

(2019) 09 CAL CK 0039

In the Calcutta High Court

Case No : Appeal From Decree (APD) No. 241 Of 2017 With Civil Suits (CS) No. 76 Of 2007

Srei Capital Markets Ltd

APPELLANT

Vs

Gridco Ltd

RESPONDENT

Date of Decision : 13-09-2019

Acts Referred:

Evidence Act, 1872 — Section 114(g)
Indian Contract Act, 1872 — Section 49
Negotiable Instruments Act, 1881 — Section 70
Limitation Act, 1963 — Section 14, 14(2)
Commercial Courts Act, 2015 — Section 2(c)(i)
Code Of Civil Procedure, 1908 — Order 7 Rule 10

Citation : (2019) 09 CAL CK 0039

Hon'ble Judges : Soumen Sen, J;Ravi Krishan Kapur, J

Bench : Division Bench

Advocate : S.N. Mitra, Anuj Singh, S. Ghosh, Debdt Mukherjee

Final Decision : Partly Allowed

Judgement

Soumen Sen, J

The appeal is directed against the judgment and decree dated 8th September, 2016 in a suit for recovery of money on account of fees allegedly remaining unpaid for service rendered.

The learned Single Judge on the basis of the pleadings has framed five issues which are as follows:

"1. Whether this Hon'ble Court has any jurisdiction to entertain the present suit or the suit is otherwise maintainable, as framed or at all?

2.Was the syndication fees as payable to the plaintiff dependent upon the amount actually received by the defendant, as alleged in the written statement and particularly in paragraph 12 thereof?

3. Did the plaintiff not perform its obligations under the contract between the parties, as alleged in paragraph 15 of the written statement?
4. Did not the financier make disbursement of any portion of the second tranche of the said sum of Rs.300 crores in spite of the request of the defendant and was the plaintiff fully aware of the same, as alleged in the paragraph 19 of the written statement?
5. What relief, if any, is the plaintiff entitled to?"

The learned Single Judge has decided the issue no.2 first and thereafter issue no.1. We have invited the parties to first address us on issue no.1 since if it is decided in favour of the plaintiff/appellant, there would be no necessity to decide issue no.2. The learned Single Judge decided issue no. 2 against the appellant.

Unnecessary facts not relating to the issue no.1 are not required to be stated and accordingly we state only the facts that are necessary to decide the said issue.

The defendant floated a tender for selecting its merchant banker for the purpose of syndication of loan facilities to be availed of by the defendant. The plaintiff/appellant participated in the tender and was appointed as merchant banker being the second lowest tenderer for mobilisation of a term loan to the tune of Rs. 300 crores. The defendant by a letter dated 2nd June, 2003 communicated its acceptance of the tender from its office at Bhubaneswar to the office of the plaintiff at 86C Topsia Road (South), Vishwakarma, Kolkata -700 046, outside the jurisdiction of the Court. The mode of payment was through Escrow mechanism. The plaintiff in acknowledgement of the letter dated 2nd June, 2003 confirmed its acceptance to undertake the mandate offered by the defendant by a letter dated 5th June, 2003 issued from its registered office at Viswakarma 86C Topsia (South), Kolkata. In the said communication, the plaintiff called for certain clarification and/or information. The defendant was requested to forward a line of confirmation in all the matters mentioned in the said letter. The defendant from its office at Bhubaneshwar by a letter dated 19th June, 2003, addressed to the defendant at its registered office at Topsia, provided certain information in relation to the said contract. However, the said arrangement was cancelled by letter dated 2nd August, 2003 by GRIDCO followed by letter of the dated 2nd August, 2003 addressed to the plaintiff at its registered office at Topsia regarding mandate for term loan syndication for an amount of Rs.600 crores. The defendant requested the plaintiff that if the plaintiff was agreeable to the terms, they must communicate their acceptance. The said terms and conditions were accepted by the plaintiff at its registered office at Topsia. Thereafter on 3rd November, 2003 the defendant requested the plaintiff to take necessary steps for raising of funds and rating of the issue as per the mandate letter. This was followed by a letter dated 10th November, 2003 and few other communications from HUDCO regarding financial assistance of term loan of Rs.600 crores to plaintiff and defendant at their respective registered office. On 3rd February, 2004 a joint meeting was held between the plaintiff, defendant and the

