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

% **Order reserved on: 10 February 2023**
Order pronounced on: 06 April 2023

\+ EX.P. 37/2021 & EX.APPL.(OS) 535/2021, EX.APPL.(OS) 536/2021, EX.APPL.(OS) 537/2021

TRANSASIA PRIVATE CAPITAL LIMITED
..... Decree Holder
Through: Mr. Rajshekhar Rao Sr. Adv.
Mr. Raj deep Panda,
Mr. Chitranshul Sinha and
Ms. Akshita Upadhyay, Advs.

versus

GAURAV DHAWAN ..... Judgment Debtor
Through: Mr. D. P. Singh and Mr. Saumay Kapoor, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

O R D E R

EX.APPL.(OS) 1191/2021

1. The present execution petition has been instituted for the enforcement of a foreign judgment dated 16 October 2020 passed by the **High Court of Justice Business and Property Courts of England and Wales Commercial Court (QBD)**[1]. The execution has been lodged in terms of the provisions made in Section 44A of the

[1] High Court of England

Code of Civil Procedure, 1908[2]**.** The judgment debtor has been duly placed on notice and has also filed his objections in these proceedings. For the purposes of sketching a brief background in the context of which the foreign judgment came to be rendered, the following essential facts may be noticed.

2. On 19 July 2017 on the request of one **Phoenix Global DMCC**[3], a company incorporated in the United Arab Emirates, an '*Uncommitted Revolving Trade Finance Facility*' came to be granted by the Asian Trade Finance Fund. For the sake of brevity, the same would be referred to hereinafter as the "First Credit Facility". In terms of the Facility Agreement which came to be executed, Trade Finance Corporation Limited was appointed as the agent and TransAsia Private Capital Limited, the execution petitioner, designated as the manager of Asian Trade Finance Fund for the purposes of the said facility. The Facility Agreement was secured by a Corporate Guarantee furnished by **Phoenix Commodities Private Limited**[4], a company incorporated in the British Virgin Islands.

3. On 17 November 2017, Asian Trade Finance Fund 2 granted another '*Uncommitted Revolving Finance Facility*' to Phoenix UAE. For convenience, the same shall be referred to hereinafter as the "Second Credit Facility". Similar to the process which was followed for the First Credit Facility, Trade Finance Corporation Limited was appointed as the agent and the execution petitioner, the manager of

[2] Code
[3] Phoenix UAE
[4] Phoenix BVI

Asian Trade Finance Fund 2. The Second Facility Agreement was also secured by a Corporate Guarantee furnished by Phoenix BVI. Additionally, and as per the terms of the Second Credit Facility, an **Irrevocable and Unconditional Personal Guarantee**[5] was executed by the judgment debtor. The facility limits under the Second Credit Facility are stated to have been enhanced in January 2018. Both the First as well as the Second Credit Facilities were thereafter renewed on 23 January 2019. On 14 May 2019, the judgment debtor executed another **Personal Guarantee**[6] in respect of the First Facility Agreement.

4. While the aforenoted two facilities were still in force, defaults are stated to have occurred in February and March of 2020. In view thereof, demand letters dated 17 April 2020 came to be issued by the execution petitioner for repayment of all sums due and payable under the First and Second Credit Facilities. The demand, apart from being addressed to the corporate debtor, was also made upon the judgment debtor. On 17 April 2020, the judgment debtor is stated to have sent an email seeking a standstill period of 45 days to assess the entire situation. The said request was not acceded to by the execution petitioner, Asian Trade Finance Fund, Asian Trade Finance Fund 2 and Trade Finance Corporation Limited.

5. Consequent to a failure on the part of the judgment debtor to attend to the demand which stood raised, the execution petitioner issued a letter on 21 April 2020 declaring total indebtedness under the

[5] Second Personal Guarantee
[6] First Personal Guarantee

First Credit Facility of a sum of USD 23,402,785.83/-. Simultaneously, and on 21 April 2020 itself, the execution petitioner raised a demand under the Second Credit Facility calling upon the judgment debtor to produce all documents entitled for securing the total indebtedness. The judgment debtor is stated to have failed to act in terms of those demands.

6. Consequently, and on 29 April 2020, the claim form registered as CL-2020-000257 was submitted by Asian Trade Finance Fund, Asian Trade Finance Fund 2, Trade Finance Corporation Limited and the execution petitioner before the High Court of England. In terms of the aforesaid claim, a sum of USD 23,402,785.83/- was stated to be due and payable under the First Credit Facility and a sum of USD 21,338,131.94/- under the Second Credit Facility. As per the statements of witnesses which came to be recorded and filed before the High Court of England, steps for service upon the judgment debtor was taken as per the following details: -

Document	Date of service	Method of service	Address/ Number	Relevance	Was service acknowledged
Claim form dated 29 April 2020 and response pack comprising of: (i) Acknowledgment of Service form; (ii) Admission form; (iii) Defence and Counterclaim form; (iv) NIC(CC) Notes for defendant	13 May 2020	By WhatsApp messenger **[pp.1-4]**	+971529000084	Mobile number in use by the Second Defendant	No
Claim form dated 29	19	By	Flat 605,	Registered	Yes, by Ms

April 2020 and response pack	May 2020	personally handling it to Ms Parul Rungta, the accountant for the Second Defendant [**p.3**]	Washington Building, Deals Gateway, London SE13 7SE	address of Afri Green Energy Limited and Aakar Investments Limited for which the Second Defendant is a director	Parul Rungta
Claim form dated 29 April 2020 and response pack	19 June 2020	By e-mail [**pp.5-7**]	gaurav@pclworld.net	E-mail address used by the Second Defendant	No
Claim form dated 29 April 2020 and response pack	22 June 2020	By delivering to the offices of Afri Green Energy Limited and Aakar Investments Limited [**p.8**]	33 St.James's Square, London, England, SW1Y4JS	Registered address of Afri Green Energy Limited and Aakar Investments Limited for which the Second Defendant is a director	Yes, by the Second Defendant
Particulars of Claim dated 16 July 2020	16 July 2020	By e-mail [**pp.9-10**]	ceo@pclworld.net, gaurav@pclworld.net	E-mail addresses used by the Second Defendant	No
Particulars of Claim dated 16 July 2020	20 July 2020	By delivering to the offices of Afri Green Energy Limited and Aakar Investments Limited [**p.11**]	33 St.James's Square, London, England, SW1Y4JS	Registered address of Afri Green Energy Limited and Aakar Investments Limited for which the Second Defendant is a director	No, recipient refused to accept delivery. The reception informed the courier that they were no longer instructed to take deliveries for the Second

					Defendant.
Application notice dated 17 July 2020 and exhibits: (i) Witness statement of Kirsty MacHardy dated 17 July 2020 and exhibits (ii) Draft Order	20 July 2020	By e-mail [**pp.12-13**]	ceo@pclworld.net, gaurav@pclworld.net	E-mail addresses used by the Second Defendant	No

7. The record further bears out that service upon the judgment debtor was sought to be affected in accordance with Section 1140 of the **Companies Act, 2006**[7] with the claim being served upon the registered addresses of Aakar Investments Limited and Afri Green Energy Limited. The judgement debtor was a director in both the aforenoted two entities duly incorporated under the Act. It further transpires that service was duly affected in terms of Section 1140 of the Act on 19 May 2020.

8. Two days thereafter, Afri Green Energy Limited and Aakar Investments Limited applied for and obtained a change of address from Flat 605, Washington Building, Deals Gateway, London, SE13 7SE to 33 St. James's Square, London, England, SWlY 4JS. In light of the aforesaid, the claim form is asserted to have been yet again served upon the judgment debtor on 22 June 2020 in terms of Section 1140 of the Act and at the newly registered addresses of the two corporate entities noted above. An application thereafter is stated to have been made before the High Court of England on 17 July 2020 for summary

[7] the Act

judgment being entered. It is the aforesaid application which ultimately came to be allowed by the High Court of England on 16 October 2020 holding the judgment debtor liable to pay a sum USD 47,779,823.02/- together with a sum of GBP 72,741.13/- for costs along with interest at 8%. Certificate for enforcement of the aforesaid judgment in a foreign country in accordance with Section 10 of the Foreign Judgment (Reciprocal Enforcement) Act, 1933 came to be granted on 23 December 2020. The instant execution petition came to be preferred thereafter.

