of the United Kingdom] to be judicially noticed;....."

30. Section 45 of the Indian Evidence Act also reads as under:-

"45. Opinion of experts.- When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting [or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, [or in questions as to identity of handwriting] [or finger impressions] are relevant facts. Such persons are called experts."

31. A conjoint reading of the above provisions clearly shows that Courts in India have to take judicial notice of Indian laws and in respect of foreign law, expert opinion can be adduced. In *Hari Shanker Jain vs. Sonia Gandhi*, (2001) 8 SCC 233, the Supreme Court held as under:-

"26. Italian law is a foreign law so far as the courts in India are concerned. Under Section 57(1) of the Indian Evidence Act, 1872, the court shall take judicial notice of, inter alia, all laws in force in the territory of India. Foreign laws are not included therein. Sections 45 and 84 of Evidence Act permit proof being tendered and opinion of experts being adduced in evidence in proof of point of foreign law. Under Order 6 Rule 2 of the Code of Civil Procedure, 1908, every pleading shall contain a statement in concise form of the material facts relied on by a party but not the evidence nor the law of which a court may take judicial notice. But the rule against pleading law is restricted to that law only of which a court is bound to take judicial notice. As the court does not take judicial notice of foreign law, it should be pleaded like any other fact, if a party wants to rely on the same (see *Mogha's Law of Pleadings*, 13th Edn., p. 22). In *Guaranty Trust Co. of New York v. Hannay & Co.* [(1918) 2 KB 623, it was held that "Foreign law is a question of fact to an English court ... the opinion of an expert on the fact, to be treated with respect, but not necessarily conclusive." In *Beatty v. Beatty* [(1924) 1 KB 807], it was held that the American law in English courts must be proved by the evidence of experts in that law. In *Lazard Bros. and Co. v. Midland Bank, Ltd.* [1933 AC 289], their Lordships of the Privy Council observed that what the Russian Soviet law is, is a question of fact, of which the English court cannot take judicial cognizance, even though the foreign law has already been proved before it in another case. The court must act upon the evidence before it in that actual case. The statement of law by Halsbury in *Laws of England* (3rd Edn., Vol. 15, para 610 at p. 335) is that the English courts cannot take judicial notice of foreign law and foreign laws are usually matters of evidence requiring proof as questions of fact."

32. As per the above judgement, the Court cannot take judicial notice of foreign law, the same has to be pleaded like any other fact and has to be proved with the aid of experts.

33. Halsbury's Laws of India, 10th edition also elucidates the position in respect of foreign law as under: -

"75.237. Need for proof Foreign law is a question of fact. It must be specifically pleaded by the party or parties relying upon it. It must be proved to the satisfaction of the court like other plea set up by the concerned party or parties. Thus, the onus of proof of foreign law lies on the party relying on it.

75.238. Mode of proof In general, an Indian Court will not research into foreign law or the concepts which have foreign origin. The foreign law or the concepts must be proved in civil proceedings by properly qualified witnesses, that is a person who is suitably qualified to do so on account of his knowledge or experience and who is competent to give expert evidence as to the law of any country, irrespective of whether he has acted or is entitled to act as a legal practitioner there. If his evidence is not contradicted, the Court will normally accept it, unless it is obviously unreliable or extravagant.

Where the witnesses deposit materials as part of their evidence into Court, the Court is entitled to examine those materials, and where there is conflict of evidence as to the interpretation to be placed upon the materials, the Court must scrutinize them and form its own conclusion on them.

Because foreign law or concepts of a foreign origin are questions of fact, courts may not generally at common law rely upon a previous Indian decision on foreign law."

34. Recently, the Supreme Court in Transport Corporation of India Limited vs. Ganesh Ploytex Limited, (2015)3 SCC 571 reads as under: -

"41. It is the pleaded case of the appellant that its legal obligation as transporter ends on its delivering the goods entrusted to it at Benapole Customs Station. Unloading of imported goods at any customs station in this country is also regulated by the provisions of the Customs Act, 1962. We are sure that it must be equally regulated by the law of Bangladesh. What exactly the law of Bangladesh is in this regard and how the factum of delivery of goods allegedly carried and delivered by the appellant at Benapole is to be proved are two distinct and different matters. It is a settled principle of private international law that foreign law is always a question of fact which is required to be pleaded and proved by the party whose rights or obligations flow from such foreign law. There is no pleading or proof in this regard in the instant case."

35. The Plaintiff clearly relies upon the various provisions of UAE Civil Code and UAE law in support of its case. The question whether the period of limitation can be waived legally under UAE law as also whether the Defendant actually waived the said period of limitation, are both questions of fact which will have to be

established in trial.