representative of the HUDCO at the office of HUDCO at Bhubaneshwar. The extension of mandate for term loan syndication was issued by the defendant sent to the plaintiff at its registered office. On 31st March, 2004 plaintiff raised a bill towards syndication fees payable in terms of GRIDCO letter dated 2nd August, 2003 for term loan syndication for an amount of Rs.600 crores. The said bill was issued by the plaintiff from its registered office at Topsia and sent to the defendant at its office at Bhubaneshwar. The defendant in response to the said letter informed the plaintiff that they have already delivered the cheque drawn on Union Bank of India towards ad hoc payment for loan syndication as per details mentioned therein. The said letter was addressed to the plaintiff at its registered office and received by the plaintiff at its registered office. Thereafter on 10th April, 2004 the plaintiff issued a letter from its registered office at Topsia to the defendant regarding arranger fees on Rs. 300 crores. In the said letter, the plaintiff raised a demand for payment of Rs.40.80 lakhs on account of service tax.

This was followed by a letter dated 20th July, 2004 from plaintiff's registered address to the defendant, requesting the defendant to ensure withdrawal of the balance amount at an early date since the balance fees had remained outstanding in spite of the sanction letter issued by HUDCO in favour of GRIDCO for the entire term loan amount of Rs.600 crores. The defendant was further reminded that the payment of service tax amounting to Rs.40.80 lakhs had still not been released by the defendant.

GRIDCO by a letter dated 22nd July, 2004 requested HUDCO to consider the loan for the purpose of swapping on bonds which are in the nature of long term loans payable to power suppliers. The copy of the said letter was sent to the plaintiff at its registered office at Topsia. The same was followed by a further letter dated 4th September, 2004 addressed to HUDCO with a copy marked to the plaintiff. On 23rd September, 2004 GRIDCO requested HUDCO to consider the redemption of LIC loan in relation to other loans mentioned in its letter dated 4th September, 2004. The said letter was marked to plaintiff and received by the plaintiff at its registered office. This was followed by a series of letters between the defendant and HUDCO concerning the term loan of Rs.600 crores and copies of all such letters were marked to plaintiff. All these communications have been received by plaintiff at its registered office at Topsia. On 8th October, 2004 the plaintiff issued a letter regarding availing of term loan for the balance of Rs.300 crores from HUDCO in which the plaintiff requested the GRIDCO to execute the necessary guarantee demand favouring HUDCO and during the matter on top most priority basis. This was followed by

series of communication between the plaintiff and the defendant between 10th November, 2004, 10th March, 2005 and 5th May, 2005. On 10th March, 2005 the plaintiff requested the defendant to release their commission in connection of syndication of term loan of Rs.600 crores. This was followed by further letter dated 5th May, 2005 by which similar demand was made. This letter demanding payment like all other previous letter were issued by the plaintiff from its

registered officer at Topsia to the defendant at his officer at Bhubaneswar.

On 12th February, 2007, for the first time, the plaintiff requested the defendant to send the payment directly to its Branch Office. The address of the branch office is 6A Kiran Sankar Roy Road, Kolkata-700001. This branch office is situated within the jurisdiction of this Court. The defendant did not make any payment. In view of failure to pay the amount, a legal notice was issued. In spite thereof, payment was not made. On the basis of such facts, the plaintiff filed a suit for recovery of money, seeking leave under Clause 12 of the Letters Patent. The plaintiff in paragraph 23 has pleaded that the cause of action in the suit has arisen both outside and/or within the jurisdiction "inasmuch as the defendant failed to make payment of the agreed amount at the office of the plaintiff within jurisdiction of this Hon'ble Court and that discussion relating to the matter was also held at the office of the plaintiff within jurisdiction of this Hon'ble Court. Such breaches have been committed by the defendant from their place of business outside the jurisdiction and as such the plaintiff prays for leave under Clause 12 of the Letters Patent to be granted."