9. The judgment debtor in terms of the objections which have been filed in these proceedings has principally contended that the High Court of England came to render judgment *ex parte* and without due service having been affected upon him. It was contended that at the time when the claim came to be instituted before the High Court of England, the judgment debtor was not ordinarily residing in England so as to enable the said court to have assumed jurisdiction**.** This, according to learned counsel, is without prejudice to the contention of the judgment debtor that the High Court of England in any case could not be construed to be a *"court with jurisdiction"* under the First and Second Personal Guarantees which were executed.

10. Learned counsel appearing for the judgment debtor has also questioned the invocation of Section 1140 of the Act with it being urged that the execution petitioner was bound to follow the procedure as set forth in Para 6 of the **Civil Procedure Rules**[8]. It was

[8] CPR

additionally submitted that the courts in the United Kingdom could not have, in any case, exercised jurisdiction bearing in mind the clauses embodied in the First and Second Personal Guarantees.

11. For the purposes of appreciating the submission which is addressed in this regard, the Court deems it apposite to extract the relevant parts from the First Personal Guarantee dated 14 May 2019 which had been executed in respect of the First Credit Facility: -

> "12. **Notices**
> Every notice, request, demand or other communication under this Guarantee shall:
>
> (A) be in writing delivered personally, by courier, by prepaid letter or by fax;
>
> (B) be deemed to have been received, in the case of a couriered notice or prepaid letter when delivered, and in the case of a fax, when a complete and legible copy is received by the addressee (unless the date of despatch is not a business day or the time of despatch of any fax is after the close of business in United Arab Emirates in which case it shall be deemed to have been received at the opening of business on the next such business day); and
>
> (C) be sent:
>
> (1) in the case of the Lender, in accordance with the details set out in the Finance Agreement; and
> (2) in the case of the Personal Guarantor, to:
>
> 394 Corniche 2 St., Emirates Hill 3rd
> PO Box 49451
> Dubai, United Arab Emirates
>
> Email: gaurav@pclworld.net
> Attention: Gaurav Dhawan"
>
> 14. **Governing law and Jurisdiction**
>
> 14.1 **Governing law**

This Guarantee, and all rights, obligations and liabilities arising out of or in connection with it, shall be governed by and construed in accordance with the laws of the Dubai International Financial Centre.

14.2 **Enforcement**

(A) The courts of the Dubai International Financial Centre shall have exclusive jurisdiction to settle any dispute arising out of or in connection with this Guarantee (including a dispute relating to the existence, validity or termination of this Guarantee or any non-contractual obligation arising out of or in connection with this Guarantee) (a "Dispute").

(B) The Parties agree that the courts of the Dubai International Financial Centre are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary.

(C) This Clause 14.2 is for the benefit of the Lender only. As a result, the Lender shall not be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Lender may take concurrent proceedings in any number of jurisdictions.

14.3 **Waiver of immunity**

To the extent that the Personal Guarantor may in any jurisdiction claim for himself or his assets Immunity from suit, execution, attachment (whether in aid of execution, before judgment or otherwise) or other legal process and to the extent that in any such jurisdiction there may be attributed to itself or its assets such immunity (whether or not claimed), the Personal Guarantor hereby irrevocably agrees not to claim and hereby irrevocably waives such immunity to the fullest extent permitted by the laws of such jurisdiction.

THIS GUARANTEE has been entered into on the date specified at the beginning of this Guarantee."

12. Similar provisions stood incorporated in the Second Personal Guarantee dated 17 November 2017, relevant parts whereof are extracted hereinbelow: -

"19. **Notices**

19.1 **Communications in writing**

Any communication to be made under or in connection with this Deed shall be made in writing and, unless otherwise stated, may be made by fax or letter.

19.2 **Addresses**

The initial administrative details of the Personal Guarantor are contained in the Schedule (Details of the Personal Guarantor) whereas the initial administrative details of the Lender are contained in Part 1 of Schedule *(Initial Administrative Details of the Parties)* of the Finance Agreement, or any substitute address as the Personal Guarantor or the Lender may notify to the other Party by not less than five Business Days' notice.

19.3 **Delivery**

(A) Subject to clause 23.3(A), any communication or document made or delivered by one person to another under or in connection with this Deed will only be effective:

(1) if by way of fax, when received in legible form; or

(2) if by way of letter, when it has been left at the relevant address or five Business Days after being deposited in the post postage prepaid in an envelope addressed to it at that address, and, if a particular department or officer is specified as part of its address details provided under clause 19.2 *(Addresses)*, if addressed to that department or officer.

(B) Any communication or document to be made or delivered to the Lender will be effective only when actually received by the Lender and then only if it is expressly marked for the attention of the department or officer specified in clause 19.2 (Addresses) (or any substitute department or officer as the Lender shall specify for this purpose).

19.4 **English translations**

(A) Any notice given under or in connection with this Deed must be in English.

(B) Where any other document provided to the Lender under the terms of this Deed is not in English, that document must be accompanied by an English translation, certified to be an accurate translation of the original.

(C) The English translation will prevail over the original document unless that document is a constitutional, statutory or other official document.

21. **Governing law and enforcement**

21.1 **Law**

This Deed is governed by Singapore law.

21.2 **Jurisdiction**

(A) The Personal Guarantor irrevocably agrees that the Singapore courts have exclusive jurisdiction and accordingly submits to the jurisdiction of the Singapore courts in relation to any matter arising in connection with this Deed (including regarding their existence).
(B) The Personal Guarantor agrees that the Singapore courts are the most appropriate and convenient courts to settle any matter falling within this Guarantee.
(C) The Lender may, however, bring proceedings in connection with this Deed (including their existence) in any court of competent jurisdiction and, to the extent allowed by law, take concurrent proceedings in any number of jurisdictions.

21.3 **Process agent**

Without prejudice to any other mode of service allowed under any relevant law, the Personal Guarantor:
(A) irrevocably appoints the person named in the Schedule (Details of the Personal Guarantor) from time to time to *receive* on his behalf process issued out of the Singapore courts in connection with this Deed;
(B) agrees that failure by the process agent to notify the Personal Guarantor of the process shall not invalidate the proceedings concerned; and
(C) if this appointment is terminated for any reason, the Personal Guarantor will appoint a replacement agent and will ensure that the new agent notifies the Lender of its acceptance of appointment.

This Deed has been executed as a deed, and it has been delivered on the date stated at the beginning of this Deed."

13. The said guarantee in its Schedule set out details of the judgment debtor as follows: -

"SCHEDULE: DETAILS OF THE PERSONAL GUARANTOR

Personal Guarantor	: Gaurav Dhawan
Country of residence	: Dubai
Country of domicile	: Dubai
Nationality and Passport Number	: Maltese/1295520
Residential address	:VILLA-E95.W SUB METER 394.CORNICHE.2 ST EMIRATES HILL 3RD"

14. Mr. Singh, learned counsel appearing for the judgment debtor, urged that as would be evident from the terms of the aforesaid guarantees, parties had designated the governing law to be that of the Dubai International Financial Centre and the Republic of Singapore respectively. According to learned counsel, in view of the said governing law clauses, the High Court of England could not have possibly either assumed jurisdiction or invoked English law. It was additionally contended that notwithstanding those guarantees incorporating asymmetric jurisdiction clauses, courts in England could not have entertained the claim since no part of the cause of action arose therein and they would thus have had no jurisdiction otherwise in law to rule upon the same. According to Mr. Singh, the aforesaid grounds and objections as taken would clearly fall within the ambit of the exception clauses embodied in Section 13 of the Code and thus rendering the foreign judgment incapable of being executed.

15. Before proceeding further and in order to appreciate the submissions noticed above, the Court deems it apposite to reproduce the provisions of Section 1140 of the Act, which reads as follows: -

"**1140 Service of documents on directors, secretaries and others**

(1) A document may be served on a person to whom this section applies by leaving it at, or sending it by post to, the person's registered address.

(2) This section applies to —

(a) a director or secretary of a company;

(b) in the case of an overseas company whose particulars are registered under section 1046, a person holding any such position as may be specified for the purposes of this section by regulations under that section;

(c) a person appointed in relation to a company as —

(i) a judicial factor (in Scotland),

(ii) a receiver and manager appointed under section 18 of the Charities Act 1993 (c. 10), or

(iii) a manager appointed under section 47 of the Companies (Audit, Investigations and Community Enterprise) Act 2004 (c. 27).

(3) This section applies whatever the purpose of the document in question.

It is not restricted to service for purposes arising out of or in connection with the appointment or position mentioned in subsection (2) or in connection with the company concerned.

(4) For the purposes of this section a person's "registered address" means any address for the time being shown as a current address in relation to that person in the part of the register available for public inspection.