5) Whether the suit is bad for non-joinder of the principal borrower?

6) Whether interest as per agreement of 2% per day is exorbitant and hence unenforceable under Indian Law?

7) Whether the agreement is admitted and if so, what relief is the Plaintiff is entitled to?

36. On these issues, the case of the Defendant is that the principal borrower has not been impleaded and hence the Plaintiff cannot proceed against the Defendant who is merely a guarantor. The Plaintiff relies upon Clause 2.4 of the personal guarantee to submit that it is not obliged to take action against the principal before proceeding against the guarantor. Reliance is also placed upon Section 128 and 135 of the Indian Contract Act, 1872 to submit that even under Indian law, the surety's liability is co-extensive with that of the principal debtor. Article 1078 of the UAE Civil Code is also relied on in this regard.

37. Without going into the question of UAE law which governs the two contracts, the clear stipulation in the contract itself is that the guarantor has agreed that the Plaintiff need not make any demand on the principal i.e. the principal borrower, in order for the Plaintiff to be able to exercise its rights under the guarantee. Clause 2.4 reads as under:-

"2.4 The Financier shall not be obliged before exercising any of the rights, powers or remedies conferred upon it in respect of the Guarantor by this Guarantee or by law:

2.4.1 to make any demand of the Principal;

2.4.2 to take any action or obtain judgment in any court against the Principal;

2.4.3 to make or file any claim or proof in a winding-up or dissolution of the Principal; or

2.4.4 to enforce or seek to enforce any security taken in respect of any of the obligations of the Principal under the Murabaha Facility Agreement."

38. In the light of the above clause, it cannot be held that the suit is not maintainable against the guarantor as the principal debtor has not been made a party or because the Plaintiff has not first sued the principal debtor. This question is answered accordingly.

39. Moreover, if the foreign law which is sought to be enforced is not in conflict with Indian law, the same is liable to be recognised. Article 1078 of the UAE Civil Code reads as under: -

"Article 1078

1) The obligee may claim against the principal obligor or the surety, or may claim

against them both.

2) If the surety has a surety the obligee may claim against either of them as he wishes

3) provided that if he makes a claim against one of them, his right to claim against the others shall not lapse"

40. The said position is similar to Section 128 of the Indian Contract Act, 1872 which reads as under: -

"128. Surety's liability. - The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract."

41. In Industrial Investment Bank of India Limited vs. Biswanath Jhunjhunwala, 2009 (9) SCC 478 the Supreme Court agreed with the judgment of a 3-judge bench of the Supreme Court in Bank of Bihar Limited vs. Dr. Damodar Prasad and Anr., AIR 1969 SC 297 wherein the Court had held as under:-

"6.... The very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety. In the present case the creditor is a banking company. A guarantee is a collateral security usually taken by a banker. The security will become useless if his rights against the surety can be so easily cut down."

Further, the judgment in Industrial Investment Bank (supra) also relied upon Pollock and Mulla, the relevant extract of the judgment reads as under:-

"18. The term "coextensive" has been defined in the celebrated book of Pollock & Mulla on Indian Contract and Specific Relief Act, 10th Edn., at p. 728 as under:

"Coextensive.-Surety's liability is coextensive with that of the principal debtor.

A surety's liability to pay the debt is not removed by reason of the creditor's omission to sue the principal debtor. The creditor is not bound to exhaust his remedy against the principal before suing the surety, and a suit may be maintained against the surety though the principal has not been sued."

42. Though the interpretation of Article 1078 of the UAE Civil Code, finally, has to be determined after evidence is led, the Court at the stage of leave to defend has to consider the triability of the issues raised.

43. In IDBI Trusteeship Services Limited vs. Hubtown Limited, (2017) 1 SCC 568, the Supreme Court on the question of leave to defend has settled the legal position which is as under: -

"16.The position in law now is that the trial Judge is vested with a discretion which has to result in justice being done on the facts of each case. But Justice, like Equality, another cardinal constitutional value, on the one hand, and arbitrariness on the other, are sworn enemies. The discretion that a Judge exercises under Order 37 to refuse leave to defend or to grant conditional or

unconditional leave to defend is a discretion akin to Joseph's multi-coloured coat - a large number of baffling alternatives present themselves. The life of the law not being logic but the experience of the trial Judge, is what comes to the rescue in these cases; but at the same time informed by guidelines or principles that we propose to lay down to obviate exercise of judicial discretion in an arbitrary manner. At one end of the spectrum is unconditional leave to defend, granted in all cases which present a substantial defence. At the other end of the spectrum are frivolous or vexatious defences, leading to refusal of leave to defend. In between these two extremes are various kinds of defences raised which yield conditional leave to defend in most cases. It is these defences that have to be guided by broad principles which are ultimately applied by the trial Judge so that justice is done on the facts of each given case.