Mr. S.N. Mitra, the learned senior counsel appearing on behalf of the appellant, has submitted that the plaintiff has examined one Mr. Subrata Ghosh, one of its directors and advisors, who has proved the case of the plaintiff and has accepted the document which were marked as Exhibits "A" to "X". On behalf of the defendant, no evidence was led; and in view of such uncontroverted statement, the learned judge ought not to have returned a finding in favour of the defendant regarding the jurisdiction of this Court to try and determine the suit. The learned Senior Counsel has relied upon the decision reported in *Pranballav Saha v. Tulshi Bala Dassi* reported at 1963 CWN 258 and *Vidyadhar v. Manikrao* reported at (1999) 3 SCC 573 (paragraph 16 and 17) as well as on Section 114(g) of the Evidence Act 1872 to submit that in absence of the defendant leading any evidence to the contrary, the case made out by the plaintiff with regard to the syndication fees should have been accepted. Mr. Mitra has drawn our attention to paragraph 18 of the plaint and submits that the sole witness of the plaintiff has stated, in his examination-in-chief, in answer to question no. 148 that the statements made in paragraph 18 of the plaint are true and correct. The defendant did not cross-examine the witness of the plaintiff on such issue.

Paragraph 18 of the plaint and question no.148 of the witness relied upon by Mr. Mitra read as follows:-

Para 18 of the plaint - "18. In view of the fact that no payment was received the matter was discussed in between the representatives of the parties at the office of plaintiff at 6A, Kiran Shankar Roy Road, Kolkata when assurances were given but in spite thereof no payment was made by the defendant to the plaintiff towards its admitted liability under the agreement. As a result whereof a notice was issued by the Ld. Advocates for the plaintiff on March 14, 2007 as will be appearing from a copy of the said notice being annexed hereto and marked with the letter "AA" but in spite thereof the defendant has not made any payment in

respect of the said balance portion of syndication of loan arranged by the plaintiff as the merchant banker of the defendant which is an admitted debt in spite of the illegal wrongful denial by the defendant."

Question No. 148/ and its answer - "148. Kindly come to paragraph 18 of the plaint - are the statements made therein and the subsequent paragraphs true and correct?/ Yes."

The learned Senior Counsel has also relied upon a decision of the Hon'ble Supreme Court in Muddasani Venkata Narsaiah v. Muddasani Sarojara reported at (2016) 12 SCC 288 (paragraphs 15 and 16) with regard to the effect of non cross-examination of a witness. It is submitted that the learned Single Judge although has relied upon Oil & Natural Gas Commission v. Utpal Kumar Basu and Ors. reported at (1994) 4 SCC 711 but has failed to take into consideration paragraph 6 of the judgment, which reads -

"6. It is well settled that the expression "cause of action" means that bundle of facts which the petitioner must prove, if traversed, to entitle him to a judgment in his favour by the Court. In Chand Kour v. Partab Singh' Lord Watson said:

"... the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the ground set forth in the plaint as the cause of action, or, in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour."

Therefore, in determining the objection of lack of territorial jurisdiction the court must take all the facts pleaded in support of the cause of action into consideration albeit without embarking upon an enquiry as to the correctness or otherwise of the said facts. In other words the question whether a High Court has territorial jurisdiction to entertain a writ petition must be answered on the basis of the averments made in the petition, the truth or otherwise `jurisdiction must be decided on the facts pleaded in the petition. Therefore, the question whether in the instant case the Calcutta High Court had jurisdiction to entertain and decide the writ petition in question even on the facts alleged must depend upon whether the averments made in paragraphs 5, 7, 18, 22, 26 and 43 are sufficient in law to establish that a part of the cause of action had arisen within the jurisdiction of the Calcutta High Court."

It is submitted that the learned Single Judge has erroneously held that the plaintiff cannot rely upon the principle that a debtor must seek the creditor, if it is demonstrated that the creditor had accepted payment at a place other than the place where it is suing. The learned Senior Counsel has referred to a decision of Madhya Pradesh High Court in J.N. Sahni v. State of Madhya Pradesh reported at AIR 1954 Madh. B 184 (FB) to contend that part payment made at a place did not decide the place of payment.