(5) If notice of a change of that address is given to the registrar, a person may validly serve a document at the address previously registered until the end of the period of 14 days beginning with the date on which notice of the change is registered.

(6) Service may not be effected by virtue of this section at an address—

(a) if notice has been registered of the termination of the appointment in relation to which the address was registered and the address is not a registered address of the person concerned in relation to any other appointment;

(b) in the case of a person holding any such position as is mentioned in subsection (2)(b), if the overseas company has ceased to have any connection with the United

Kingdom by virtue of which it is required to register particulars under section 1046.

(7) Further provision as to service and other matters is made in the company communications provisions (see section 1143).

(8) Nothing in this section shall be read as affecting any enactment or rule of law under which permission is required for service out of the jurisdiction."

16. CPR in Part 6 makes the following provisions with respect to service: -

"I SCOPE OF THIS PART AND INTERPRETATION

Part 6 rules about service apply generally

6.1 This Part applies to the service of documents, except where –
(a) another Part, any other enactment or a practice direction makes different provision; or
(b) the court orders otherwise.

(Other Parts, for example, Part 54 (Judicial Review) and Part 55 (Possession Claims) contain specific provisions about service.)

Interpretation

6.2 In this Part –

(a) 'bank holiday' means a bank holiday under the Banking and Financial Dealings Act 1971 in the part of the United Kingdom where service is to take place;

(b) 'business day' means any day except Saturday, Sunday, a bank holiday, Good Friday or Christmas Day;

(c) 'claim' includes petition and any application made before action or to commence proceedings and 'claim form', 'claimant' and 'defendant' are to be construed accordingly;

(d) 'solicitor' includes any other person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the conduct of litigation (within the meaning of that Act)

II SERVICE OF THE CLAIM FORM IN THE JURISDICTION

Methods of service

6.3

(1) A claim form may be served by any of the following methods–

(a) personal service in accordance with rule 6.5;

(b) first class post, document exchange or other service which provides for delivery on the next business day, in accordance with Practice Direction 6A;

(c) leaving it at a place specified in rule 6.7, 6.8, 6.9 or 6.10;

(d) fax or other means of electronic communication in accordance with Practice Direction 6A; or

(e) any method authorised by the court under rule 6.15.

(2) A company may be served –

(a) by any method permitted under this Part; or

(b) by any of the methods of service permitted under the Companies Act 2006.

(3) A limited liability partnership may be served –

(a) by any method permitted under this Part; or

(b) by any of the methods of service permitted under the Companies Act 2006 as applied with modification by regulations made under the Limited Liability Partnerships Act 2000.

Who is to serve the claim form

6.4

(1) The court will serve the claim form except where –

(a) a rule or practice direction provides that the claimant must serve it;

(b) the claimant notifies the court that the claimant wishes to serve it; or

(c) the court orders or directs otherwise.

(2) Where the court is to serve the claim form, it is for the court to decide which method of service is to be used.

(3) Where the court is to serve the claim form, the claimant must, in addition to filing a copy for the court, provide a copy for each defendant to be served.

(4) Where the court has sent –

(a) a notification of outcome of postal service to the claimant in accordance with rule 6.18; or

(b) a notification of non-service by a bailiff in accordance with rule 6.19, the court will not try to serve the claim form again.

Personal service

6.5

(1) Where required by another Part, any other enactment, a practice direction or a court order, a claim form must be served personally.

(2) In other cases, a claim form may be served personally except –

(a) where rule 6.7 applies; or

(b) in any proceedings against the Crown.

(Part 54 contains provisions about judicial review claims and Part 66 contains provisions about Crown proceedings.)

(3) A claim form is served personally on –

(a) an individual by leaving it with that individual;

(b) a company or other corporation by leaving it with a person holding a senior position within the company or corporation;

or

(c) a partnership (where partners are being sued in the name of their firm) by leaving it with –

(i) a partner; or

(ii) a person who, at the time of service, has the control or management of the partnership business at its principal place of business.

(Practice Direction 6A sets out the meaning of 'senior position'.)

Where to serve the claim form – general provisions

6.6

(1) The claim form must be served within the jurisdiction except where rule 6.7(2) or 6.11 applies or as provided by Section IV of this Part.

(2) The claimant must include in the claim form an address at which the defendant may be served. That address must include a full postcode, unless the court orders otherwise.

(Paragraph 2.4 of Practice Direction 16 contains provisions about postcodes.)

(3) Paragraph (2) does not apply where an order made by the court under rule 6.15 (service by an alternative method or at an alternative place) specifies the place or method of service of the claim form.

Service of the claim form by contractually agreed method

6.11

(1) Where –

(a) a contract contains a term providing that, in the event of a claim being started in relation to the contract, the claim form may be served by a method or at a place specified in the contract; and

(b) a claim solely in respect of that contract is started, the claim form may, subject to paragraph (2), be served on the defendant by the method or at the place specified in the contract.

(2) Where in accordance with the contract the claim form is to be served out of the jurisdiction, it may be served –

(a) if permission to serve it out of the jurisdiction has been granted under rule 6.36; or

(b) without permission under rule 6.32 or 6.33.

Service of the claim form relating to a contract on an agent of a principal who is out of the jurisdiction

6.12

(1) The court may, on application, permit a claim form relating to a contract to be served on the defendant's agent where –

(a) the defendant is out of the jurisdiction;

(b) the contract to which the claim relates was entered into within the jurisdiction with or through the defendant's agent; and

(c) at the time of the application either the agent's authority has not been terminated or the agent is still in business relations with the defendant.

(2) An application under this rule –

(a) must be supported by evidence setting out –

(i) details of the contract and that it was entered into within the jurisdiction or through an agent who is within the jurisdiction;

(ii) that the principal for whom the agent is acting was, at the time the contract was entered into and is at the time of the application, out of the jurisdiction; and

(iii) why service out of the jurisdiction cannot be effected; and

(b) may be made without notice.

(3) An order under this rule must state the period within which the defendant must respond to the particulars of claim.

(4) Where the court makes an order under this rule –

(a) a copy of the application notice and the order must be served with the claim form on the agent; and

(b) unless the court orders otherwise, the claimant must send to the defendant a copy of the application notice, the order and the claim form.

(5) This rule does not exclude the court's power under rule 6.15 (service by an alternative method or at an alternative place).

III SERVICE OF DOCUMENTS OTHER THAN THE CLAIM FORM IN THE UNITED KINGDOM

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Service of the claim form where the permission of the court is not required – Scotland and Northern Ireland

6.32

(1) The claimant may serve the claim form on a defendant in Scotland or Northern Ireland where each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine under the 1982 Act and –

(a) no proceedings between the parties concerning the same claim are pending in the courts of any other part of the United Kingdom; and

(b)

(i) the defendant is domiciled in the United Kingdom;

(ii) the proceedings are within paragraph 11 of Schedule 4 to the 1982 Act; or

(iii) the defendant is a party to an agreement conferring jurisdiction, within paragraph 12 of Schedule 4 to the 1982 Act.

(2) The claimant may serve the claim form on a defendant in Scotland or Northern Ireland where each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine under any enactment other than the 1982 Act notwithstanding that –

(a) the person against whom the claim is made is not within the jurisdiction; or

(b) the facts giving rise to the claim did not occur within the jurisdiction.

Service of the claim form where the permission of the court is not required – out of the United Kingdom

6.33

(1) Omitted

(2) The claimant may serve the claim form on a defendant out of the United Kingdom where each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine under sections 15A to 15E of the 1982 Act and –

(a) No proceedings between the parties concerning the same claim are pending in the courts of any other part of the United Kingdom; and

(b)

(i) Omitted

(ii) the defendant is not a consumer, but is a party to a consumer contract within section 15B(1) of the 1982 Act; or

(iii) the defendant is an employer and a party to a contract of employment within section 15C(1) of the 1982 Act;

(2A) Omitted

2B) The claimant may serve the claim form on a defendant outside the United Kingdom where, for each claim made against the defendant to be served and included in the claim form—

(a) the court has power to determine that claim under the 2005 Hague Convention and the defendant is a party to an exclusive choice of court agreement conferring jurisdiction

> on that court within the meaning of Article 3 of the 2005 Hague Convention; or
>
> (b)a contract contains a term to the effect that the court shall have jurisdiction to determine that claim.
>
> (3) The claimant may serve the claim form on a defendant out of the United Kingdom where each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine other than under the 2005 Hague Convention, notwithstanding that –
>
> (a) the person against whom the claim is made is not within the jurisdiction; or
>
> (b) the facts giving rise to the claim did not occur within the jurisdiction.
>
> **Service of the claim form where the permission of the court is required**
>
> **6.36** In any proceedings to which rule 6.32 or 6.33 does not apply, the claimant may serve a claim form out of the jurisdiction with the permission of the court if any of the grounds set out in paragraph 3.1 of Practice Direction 6B apply."