17. Accordingly, the principles stated in para 8 of Mechelec case [Mechelec Engineers & Manufacturers v. Basic Equipment Corpn., (1976) 4 SCC 687] will now stand superseded, given the amendment of Order 37 Rule 3 and the binding decision of four Judges in Milkhiram case [Milkhiram (India) (P) Ltd. v. Chamanlal Bros., AIR 1965 SC 1698 : (1966) 68 Bom LR 36] , as follows:

17.1. If the defendant satisfies the court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit.

17.2. If the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend.

17.3. Even if the defendant raises triable issues, if a doubt is left with the trial Judge about the defendant's good faith, or the genuineness of the triable issues, the trial Judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security.

17.4. If the defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.

17.5. If the defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith.

17.6. 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."

44. As per the above settled legal position, the Court, depending upon the facts and circumstances of each case and the genuineness of the defence raised can either: -

- (i) Grant unconditional leave to defend.
- (ii) Direct payment into the Court for furnishing of security.
- (iii) Impose conditions in respect of the trial of the suit.
- (iv) Decree the suit.
- (v) Dismiss the suit.

45. In the present case, the admitted position is that the Defendant does not dispute the execution of the facility agreement and the personal guarantee. He does not even dispute the fact that he availed of the facility and that he has received the monies disbursed by the Plaintiff. Most of the objections raised in the leave to defend application are objections which are legal and technical in nature - like limitation, which would require adjudication. In the leave to defend application the Defendant admits the execution of the agreement and deed of guarantee in several places. Two such non-exhaustive extracts are set out below:-

"4. That the present Suit filed by the Plaintiff is not maintainable for want of jurisdiction and this Hon'ble Court lacks jurisdiction to entertain and try the present suit against the Defendant. The Plaintiff has referred and relied upon a Murabaha Facility Agreement dated 02.05.2016 (hereinafter referred to as the "Agreement") executed between Plaintiff and Met Trade UAE FZC (the "Principal Borrower") and a Deed of Guarantee dated 02.05.2016 executed by the Defendant (hereinafter referred to as the "Guarantee"). Admittedly, both the aforesaid documents were executed at UAE. The Agreement as well as the Guarantee are agreed to be governed by laws of United Arab Emirates (UAE) with the Courts of Dubai (excluding the courts of the Dubai Financial Centre) having jurisdiction to hear all disputes related to the Agreement and the Guarantee.

....

15. The Plaintiff has also concealed that as against the approved limit of USD 20 Million, the Plaintiff allowed the Principal Borrower to only avail the limit upto USD 13.57 Million, thus, abruptly curtailing the limit of US\$ 6.43 Million resulting in the blockage of working capital of the Principal Borrower with its customers."

46. The conduct of the Defendant has also not been above board. The initial order was passed on 21st May, 2018 directing disclosure of all the assets of the Defendant. The affidavit which was purportedly filed in compliance of the said

order was completely cryptic and did not make the requisite disclosures. A further affidavit was directed to be filed by this Court which was challenged by the Defendant before the Division Bench. After the order of the Division Bench dated 3rd April, 2019 the Defendant filed a further affidavit disclosing the assets in the following manner:

STATEMENT OF ASSETS ON 31/07/2018

S. No.

PARTICULAR

AMOUNT (IN RS)

A

IMMOVABLE PROPERTIES

NIL

B

MOVEABLE PROPERTIES & ASSETS

NIL

C

BANK ACCOUNTS

1

BANDHAN BANK LTD

18,916

A/C NO 50170005717839 SURYA KIRAN BUILDING, KG MARG NEW DELHI-110001

2.

KOTAK MAHINDRA BANK

1,827,477

A/C- 7011818181 AMBADEEP BUILDING, KG MARG NEW DELHI-110001

D

DEMAT ACCOUNT

NIL

E

FUNDS (MUTUAL FUNDS)

NIL

F

INVESTMENTS IN SHARES

DETAIL

NO OF SHARES

PAR VALUE

BOOK VALUE

1

METENERE LIMITED

49,608,575

Rs.1/

NIL

2

METENERE GLOBAL LTD

260,412

Rs.100/-

NIL

3

RELIANCE PETROLEUM LTD

17

Rs.10/-

9,600

4

MET TRADE UAE

45

AED 1000

NIL

G

BONDS AND OTHER ASSETS

NIL

STATEMENT OF ASSETS ON 31/03/2019

S. No.

PARTICULAR

AMOUNT (IN RS)

A

Immovable Properties

NIL

B

MOVEABLE PROPERTIES and Personal effects

2,50.000

C

BANK ACCOUNTS

1

Kotak Mahindra Bank

1,34,521

A/C NO 7011818181 Ambadeep Building, Kg Marg New Delhi - 110001

D

DEMAT ACCOUNT

E

FUNDS (MUTUAL FUNDS)

F

INVESTMENT IN SHARES

DETAIL

NO OF SHARES

Investment Value

1.