Mr. Mitra has strenuously argued that although the learned Single Judge took

into consideration the letter dated 12th February, 2007 by which the plaintiff had requested the defendant to send payment at the Branch Office of the plaintiff within the territorial jurisdiction of this Court, the learned Single Judge had failed to take into consideration the fact that by the said letter, the plaintiff had fixed the place of payment which was to be made by the defendant, which definitely gave the plaintiff a part of the cause of action within the jurisdiction of this Hon'ble Court. It is submitted that the finding of the learned Single Judge that it can be inferred from the correspondence exchanged between the parties that no discussion took place between the parties within the territorial jurisdiction of this Hon'ble Court, is also erroneous. It is submitted that from the evidence on record, no such inference could be drawn. As stated above, the oral evidence of the plaintiff's witness remained uncontroverted, either by way of cross-examination or by production of any witness of the defendant.

It is argued that though it is nobody's case that no negotiation took place within the territorial jurisdiction of this Court and the Branch Office of the plaintiff was never involved in the process of negotiation yet the learned trial judge has held otherwise. The learned Judge further erroneously held that because the defendant had paid the plaintiff at a place outside the jurisdiction of this Court and the plaintiff has not led any evidence to establish that any payment was made by the defendant to the plaintiff at a place within the territorial jurisdiction of this Court, this Hon'ble Court lacked jurisdiction to receive, try and determine the suit.

Mr. Mitra has submitted that courts have consistently held that even when a small fraction of cause of action accrues within the jurisdiction of a Court, the Court will have the jurisdiction in the matter. In this connection, reference has been made to *D. Munirangappa v. Amidayala Venkatappa* reported at AIR 1965 Mysore 316 (Para 4), *Ujjal Talukdar v. Netai Chand Kole* reported at AIR 1969 Calcutta 224 (Para 17), *A.B.C. Laminart Pvt. Ltd. v. A.P. Agencies* reported at AIR 1989 Supreme Court 1239 (Para 15) and *Kusum Ingots & Alloys Ltd. v. Union of India* reported at (2004) 6 SCC 254 (Para 6 to 10).

It is submitted that the only ground on which the issue of wrong place of suing becomes of substantial importance is when such wrong place of suing might have resulted in a failure of justice. It is stated that this is not the case of the defendant. The trial of the suit before this Hon'ble Court cannot be termed to have resulted in failure of justice by the defendant. In support of such proposition, the plaintiff has relied upon a judgment of the Supreme Court in *Pathumma v. Kuntalan Kutty* reported at (1981) 3 SCC 589 (paragraphs 5 and 6).

In view of the aforesaid Mr. Mitra submits that the impugned judgment and decree dated September 8, 2016 is liable to be set aside.

The learned Counsel for the respondent has supported the judgment and has submitted that the appellant has failed to prove that any discussion as alleged by the plaintiff in paragraph 18 and 23 of the plaint indeed took place.

We have perused the pleadings and the evidence on record. From the events narrated above, read with the pleadings and the evidence, there cannot be any doubt that the formation of the contract, execution thereof and performance of the contract had all taken place outside the jurisdiction of this Court. All the payments prior to the letter dated 12th February, 2007 were received by the plaintiff at its registered office. All the letters of demand prior to 5th May, 2005 were issued by the plaintiff from its registered office at Topsia. It was for the first time, on 12th January, 2007 the plaintiff directed the defendant to make payment at its branch office at 6A Kiron Shankar Roy Road, Kolkata obviously with the intention to create a jurisdiction of this Court. The plaintiff thought that the High Court in its original side would be more competent to decide the issue rather than the district court. The branch office of the plaintiff at no point of time was involved in the transaction. The defendant was required to discharge his obligation by making payment at the registered office of the plaintiff and not in any other place. This is the only conclusion that can be drawn from the pleadings and the evidence.

Mere discussion at the branch office situated within the jurisdiction of this court cannot create a jurisdiction. The evidence with regard to promise to pay at branch office in place of the registered office is not believable and acceptable in view of the fact that all payments in the past have been paid and received at the registered office of the plaintiff at Topsia. There has to be an agreement between the parties that the defendant is no more required to discharge its obligation at the registered office but at some other place. This evidence is lacking. Unlike a branch office of a bank which has often been regard as very distinct for many special purposes although it is in fact an agency of the principal banking corporation, in the instant case, the branch office does not assume any such importance (See *Hansraj Bajaj v. Indian Overseas Bank* reported at AIR 1956 Cal 33, *Agencia Commercial International Ltd. & Ors. v. Custodian of the Branches of Banco Nacional Ultramarino* reported at AIR 1982 SC 1268 (paragraph 14), *Chainrup Sampatram v. Punjab & Sind Bank* reported at (2009) 1 Cal LJ 199 (FB)).