17. It was in light of the aforesaid provisions as incorporated in the CPR coupled with his assertion that the judgment debtor did not reside in the United Kingdom that Mr. Singh had contended that no valid service had been affected and therefore the judgment is not liable to be enforced. Mr. Singh had specifically relied upon Rule 6.36 of the CPR to submit that since he was not residing within the jurisdiction of the High Court of England, it was incumbent upon the execution petitioner to have sought the permission of the court and to take consequential steps for service accordingly. In support of his contention that the decree is inexecutable, learned counsel had also placed reliance upon the judgment rendered by the Andhra Pradesh

High Court in **Potluri Rajeswara Rao v. Syndicate Bank**[9]. The Court deems it apposite to extract the following passages from that decision: -

> **"6.** Thus, Section 13 lays down that a foreign judgment shall be conclusive as to any matters thereby directly adjudicated between the same parties under whom they or any of them claim litigating under the same title except in cases as mentioned in clauses (a) to (f). Clauses (a) and (b) are relevant to the instant case. The objection taken on behalf of the petitioner-judgment debtor falls under the exception (a) and (b) and it will be dealt accordingly. The first objection, namely that the High Court of Justice, London was not competent to entertain the action and pass a decree is the most substantial objection. This objection as to jurisdiction is to be looked at not from the point of view of municipal law but private international law. In the present case it is contended that the defendant has neither any property within the jurisdiction of the English Courts nor did he reside there at the time of commencement of the action or at the time of the service of writ summons or at the time of passing the default decree. Whether the defendant submitted to the jurisdiction is the most important issue to be decided. *Cheshire* (Private International Law, 3rd Edition, Page 139), *Cheshire* Private International Law, 3rd Edition, Page 139 says as follows:
>
> > "As a general rule, an English Court is not prevented from entertaining a suit merely because the parties are foreign by nationality or by domicile or because the incidents that raised the issue have all occurred in a foreign country. At the same time it is obvious that the power to adjudicate must be subject to some restriction, for otherwise, to mention only one consideration, a judgment would often be nothing but a 'brutum fulmen'. The general doctrine of English law is that the exercise of civil jurisdiction, in the absence of an Act of Parliament, must in all cases be founded upon one or other of two principles, namely, the principle of effectiveness or the principle of submission."
>
> **7.** The principle of effectiveness referred to by the author means that a Judge has no right to pronounce a judgment if he cannot enforce it within his own territory. The power of adjudicate means that physical power which becomes exercisable because the property which is the subject matter of the suit is in England or the defendants was present

[9] 2000 SCC OnLine AP 67

at the time of service of writ summons in England. Speaking about personal action, *Cheshire* says in the same book 'Private International Law' 3rd Edition at Page 139 as follows:

> "The principle of effectiveness here is triumphant. Jurisdiction depends upon physical or, what is the same thing in the present connection, the power of issuing process is exercisable only against persons who are within the territory of the sovereign whom the Court represents, the rule at Common Law has always been that jurisdiction is confined to persons who are within the process of the Court at the time of service of the writ. A Court cannot extend its process and so exert sovereign power beyond its territorial limits. Thus jurisdiction depends upon the presence of the defendant in England at the time when the writ is served, since the exercise of judicial power in the shape of service of a writ obviously requires his actual presence …… The fact that England is the 'forum domicilli' or the 'foreign reigestoe' or the place where a business has been carried on is insufficient at Common Law to found jurisdiction against an absent defendant. A Legislature may and often does, authorise its Courts to pass judgment upon absentees after substituting some form of notice for personal service of writ, but such a judgment though binding in the country where pronounced has no international validity."

12. It is, therefore, to be remembered it a cause of action may arise in a foreign country but cause of action by itself is not a general ground of jurisdiction in a Private International Law. The well-known Jurist Mr. *Albert Venn Dicey* in 'Conflict of Laws on the question of 'jurisdiction in Personam' says:

> "The High Court now claims jurisdiction 'in personam' over an absent defendant when the action is founded on a contract which is made in England, or which by its terms or by its implication is to be governed by English Law, or on a breach committed in England of a part of a contract wherever made, which ought to have been performed in England. Whether the High Court would concede an analogous jurisdiction to foreign Tribunals is uncertain, for authority can be '*Rousillon* v. *Rousillon'*, (1880) 14 Ch. D 351, cited for the proposition that the mere circumstance of a contract having been made in a foreign country does not give jurisdiction to the Courts thereof. Even this amount of respect for the 'forum obligationis'

> cannot be explained by the principle of effectiveness……"
>
> **23.** On the aforementioned conspectus of statutory provision and the judicial pronouncements of Apex Court and various High Courts the following principles emerge:
>
> (a) A judgment of foreign Court is conclusive between the parties and is a judgment pronounced by a Court of competent jurisdiction as contemplated in Private International Law *vis-a-vis* Section 13(a) of the Code of Civil Procedure. The Court will be a Court of competent jurisdiction where both the parties voluntarily and unconditionally subject themselves to the jurisdiction of that Court.
>
> (b) A foreign judgment will be conclusive only, if they contested and it was adjudicated on merits. If the judgment is not based on merits that judgment will not be conclusive and is hit by Section 13(b) of the Code of Civil Procedure.
>
> **24.** The District Court held that the defendant-judgments debtor is a citizen of India and that he was never a citizen or domicile of United Kingdom and that the writ summons were served at Algeria and that the summons were received without prejudice to the rights of the defendant. Having given clear findings on those issues, the District Court was not justified in ordering the petition filed under Section 39 of the Code of Civil Procedure. On the face of such findings, the judgment and decree of the High Court of Justice, Queen's Bench Division passed in OS No. 902 of 1984 dated 6-11-1985 is a nullity. The finding of the District Court that mere receipt of writ of summons by the defendant at Algeria amounts to submission of jurisdiction is erroneous. Similarly the finding of the District Court that the affidavit of the attorney of the plaintiff itself is evidence is unsustainable."

18. Controverting the aforenoted submissions, Mr. Rao, learned senior counsel appearing for the execution petitioner, contended that the personal guarantees adopted asymmetric jurisdiction clauses and thus entitled the execution petitioner to institute proceedings in a court of its choice. Mr. Rao submitted that reliance placed on the provisions contained in the CPR is clearly misplaced bearing in mind Rule 6.1(a) which unambiguously stipulates that Part 6 would apply to service of documents subject to any other enactment or a practice decision which

may have made contrary provisions. According to Mr. Rao, since in the present case it was Section 1140 which was invoked, its provisions would have to be given effect to notwithstanding anything to the contrary contained in the CPR.

19. Mr. Rao laid stress upon Section 1140(3) which clarifies that service upon a person who additionally happens to be a director or secretary of a company need not to be restricted for the purposes arising out of or connected with his appointment or position in the company concerned. According to Mr. Rao, Section 1140(3) thus envisages service upon a person who though named as a director in a company registered in the United Kingdom is sought to be served in proceedings unconnected with either the company or his position in that corporate entity.

20. For the purposes of understanding the reach of Section 1140, Mr. Rao placed reliance upon the following extracts from **Key Homes Bradford Limited v. Rafik Patel**[10] where the scope of that provision was explained as follows: -

> **"12.** Sections 1140 and 1141 are linked to the information that is required to be recorded in the register of directors pursuant to section 163 of the 2006 Act. Under section 163(1) the register must contain for each director "a service address" and it is also required for the register to specify the country or state in which the director is usually resident. Under section 163(5) a person's service address may be stated to be the company's registered office.
>
> **13.** Section 1140 came into force on 1st October 2009. Some assistance about its intended meaning can be derived from the commentary relating to the Bill. Clause 747 of the Bill corresponded to section 1140. The commentary is as follows:

[10] [2015] 1 BCLC 402

> "This clause is a new provision. It ensures that the address on the public record for any director or secretary is effective for the service of documents on that person. Sub-section (3) provides that the address is effective even if the document has no bearing on the person's responsibilities as director or secretary. The provision also applies to the address on the public record of various other persons for whom the 1985 Act requires an address on the public record."