METENERE LIMITED

4,96,08,575

5,15,24,000

2.

METENERE GLOBAL LTD

2,60,412

10,00,500

3.

RELIANCE PETROLEUM LTD

17

13,920

4.

MET TRADE UAE

4,500

62,382

G

BONDS AND OTHER ASSETS

NIL

LIST OF CASES INITATED BY BANKS

S.No

Case Title

Case No./Tribunal

Recovery Amount (INR) (IN CRORES)

1.

PNB Vs Metenere Ltd. and Ors.

OA No. 1475/18- DRT, Delhi

220.93

2.

IDBI Bank Limited Vs Metenere Ltd. and Ors.

OA No. 718/2018- DRT Delhi

190.34

3.

Dena Bank Limited Vs Metenere Ltd. and Ors.

OA No 1483/2019- DRT, Delhi

230.57

4.

Laxmi Vilas Bank Vs Metenere Ltd and Ors

OA No. 22/2019- DRT, Delhi

57.82

A perusal of the above two assets lists and the list of cases initiated by banks shows that the Defendant had not initially come clean with the Court. Even now, the Defendant has not disclosed fully as to who are the shareholders of M/s Metenere Limited and Metenere Global Limited etc. The values of these investments, assets owned by the companies etc. are also not clear. The companies appear to be family owned companies/ the shareholding of these companies has also not been disclosed. At this stage, it is not even clear as to, if any assets of the Defendant have been transferred to these companies. However, considering the overall facts, certain directions would have to be issued.

47. In the light of the above admissions by the Defendant, it is clear that the Defendant is not entitled to unconditional leave to defend. The execution of the first agreement, the extension of the same to additional amounts, the signatures on the same, are all admitted. The objection as to jurisdiction which is one of the main planks of the Defendant's case is also not tenable as held above. The grievance of the Defendant is, in fact, to the effect that further 6 million USD which were to be disbursed, were not disbursed which led to stoppage of transactions of the Plaintiff.

48. Thus, out of total agreed facility of 20 million USD 14,281,414.56 has been extended to the Defendant which remains unpaid. The principal borrower being a company of which the Defendant himself was a promoter, director/shareholder and the Defendant himself being the personal guarantor for the facility, it is clear that the Defendant is not entitled to unconditional leave to defend. The Defendant's assets are not clear and it is also not clear as to whether he would be in a capacity to pay back the money which he guaranteed to the Plaintiff. The liability of the Defendant stands admitted at this stage, subject to the issues of foreign law, being adjudicated. Question as to whether the Plaintiff is entitled to interest, if any, and at what rate would be adjudicated at the final stage. The principal amount however deserves to be secured. As held in IDBI Trusteeship (supra), this Court upon weighing the relative merits is of the opinion that, conditional leave to defend deserves to be granted to the Defendant on the following terms:

(i) The Defendant shall deposit a sum of USD 14,281,414.56 converted in Indian Rupees (INR) at the exchange rate prevalent on the date of judgment.

(ii) The said amount shall be deposited with the Registrar General of this Court within a period of ten weeks.

(iii) Subject to the above deposit being made, the written statement shall be filed by the Defendant within thirty days from the date of deposit.

49. The amount so deposited by the Defendant shall be retained in an interest-bearing FDR. I.As. 13231/18 and 8652/18 are disposed of. The observations made above are prima facie and shall not bind the final adjudication.

I.A. 7036/2018 (u/O XXXIX Rules 1 & 2 CPC)

50. By this application, the Defendant was directed to disclose all the moveable and immovable properties, in respect of which orders dated 21st May, 2018 and 14th March, 2019 were passed. Since the Defendant has now disclosed some of the assets, it is directed that during the pendency of the present suit, there shall be an injunction restraining the Defendant from in any manner selling, alienating, dispossessing or creating any third party interest in respect of his immovable properties, movable properties, bank accounts, investments in shares in M/s. Metenere Limited, Metenere Global Limited, Reliance Petroleum Limited, Met Trade UAE and any other assets which may or may not have been disclosed in the present suit.

51. The I.A. is disposed of.