In a matter like the present one, the carrying on of business within the jurisdiction of this court by the plaintiff is of no consequence unless a part of the cause of action also arises here. Clause 12 of the Letters Patent gives this court its jurisdiction. For the purpose of jurisdiction the Court needs to find out whether the High Court under Clause 12 of the Letters Patent has the territorial jurisdiction to try and entertain the suit. The considerations for the court under clause 12 are quite well settled. Clause 12 of the Letters Patent states -

"12. Original jurisdiction as to suits. - And we do further ordain, that the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try and determine suits of every description, if, in the case of suits for land or other immoveable property, such land or property shall be situated, or in all other cases if the cause

of action shall have arisen, either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court, or if the Defendant at the time of the commencement of the suit shall dwell, or carry on business, or personally work for gain within such limits; except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Calcutta, in which the debt or damage, or value of the property sued for, does not exceed One hundred rupees."

In *Muttra Electric Supply Co. Ltd. Vs. Gopal Saran* reported at 59 CWN 419 the scope of Clause 12 has been succinctly stated by Justice P.B. Mukharji, J. a former Chief Justice of this Court and an eminent jurist in the following words:-

"The basic character of the jurisdiction of this Court under clause 12 of the Letters Patent requires a more thorough investigation than it has received so far. Under this clause there is first a grant of power to this Court to receive, try and determine suits of every description. Then there is a broad classification of such suits into two divisions. The first classification is concerned with suits for land and immovable property and the second classification is with regard to other suits. Regarding the first class of suits relating to land and immovable property the limitation of jurisdiction of this Court is that such land or immovable property must be situated within its jurisdiction. Regarding the second class of suits other than those for land and immovable property the first limitation is that the cause of action must arise wholly within its jurisdiction. Then this clause deals with those cases where part of the land or part of the cause of action is outside the jurisdiction of this Court. It is here that the leave of this Court has first to be obtained before the suit can be instituted in this Court, with the one exception where the defendant at the time of the suit dwells or carries on business or personally works for gain within the jurisdiction of the Court.

A close scrutiny of this clause, therefore, reveals that there are certain total and absolute jurisdictions of this Court. They are where the whole of the land or immovable property is situated within its jurisdiction when the suit is for such land or immovable property. That is also the case where the whole of the cause of action arises within the jurisdiction of the Court in suits other than suits for land and immovable property. Also that is the case in such cases where the defendant at the time of the institution of the suit dwells or carries on business or personally works for gain within the jurisdiction of this Court irrespective of the fact where the cause of action arises. These three are the categories of total and absolute jurisdiction of the Court under the grant of power in clause 12 of the Letters Patent. No question of the litigant having to take the leave of the Court arises in these three cases. So long as the litigant satisfies the test laid down in these three cases his right to institute the suit in this Court is absolute and unfettered. The court can neither assume nor renounce such jurisdiction.

But then there is another class of jurisdiction which this Court can avail under clause 12 of the Letters Patent where the reality or the cause of action is not

wholly but only partly within its jurisdiction. It is an inchoate jurisdiction which comes into action upon the Court granting the leave to institute the suit. It is the nascent jurisdiction which lies dormant in this Court and can only be put into life and operation by an act of the Court in granting leave to institute the suit. No act of the Court is necessary to assume jurisdiction in those three cases, which I have just described where the jurisdiction is total and absolute. There the Court in its inception is invested with jurisdiction. But here the Court has to acquire it. Here the jurisdiction does not depend only on the fact of the Court but also on the act of the Court."