Some, perhaps limited, assistance can be obtained from the DTI's consultation paper on Company Law Reform dated March 2005. At paragraph 5.3 under the heading "Directors' Home Addresses" it states:

> " .... it is important that the service address functions effectively, and the law will be tightened to increase the obligation on directors to keep the record up to date, and ensure that the address on the public record is fully effective for the service of documents."

14. It is of note that section 163 contains an entirely new provision requiring a service address to be provided. Plainly it was the intention that the register of directors should contain information that made it easier to identify an address in which a company director could be served with appropriate documents. However, the director's privacy could be protected by the director opting for the service address to be the company's registered office. Such an option might well be appropriate for a director to adopt in relation to a company operating in a field attracting controversy. Nevertheless, the register was to provide a specified address for service purposes. Section 1140 is, in my judgment, drafted in clear and unambiguous language. Subsection (3) is explicit that the section applies whatever the purpose of the document in question and the section is not restricted to service for purposes arising out of or in connection with the directorship or in connection with the company to which the register relates. On the face of the section, it provides a method by which a company director may be served with any document, including a claim form, at the registered address. There are however limiting words in subsection (8) that require further examination.

26. My conclusions in relation to section 1140 are that it does indeed provide a new set of provisions which are of broad effect. A director who is resident abroad is entitled to provide an address outside the

> jurisdiction and, if he does so, permission to serve out of the jurisdiction must be obtained before service can be effected. However, whether he is normally resident outside the jurisdiction or not, if he provides an address for service that is within the jurisdiction then he may be served at that address. It may be that Mr Patel did not, in fact, consider the matter but he has held himself out by giving a service address in England as a person who is willing to be served at that address. Parliament plainly intended to institute a revised system that places some importance on the service address being kept up-to-date. The person who has responsibility for doing that is the director himself. If he fails to make an adjustment to his address at a time when be claims to have changed residence from England to the UAE, he has no one to blame but himself. It is also relevant to note here that the Defendant nominated both the Romford and Barking addresses as addresses for service in relation to a number of new companies some time after he claims to have abandoned his residence in England. I therefore conclude that service was properly effected on the Defendant on 13th September 2013 by service of the claim form, particulars of claim and response pack at both the Romford and Barking addresses."

21. For shedding light upon the scope of Section 1140, reliance was additionally placed on the decision rendered by the Queen's Bench Division in **Idemia France SAS v. Decatur Europe Ltd & Ors.**[11]:-

> "[**113]** Idemia, however, has a second basis for its argument that Mr Rahman has validly been served within the jurisdiction. It relies upon the Companies Act 2006 s 1140. This states that:
>
> > 'Service of documents on directors, secretaries and others
> > (1) A document may be served on a person to whom this section applies by leaving it at, or sending it by post to, the person's registered address.
> > (2) This section applies to—
> > (a) a director or secretary of a company;
> > (b) in the case of an overseas company whose particulars are registered under section 1046, a person holding any such position as may be specified for the purposes of this section by regulations under that section; …
> > (3) This section applies whatever the purpose of the document in question.

[11] [2019] EWHC 946 (Comm)

> It is not restricted to service for purposes arising out of or in connection with the appointment or position mentioned in subsection (2) or in connection with the company concerned.
> (4) For the purposes of this section a person's "registered address" means any address for the time being shown as a current address in relation to that person in the part of the register available for public inspection.
> (5) If notice of a change of that address is given to the registrar, a person may validly serve a document at the address previously registered until the end of the period of 14 days beginning with the date on which notice of the change is registered.
> (6) Service may not be effected by virtue of this section at an address—
>
> (a) if notice has been registered of the termination of the appointment in relation to which the address was registered and the address is not a registered address of the person concerned in relation to any other appointment;
>
> (b) in the case of a person holding any such position as is mentioned in sub-subsection (2)(b), if the overseas company has ceased to have any connection with the United Kingdom by virtue of which it is required to register particulars under section 1046
>
> (7) Further provision as to service and other matters is made in the company communications provisions (see section 1143).
> (8) Nothing in this section shall be read as affecting any enactment or rule of law under which permission is required for service out of the jurisdiction.'

[114] It is common ground that, both at the date when this action was commenced and at the time of service, Mr Rahman was a director of various UK companies (including Decatur) and that Morris Place was his 'registered address' in relation to those companies for the purposes of s 1140.

[115] The scope of s 1140 was considered by Master Marsh (before his appointment as Chief Master) in *Key Homes Bradford Ltd v Patel*. Master Marsh held that the effect of s 1140 is that, when a company director gives an address for service in England and Wales, he can validly be served at that address, even if he is domiciled and resident overseas. Master Marsh's decision was recently followed and applied by ICC Judge Jones in *Brouwer v Anstey*.

[116] It is also common ground that, if the decision in *Key Homes* is correct, Mr Rahman has been validly served at Morris Place, and that the English court therefore has jurisdiction over him. What Mr Clarke submits on behalf of Mr Rahman is that *Key Homes* was wrongly decided, and should not be followed. In Mr Clarke's submission (and contrary to the view taken by Master Marsh), the fundamental principles of the common law have not been abrogated by this statutory provision. Service under s 1140(1) at a registered address within the jurisdiction will therefore only be valid if the person to be served is within the jurisdiction of the time of service. That that is the case is shown, in Mr Clarke's submission, by s 1140(8) which expressly preserves 'any … rule of law under which permission is required for service out of the jurisdiction'.

[117] This fundamental principle of the common law was considered by Master Marsh in his judgment in *Key Homes*. He began by citing the well-known statement of the principle by Lawrence Collins J (as he then was) in *Chellaram v Chellaram* (*No 2*) that:

> '… [I]t has always been, and remains, a fundamental rule of English procedure and jurisdiction that a defendant may be served with originating process within the jurisdiction only if he is present in the jurisdiction at the time of service, or deemed service.'

[118] After examining the consideration of this principle by the Court of Appeal in the cases of *Rolph v Zolan*; *City & Country Properties Ltd v Kamali*; and *SSL International plc v TTK LIG Ltd* Master Marsh concluded that that principle did not preclude service under s 1140 on a registered address within the jurisdiction from being effective, even if the person to be served was not in fact resident or physically present within the jurisdiction at the time of service ([2015] 1 BCLC 402 at [25]):

> 'Section 1140 in my judgment provides a basis for serving a director which is entirely outside the provisions for service in the CPR. It is a parallel code. The disapproval by the Court of Appeal in *Kamali* of the general principle enunciated by Lawrence Collins J in *Chellaram* was expressed in broad terms. It seems to me it is inherently unlikely that in passing s 1140 of the 2006 Act, Parliament can have intended what was clearly designed to be a new manner in which company directors could be served should be subject to a common-law principle which is directly contrary to the clear terms of the section. Nothing in s 1140 suggests that its provisions are limited such as to prevent service upon a director who is not resident within

> the jurisdiction. A new regime for service of documents on directors was introduced and was intended to have a wide effect. It is not prima facie unfair that a director of an English company who resides abroad, but who gives an address for service in England, should be vulnerable to being served at that address as a choice, or a deemed choice, has been made. And the solution is simple because the director can opt to provide an address abroad in appropriate circumstances."

22. Having noticed the submissions which had been addressed by respective counsels, the Court notes that the principal issue which falls for consideration is whether the judgment rendered by the High Court of England can be said to be inexecutable in terms of Section 13 of the Code. To put it in other words, the principal question appears to be whether the judgment is not liable to be recognised for the purposes of execution in light of the contention of the judgment debtor that it has been rendered by a court without jurisdiction. Coupled with the above, is the challenge to the validity of the judgment in issue on the ground of the same having been rendered *ex parte* and contrary to the agreement entered into between the parties.

23. Undisputedly, the two guarantee agreements referred to the governing laws to be that of the Dubai International Financial Centre and the Republic of Singapore. However, the asymmetric jurisdiction clauses incorporated therein conferred a right upon the execution petitioner to move any other court with jurisdiction. As is usual with such asymmetric jurisdiction clauses, the right to institute proceedings in any other court was one which stood reserved in favour of the lender only.

24. The execution petitioner appears to have instituted the claim before the High Court of England bearing in mind the fact that the judgment debtor was a director in Aakar Investments Limited and Afri Green Energy Limited, both of which were registered in the United Kingdom. Quite apart from the aforesaid, service appears to have been affected upon the judgment debtor, additionally, via WhatsApp and email. The Court also takes note of the contention of the judgment debtor on whose behalf it had been urged that by the time the claims are stated to have been served upon him on 22 June 2020, he was no longer residing in the United Kingdom and was in fact present in India. Mr. Singh had also assailed the bailiff's report in this respect and which had been relied upon in the proceedings in question. The Court has noted the aforesaid contention only for the completeness of the record notwithstanding the absence of any cogent material having been placed for its consideration in support of the aforesaid argument. In any view of the matter, the first service in terms of Section 1140(3) was duly affected prior to the change of the registered address of the two corporate entities. This was, as was noted above, in addition to the petitioner having been served by way of email and WhatsApp.

25. Reverting then to the facts as they stand duly recorded in the judgment whose execution is prayed for, the service of claim is stated to have been affected upon the judgment debtor on 19 May 2020. The registered addresses of Aakar Investments Limited and Afri Green Energy Limited are stated to have been changed after the service of summons in the first instance.

26. That takes the Court to evaluate the submissions addressed on the ambit of Section 1140. This Court firstly bears in mind the unambiguous language in which Section 1140 stands couched and framed. The said provision clearly appears to construct a special procedure for service of summons. As is manifest from a reading of sub-section (3) thereof, resort to Section 1140 can be had even when a party in the United Kingdom seeks to serve a claim upon a person otherwise than in his/her capacity as a director or secretary of an incorporated company. Section 1140 as placed in the Act contemplates service upon a director or a secretary of a company by permitting service of documents at the registered address of the corporate entity. It additionally and in terms of sub-section (3) thereof enables service of summons notwithstanding the director or secretary not residing in the United Kingdom. This subject, of course, to the director or the secretary having maintained that address in the statutory records and not having indicated anything contrary to the statutory presumption that stands raised in terms of the said provision. In fact and as would be evident from a reading of Section 1140(2), even in the case of an overseas company whose particulars may be registered under Section 1046 of the Act, directors or secretaries of such a company may also be served and placed upon notice by service being affected at the registered address of that overseas company.

27. It is the aforesaid scheme of Section 1140 which has been explained in *Key Homes* and *Idemia*. The Court notes that both the aforesaid decisions have held that Section 1140 embodies the intent of Parliament to institute a revised system of service and the obligation

of both corporate entities as well as their directors or secretaries to keep service addresses up-to-date. Those decisions significantly hold that a director, who is residing abroad, may justifiably provide an address outside the jurisdiction of courts in England. In such a situation the plaintiff who institutes proceedings would have to seek the requisite permission to serve out of the jurisdiction and it is only when steps are taken in accordance with the provisions embodied in the CPR in this regard that service would be deemed to have been affected. However, both *Key Homes* and *Idemia* have interpreted Section 1140 as enabling a plaintiff to effect service where a director, though residing outside the jurisdiction of courts in the United Kingdom, provides an address for service albeit in connection with a corporate entity and by virtue of being a director or secretary therein. It is here that the provisions of Section 1140(3) come into play and provision for service being affected on that individual even though it may be in respect of a cause wholly unrelated to the affairs of the corporate entity or in relation to their duties and obligations flowing from the office that they may hold in that entity. Those decisions have conclusively found that the aforesaid procedure is clearly sanctioned by Section 1140 and service being affected accordingly.

28. The judgment debtor does not dispute the fact that he was a director in both Aakar Investments Limited and Afri Green Energy Limited. Even when these two entities filed for a change of particulars and for registration of a new service address, the alternate addresses too were spelt out to be within the United Kingdom. More importantly, when documents relating to change of registered address

came to be filed, then too the judgement debtor did not provide an address outside the United Kingdom. The Court thus comes to the irrefutable conclusion that the judgment debtor by virtue of having provided the registered office addresses of the two corporate entities in England, became subject to the sweep of Section 1140(3) of the Act. In view of the aforesaid, the Court comes to conclude that the provisions of Section 1140 were correctly and justifiably invoked by the High Court of England.

29. That takes the Court to then consider the submissions addressed at the behest of the judgment debtor and which rested upon the governing law clauses in the two guarantee agreements. To recall, it had been urged that the guarantee agreements had specifically designated the Dubai International Financial Centre laws and the laws of the Republic of Singapore as being the governing law. It was in the said backdrop that the judgment debtor had questioned the assumption of jurisdiction by the High Court of England and the application of laws framed by Parliament. This Court, however, finds itself unable to sustain the said objection for the following reasons.

30. Admittedly, the guarantee agreements incorporated asymmetric jurisdiction clauses. This enabled the execution petitioner to institute proceedings before a court situate other than the United Arab Emirates or for that matter courts where Singapore law may have been enforced or applied. The execution petitioner invoked this particular clause appearing in the guarantee agreements to institute the claim before the High Court of England. That High Court would be deemed to have

assumed jurisdiction in respect of the claim by virtue of the fact that the judgment debtor had provided a registered address in the United Kingdom. By virtue of Section 1140(3) of the Act, the judgment debtor became liable to be viewed as residing in the United Kingdom and thus liable to answer any claims that may come to be lodged before courts in that country. It is this critical and decisive factor which constitutes the legal foundation for the High Court of England having assumed jurisdiction to rule upon the claim.

31. The Court finds that while the First Facility Agreement spoke of the laws of the Dubai International Finance Center being applicable, the Second Facility Agreement defined the governing law to be that of the Republic of Singapore. However, since those agreements did enable the execution petitioner to petition any other court *"with jurisdiction"*, it became entitled to sue the judgment debtor in England in light of the addresses provided by him for Afri Green Energy Limited and Aakar Investments Limited and by virtue of Section 1140(3) of the Act. The High Court of England would thus be liable to be recognised as the court with jurisdiction by virtue of the aforenoted provision and which clearly bids us to assume the judgment debtor being resident in England. As was noticed hereinabove, the moment an individual indicates an address in the United Kingdom, albeit in connection with a directorship position that is held in a company incorporated in that country, the same would be sufficient for service in relation to claims that may come to be instituted against that person even in his personal capacity. Section 1140 thus creates a fictional

residency and also engrafts a presumption that such a person consents to be subject to the jurisdiction of courts in England.

32. It becomes pertinent to note that courts in England, while dealing with the issue of governing law clauses and which may in turn allude to a foreign law as having been chosen to be applicable by parties, have formulated the test to be an obligation on a party who so pleads the applicability of foreign law to assert and establish by way of evidence that English law would not be applicable. Failing that party discharging that burden, courts in England have adopted the principle of the *'default rule'*. It would in this connection be pertinent to notice the enunciation of the legal position as rendered by the Supreme Court of the United Kingdom in **Brownlie v. FS Cairo (Nile Plaza) LLC[12]:**

> "**The default rule**
> **[113]** The obvious objection to the default rule is that, where the relevant rules of English private international law provide that the law applicable to an obligation is the law of another country, it is the duty of the court to apply that system of law and not English law to the obligation. The answer given to that objection by those who defend the default rule is that, in an adversarial system such as that in England and Wales, if a party does not rely on a particular rule of law even though it would be entitled to do so, it is not generally for the court to apply the rule of its own motion. The issues in proceedings are defined by the parties' statements of case. Thus, it is for each party to choose whether to plead a case that a foreign system of law is applicable to the claim; but neither party is obliged to do so and, if neither party does, the court will apply its own law to the issues in dispute.
>
> **[114]** I think this justification for applying English domestic law by default is valid so far as it goes. Article 1(3) of each of the Rome I and Rome II Regulations provides that (with immaterial exceptions) the Regulation 'shall not apply to evidence and procedure'. The rule that

[12] [2021] UKSC 45

(with limited exceptions) the court is not obliged to decide a case in accordance with a rule of law on which neither party chooses to rely is a rule of English civil procedure. The Rome I and Rome II Regulations therefore do not seek to oust it. (If, which I doubt, the Court of Appeal in *Belhaj v Straw MP* (*United Nations Special Rapporteur on Torture intervening*) [2014] EWCA Civ 1394, [2017] AC 964, [2016] 1 All ER 121 (para [155]), intended to suggest otherwise, I agree with the reasons given by Andrew Baker J in *Iranian Offshore Engineering and Construction Co v Dean Investment Holdings SA* (*formerly Dean International Trading SA*) [2018] EWHC 2759 (Comm), [2019] 1 WLR 82 (para [21]), for regarding the suggestion as mistaken.) In accordance with this procedural rule, the English court is not obliged to apply the choice of law rules contained in the Rome I and Rome II Regulations if neither party chooses to assert in its statement of case that foreign law is applicable. That is so even if the case is one to which a foreign system of law would clearly have to be applied if either party chose to rely on that fact. It may also be said that in such a situation the parties are tacitly agreeing that English law should be applied to decide the case. There is no public policy which prevents this. Indeed, the freedom to agree after the event to submit a contractual or non-contractual obligation to a law of the parties' choice different from the law previously or otherwise applicable is expressly affirmed by, respectively, art 3(2) of the Rome I Regulation and art 14(1)(a) of the Rome II Regulation.