The circumstances under which a suit under Clause 12 of the Letters Patent would lie has been elaborately discussed in Chainrup Sampatram Vs. Punjab & Sind Bank reported at 2009 (1) CHN 346 (FB) at Paragraph

24, which reads:-

"24. There are three limbs to Clause 12 of the Letters Patent: the first limb covers suits for land or other immovable property, which is not germane for the present purpose; the second limb speaks of the place of accrual of the cause of action in the suit, requiring no previous leave if the cause of action arises wholly within jurisdiction but requiring previous leave if only a part - however infinitesimal or significant - of the cause of action arises within jurisdiction; and, the third is the situs of the Respondent at the time of commencement of the suit. A suit for land (or other immovable property) stands on a different pedestal and it is unnecessary to go into that aspect of Clause 12 here. But in a suit which is not a suit for land (or other immovable property) the appellant has a choice of invoking the jurisdiction of this Court on either of the two remaining limbs of Clause 12. If there is a solitary Respondent in a suit which is not a suit for land (or other immovable property), the appellant may unquestionably institute it on the Original Side of this Court if the entirety of the cause of action arises within the original jurisdiction of the Court and irrespective of where the Respondent may dwell or carry on business or personally work for gain. If there is a solitary Respondent in a suit which is not a suit for land (or other immovable property), the appellant may institute it on the original side of this Court if a part of the cause of action arises within the original jurisdiction of this Court irrespective of where the Respondent may dwell or carry on business or personally work for gain, subject, however, to obtaining prior leave under Clause 12 to institute the suit. If there is a solitary Respondent in a suit which is not a suit for land (or other immovable property), the appellant may institute it on the original side of this Court if the Respondent, at the time of the commencement of the suit, dwells or carries on business or personally works for gain within the original jurisdiction of this Court, irrespective of where the cause of action may be arisen. The second and third limbs of Clause 12 that cover suits other than suits for land (or other immovable property) are, in a sense, mutually exclusive; in that the appellant has the choice of either founding territorial jurisdiction on situs of cause of action or on location of the Respondent at the time of commencement

of the suit. In a suit other than a suit for land (or other immovable property) where the appellant sues more than one Respondent, either of the last two limbs of Clause 12 of the Letters Patent has to be satisfied in respect of each Respondent in the suit for the action to be launched on the Original Side of this Court."

The plaintiff has invoked the general rule that debtor must seek the creditor should apply in the present case on the basis of the averment made in paragraph 18 read with paragraph 23 of the plaint. The general rule is that 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 pay him at the place where he is when the money is payable (See *State of Punjab v. A.K. Raha (Engineers) Ltd.* reported at AIR 1964 Cal 418). It is clear from the evidence herein that the money was payable at the registered office of the plaintiff and not at any other place.

The demand for payment was made from the registered office of the plaintiff. Although the place of payment is not clearly mentioned in the contract, it can be safely concluded from the nature and terms of the contract and the conduct of the parties, by necessary implication, that the debt was required to be discharged at the registered office of the plaintiff at Topsia. The rule that debtor must seek the creditor is not applicable to a promissory note payable on demand (See *Jagadish Chandra Sikdar v. Santimoyee Choudhuri* reported at AIR 1961 Cal 321 and W.P.

Horsburgh v. Chandroji Sambajirao reported at AIR 1957 MB 90); and on such principle, the judgement cited by the learned senior counsel of the Madhya Bharat High Court in *J.N. Sahni (supra)* can be distinguished. Moreover, in *J.N. Sahni (supra)*, it was held that the onus of proving that the money was payable at a particular place, and therefore the court had the jurisdiction of entertaining the suit, was on the plaintiff. It further held that no adverse inference could be drawn against the defendant for not having examined any witness who might have been a material witness to prove the place of payment. In paragraphs 6 and 11 of the said report, it has been observed that there is no room for applicability of the English common law rule of "debtor must seek the creditor" to a promissory note payable on demand and which is not payable at a specified place. It was further held that, moreover, section 49 of the Contract Act can have no applicability to negotiable instruments since section 70 of the Negotiable Instruments Act itself lays down the rule as to the place of payment where the negotiable instrument does not specify it.

On such consideration, we do not find any merit in the appeal with regard to the jurisdiction of this court to try, receive and adjudicate the claim of the plaintiff.

However, we agree with the submission made by Mr. Mitra, learned senior counsel appearing on behalf of the appellant, that once the court arrives at a finding that the court does not have the territorial jurisdiction to try the suit, any

decision on any other issues would be without jurisdiction and a nullity. If this court has no jurisdiction to entertain the suit, then the learned Single Judge has no jurisdiction to hear the suit on merits. Accordingly, the decision on issue no. 2 is set aside. We refrain from making any observations on the merits of issue no. 2 for the obvious reason that this court has no jurisdiction to decide issue no. 2 on merits.