[115] Not uncommonly, actions are brought in the English courts in which the parties are content for the court to apply English law, even though it is apparent that foreign law would be applicable if either party chose to rely on it. A notable example is *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 2 All ER 552, [1976] 1 WLR 676, the leading case on the effect of a clause in a contract for the sale of goods which provides for the seller to retain title to the goods until payment is made. The contract terms in issue in that case were written in the Dutch language and expressly governed by Dutch law, but neither party pleaded Dutch law and the court accordingly applied English law to the contracts. Such an approach makes good practical sense where there is or is likely to be insufficient difference between the foreign law in question and English law to justify the inconvenience and cost of asserting and proving a difference.

[116] The rationale for applying English law by default, however, depends upon neither party choosing to advance a case that foreign law is applicable. If either party pleads that under the relevant rules of English private international law foreign law is applicable to an obligation, and that case is well founded, it is the duty of the court to apply foreign law. To apply English domestic law in that situation

would ex hypothesi be unlawful. In accordance with general principle, the burden is on the party who is making or defending a claim, as the case may be, to prove that it has a legally valid claim or defence. Where the law applicable to the claim or defence is a foreign system of law, this will require the party to show that it has a good claim or defence under that law.

[117] An argument has been made by one of the leading scholars in this field, Professor Adrian Briggs, that, if a party who bears the burden of proving foreign law fails to prove its content, the court should apply English law instead. In *The Conflict of Laws* (4th edn, 2019), p 11, he writes:

> 'In the absence of proof of the content of foreign law, an English judge still has to adjudicate. The default position was, and is, that English law will be applied, faute de mieux; …'

I cannot accept that it is consistent with legal principle, however, to apply English law by default if the party who has the burden of proving that it has a good claim or defence under foreign law fails to do so. An English judge does not in that event still have to adjudicate – if by that is meant decide the case by applying a system of law (English law) which has been shown not to be applicable. Rather, the ordinary consequence must follow that, if a party fails to prove its claim or defence, the claim is dismissed or the defence rejected. Where it is asserted and established that the applicable law is a foreign system of law, there is simply no scope for applying English law in its own right.

[118] That is the position in the present case. As mentioned, the only claims made in the amended claim form and particulars of claim are claims for damages 'pursuant to Egyptian law'. There is accordingly no scope for applying English law by default. It follows that, if English law has any role to play, it can only be on the basis of a presumption that the content of the applicable foreign law is materially similar to the English law on the matter in question."

33. It becomes pertinent to note that the High Court of England has in this regard noticed that the judgment debtor had failed to either plead or establish that English law would not be applicable. As per the law which has evolved on the subject and stands duly enunciated by courts in England including in *Brownlie*, it is the aforesaid principles

and the default rule which would thus govern the issue. The submissions addressed on this score on behalf of the judgment debtor also clearly appear to implode bearing in mind the language in which Clauses 14.2 (C) and 21.2 (C) of the two guarantee agreements stand couched. Both those clauses empower the Lender from initiating proceedings in respect of a dispute in any other court with jurisdiction. Regard must also be had to the fact that the aforenoted two clauses are ordained by agreement to be for the benefit of the Lender only. The Court thus finds itself unable to either read or countenance the governing law clauses as being inviolable.

34. The Court further finds that the applicability of the *"default rule"* would not stand negated in the facts of the present case and where the judgment debtor asserts that the proceedings were taken *ex parte* for the following reasons. Firstly, the judgment debtor stood duly served as per the rules and procedure applicable and in any case in accordance with Section 1140. It would thus be inaccurate for the judgment debtor to contend that the proceedings were taken *ex parte* by the High Court of England. This was a case where the judgment debtor failed to contest the claim despite being duly served in accordance with the law applicable in England.

35. This Court is of the firm opinion that where a defendant has been duly served and yet chooses to refrain from participating in proceedings, it cannot turn around and assert that proceedings were taken ex parte. The phrase *ex parte* denotes an action which is continued without due notice or service of summons. It is where a

party has been deprived of the right of participation and contestation. In **Words and Phrases, Permanent Edition**, the expression *ex parte* is defined as under: -

"**EX PARTE DECREE**

Conn. 1942. A decree admitting a will to probate, entered upon hearing after notice given in compliance with statute, is not "ex parte decree" within meaning of statute authorizing probate court to modify or revoke any order or decree made by it ex parte, even as regards a party who has no actual notice. Gen.St.1930, §§ 4779, 4884 (C.G.S.A. §§ 45-20, 45-167).-Haverin v. Welch, 27 A.2d 791, 129 Conn. 309.-Wills 221.

EX PARTE INJUNCTION

Md.App. 1996. An "ex parte injunction" is an injunction granted ex parte by court without an adversary hearing on propriety thereof and is reserved for narrow set of cases in which applicant must establish from specific facts shown by affidavit, or a verified pleading with or without supporting affidavit or sworn testimony, that immediate, substantial and irreparable harm will result to appli- cant before adversary hearing can be had. Md. Rules BB70, subd. b, BB72, subd. a.-Maryland Com'n on Human Relations v. Downey Communications, Inc., 678 A.2d 55, 110 Md.App. 493.-Inj 130.

EX PARTE PROCEEDING

C.C.A.9 (Cal.) 1944. Deprivation of counsel at examination before commissioner did not constitute ground for granting habeas corpus, since a preliminary hearing is not a "trial" within the Constitution, but is an "ex parte proceeding".-Burall v. Johnston, 146 F.2d 230, certiorari denied 65 S.Ct. 1567, 325 U.S. 887, 89 L.Ed. 2001.-Hab Corp 483.

Alaska 1969. "Ex parte proceeding" is one in which relief is obtained by one party without notice to or opportunity to contest being given to other parties who will be bound or directly affected by the proceeding.-White v. State, 457 P.2d 650.-Action 20.

> III.App. 1 Dist. 1995. "Ex parte proceeding" is one brought for benefit of one party without providing notice or opportunity to be heard to opposing party. -Bank of Ravenswood v. Domino's Pizza, Inc., 207 III.Dec. 165, 646 N.E.2d 1252, 269 III. App.3d 714, rehearing denied, appeal denied 209 III.Dec. 798, 652 N.E.2d 338, 162 III.2d 563- Action 66.
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> III.App. 1 Dist. 1980. "Ex parte proceeding" is one brought for benefit of one party only and without notice to other party or opportunity for that party to be heard.-Wilson-Jump Co. v. McCarthy-Hundrieser and Associates, Inc., 40 III. Dec. 230, 405 N.E.2d 1322, 85 III.App.3d 179.- Action 66.
>
> Ky. 1934. An "ex parte proceeding" is a proceeding had on application of one party only, and for his benefit only, and without notice to, or contestation by, any person adversely interested.- Ex parte City of Ashland, 76 S.W.2d 43, 256 Ky. 384.
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> Wis.App. 1999. Generally, an "ex parte proceeding" is one in which an opposing party received no notice.-Mogged v. Mogged, 607 N.W.2d 662, 233 Wis.2d 90, 2000 WI App 39, review denied In re Marriage of Mogged, 612 N.W.2d 733, 234 Wis.2d 177. appeal after remand 638 N.W.2d 394, 248 Wis.2d 983, 2001 WI App 280-Action 66."