The question arises as to from what stage the fresh trial would take place. The learned counsel on behalf of the respondent has relied upon the decision of the Supreme Court in *ONGC Ltd. v. Modern Construction & Co.* reported at (2014) 1 SCC 648, in which it is observed that once the plaint is presented, it is to be treated as a fresh suit and even if the trial was conducted earlier, as in the instant case, it had to be done *de novo*. The only protection that can be afforded is under section 14 of the Limitation Act and, possibly, adjustment of the court fees paid. However, the learned counsel for the respondent has argued that the plaintiff is not entitled to the benefit of section 14 of the Limitation Act since the plaintiff was not *bona fide* in presenting its case. The learned counsel has placed reliance on para 12 and 13 of the said report, which reads -

"12. Section 14 of the Limitation Act provides protection against the bar of limitation to a person *bonafidely* presenting his case on merit but fails as the court lacks inherent jurisdiction to try the suit. The protection also applies where the plaintiff brings his suit in the right court, but is nevertheless prevented from getting a trial on merits because of subsequent developments on which a court may lose jurisdiction because of the amendment of the plaint or an amendment in law or in case where the defect may be analogous to the defect of jurisdiction.

13. Thus, in view of the above, the law on the issue can be summarized to the effect that if the court where the suit is instituted, is of the view that it has no jurisdiction, the plaint is to be returned in view of the provisions of Order VII Rule 10 CPC and the plaintiff can present it before the court having competent jurisdiction. In such a factual matrix, the plaintiff is entitled to exclude the period during which he prosecuted the case before the court having no jurisdiction in view of the provisions of Section 14 of the Limitation Act, and may also seek adjustment of court fee paid in that court. However, after presentation before the court of competent jurisdiction, the plaint is to be considered as a fresh plaint and the trial is to be conducted *de novo* even if it stood concluded before the court having no competence to try the same."

In the instant case, we are unable to accept this submission on behalf of the respondent that the initiation of the proceeding is not *bona fide*. It is not in dispute that the plaintiff is having a branch office within the jurisdiction of this court. The suit fails as the plaintiff could not prove the oral agreement of promise to pay at the branch office of the plaintiff in lieu of its obligation to make payment at the registered office of the plaintiff. If the plaintiff at the trial could have proved that the representative of the defendant held a discussion at the branch office and had promised to discharge the debt of the defendant at the

branch office, the court would have proceeded with the hearing of the suit. Moreover, immediately prior to the filing of the suit, the plaintiff, by a letter dated 12th February 2007, directed the defendant to send the payment directly at its branch office. However, the plaintiff could not satisfy the learned Single Judge or us that any agreement was reached by and between the parties with regard to the place of payment. Moreover, we find substance in the argument of Mr. Mitra with regard to issue no. 2 but since we are not satisfied with the evidence adduced by the plaintiff in respect of territorial jurisdiction of this court, we have not gone into the merits of the said claim. At the same time we made it clear that this observation shall have no effect when the suit would be heard afresh. The plaintiff has proceeded in good faith in this court but due to defect of jurisdiction is unable to proceed with the trial of the suit.

Under such circumstances, we allow the appeal in part and direct the department to return the original plaint to the Advocate-on-Record of the plaintiff within a week from the communication of this order, after retaining a Photostat copy thereof, in order to enable the plaintiff to present it before the appropriate commercial court having jurisdiction over the Topsis office of the plaintiff as the dispute is a commercial dispute within the meaning of Section 2(c)(i) of the Commercial Courts Act, 2015 of a special value exceeding three lacs within two weeks after the puja vacations. In the event the suit is filed within the aforesaid period before the appropriate commercial Court having jurisdiction, the appellant shall be entitled to the benefit of section 14(2) of the Limitation Act 1963. The original written statement shall also be returned to the advocate on record of the defendant after retaining a Photostat copy thereof in order to enable the defendant to file the same written statement after the suit is filed before the transferee court and notice of it is served upon the defendant. The learned Counsel for the parties have agreed before us that the trial of the suit before the transferee court may proceed on the basis of the pleadings filed in this Court.

However, there shall be no order as to costs.

The department is directed to draw up and complete the decree as expeditiously as possible.