36. What this Court seeks to lay emphasis on is that a distinction must necessarily be recognized to exist between a situation where a party has not been placed on notice at all and where even though duly summoned chooses to remain absent and contest the claim that is laid. A judgment rendered against a party who had been duly served and placed on notice of the proceedings can neither be regarded as *ex parte* nor can it be invariably considered to be a judgment otherwise than *"on merits"*. This position stands duly recognised in the decisions of our Supreme Court in **International Woollen Mills v. Standard Wool (U.K.) Ltd.**[13] and **Alcon Electronics (P) Ltd. v.**

[13] (2001) 5 SCC 265

Celem S.A. of France[14]. Those decisions are also relevant for the purposes of understanding the concept of a judgment on merits and when a foreign judgment or decree would be inexecutable by virtue of Section 13 of the Code. The Court deems it apposite to extract the following paragraphs from the judgment in *International Woollen Mills*: -

> "**22.** Reliance was also placed upon the case of *Ram Chand* v. *John Bartlett* [(1909) 3 IC 523] . In this case it has been held as follows:
>
> > "The next contention that has been raised for the appellant to show that the respondent's suit on the foreign judgment did not lie, is that the said judgment was not passed on the merits, and that, therefore, it cannot be enforced by the Indian courts. In my opinion this contention has no force. The writ of summons issued by the High Court in England was, it is admitted, duly served on the appellant in this country, but the latter did not, within the time allowed for that purpose, enter an appearance and deliver a defence. The respondent had (under the rules of procedure that govern the Supreme Court) the right, at the expiration of the prescribed period, to enter final judgment for the amount claimed, with costs. The writ aforesaid was especially endorsed with the statement of claim, containing all the necessary particulars, and there is nothing to show that the application for leave to serve the writ was not supported by an affidavit or other evidence stating the several particulars required by Order XI Rule 4. In short, the proceedings held in the High Court of England appear to have been strictly in accordance with the existing rules of procedure, which are not shown to be in any way contrary to the fundamental principles of justice and fair play; and the judgment passed against the defendant on the facts of the case must be considered as one passed on the merits. <u>It does not proceed on any preliminary point i.e. a point collateral to the merits of the case, but is based on the merits as disclosed by the pleadings before the Court, if the defendant did not, in spite of notice of action, choose to appear and defend it, the judgment passed by the Court in the plaintiff's favour</u>

[14] (2017) 2 SCC 253

was nonetheless a judgment on the merits, because it was not founded upon detailed evidence which the plaintiff might have produced had the defendant entered an appearance and contested the claim. The position to my mind is the same as if the defendant had appeared and confessed (*sic* contested) the judgment. In support of his contention that the judgment in question cannot be considered as one passed on the merits, the appellant's counsel has relied on the following passage in *Sir William Rattigan's Private International Law* (1895), at pp. 234-35:

> 'It would seem to be equally plain that, if, for instance, it should happen that by the law of a foreign country, a plaintiff was entitled to judgment simply on the non-appearance of a defendant who had been duly served, and without adducing any evidence whatever in support of his claim, or if the wrongheadedness of a foreign Judge should induce him to so decide, the plaintiff would not be entitled in an English court to sue upon a judgment so obtained. If on no other ground, such a judgment of a foreign court would, at all events, be so contrary to the fundamental principles of the law of England as, for this reason alone, to be incapable of receiving any effect in a British court.'

The above passage does not, however, as I read it, support the present appellant's position, as it cannot, in my opinion, be affirmed in this case that the plaintiff has obtained judgment from the High Court in England 'simply on the non-appearance of the defendant without adducing any evidence whatever in support of his claim'. Under Order XI Rule 4, the plaintiff's application for leave to serve the writ of summons out of the jurisdiction must be supported by affidavit or other evidence stating that the plaintiff has a good cause of action … and the grounds upon which the application is made, and leave can only be granted if the court or Judge is satisfied that the case is a proper one for the service prayed for. The necessary procedure must be presumed to have been followed in this case, and it has not been shown by the appellant that it was not so followed. The affidavit filed by the present plaintiff-respondent in pursuance of the above rule, would, in my opinion, constitute 'evidence in support of the

> claim' within the purview of the principle laid down in the passage quoted above, and the judgment obtained after service of the writ on the defendant as required by the rules of the Supreme Court would, I think, be a judgment on the merits. If, however, the passage relied upon does not bear the construction I have placed upon it, if, that is to say, it means that there can be no judgment on the merits, unless, after the service of the writ on the defendant in the regular way the plaintiff has adduced some evidence, oral or documentary, in support of his claim, such as he would have produced if the defendant had appeared and contested the claim, then, with all possible respect for the learned author of that passage, I venture to think that the rule laid down by him is expressed in too wide language, and I should be reluctant to follow it unless it were supported by clear authority. I can discover no such authority either in *Dicey's Conflict of Laws* (p. 411), or in any other standard textbook on the subject; and I do not think that the maxim enunciated by Sir William Rattigan himself as the one applicable in such cases viz. that the judgment passed must not contravene the fundamental principles of a rational system of law, supports the wide proposition, which it has been urged, is laid down in the passage quoted above."

In our view the passage in *Sir William Rattigan's Private International Law* (1895), at pp. 234-35, reproduced above, states the correct law. With great respect to the learned Judges concerned the restricted interpretation sought to be given cannot be accepted. With greatest of respect to the learned Judges we are unable to accept the broad proposition that any decree passed in the absence of the defendant, is a decree on merits as it would be the same as if the defendant had appeared and confessed (*sic* contested) the judgment. We also cannot accept the proposition that the decree was on merits as all documents and particulars had been endorsed with the statement of claim. With the greatest of respect to the learned Judges, they seem to have forgotten at the stage of issuance of writ of summons that the court only forms, if it at all does, a prima facie opinion. Thereafter the court has to consider the case on merits by looking into the evidence led and documents proved before it, as per its rules. It is only if this is done that the decree can be said to be on merits.

23. It was also submitted that the burden of proving that a decree was not on merits is entirely on the appellants. It was submitted that no evidence had been led by the appellants to show that the decree was not on merits and for that reason it must be presumed that the decree is

on merits. In support of this submission reliance was placed upon the authority in the cases of *R.M.V. Vellachi Achi* v. *R.M.A Ramanathan Chettiar* [AIR 1973 Mad 141 : (1972) 2 MLJ 468] and *R. Viswanathan* v. *Rukn-ul-Mulk Syed Abdul Wajid* [AIR 1963 SC 1 : (1963) 3 SCR 22] . Undoubtedly the burden of proving that the decree is not on merits would be on the party alleging it. However courts never expect impossible proofs. It would never be possible for a party to lead evidence about the state of mind of the Judge who passed the decree. Of course, amongst other things, the party must show that the decree does not show that it is on merits, if necessary the rules of that court, the existence or lack of existence of material before the court when the decree was passed and the manner in which the decree is passed. All this has been done in this case.

24. It was also submitted that the courts of law are not concerned with the result and even though the result may be repugnant to the court, still the court cannot relieve the party from the burden if the law provides for a contingency. In support of this reliance was placed upon the case of *Martin Burn Ltd.* v. *Corpn. of Calcutta* [AIR 1966 SC 529] and *Firm Amar Nath Basheshar Dass* v. *Tek Chand* [(1972) 1 SCC 893 : AIR 1972 SC 1548] . There can be no dispute to this proposition. However, this proposition cuts both ways. If the decree is not on merits then, even though the court may be reluctant to leave the respondents remediless, the court would still have to refuse to enforce the decree.

25. In support of the proposition that such a decree could not be a decree on merits, reliance has been placed upon the authority in the case of *Algemene Bank Nederland NV* v. *Satish Dayalal Choksi* [AIR 1990 Bom 170] . In this case a summary suit had been filed in Hong Kong. In that suit leave to defend was granted to the defence. Thus the High Court had prima facie considered the merits of the matter and had granted unconditional leave. Thereafter the defendant filed a written statement. It appears that the defendant applied to Reserve Bank of India for foreign exchange in order to engage a lawyer in Hong Kong and his application was not granted by the Reserve Bank of India. As a result the defendant could not appear at the trial and an ex parte decree came to be passed against the defendant. The question which arose before the court was whether such a decree could be said to be a decree on merits. A large number of authorities were cited before that court and it was ultimately held as follows: (AIR pp. 177-78, paras 28-29)

> "*28.* In the light of these authorities I have to see whether in the present case the Hong Kong court gave its decision on the merits of the controversy. The Hong Kong court

had before it the defence which was filed by the present defendant. The defence questioned the execution of the guarantee to repay the debts of Madhusudan & Co. Ltd. The entry of 7-4-1985 in the register of guarantees was also questioned by the defendant. In the absence of the defendant, these contentions raised by him could not have been considered. The judgment which is before me does not indicate whether actually any evidence was led before the Hong Kong court and whether the court went into the merits of the case. The judgment merely sets out that 'on the defendant's failure to appear and upon proof of plaintiff's claim', the judgment is entered for the plaintiff. The plaintiff Bank has emphasised the words 'upon proof of plaintiff's claim'. They have also produced the original guarantee which bears in one corner a sticker showing that it was exhibited before the Hong Kong court. The plaintiff Bank has not said in its affidavit that the documents which were tendered before the court were properly proved or that anybody on behalf of the bank had given evidence to establish the plaintiff's claim. This becomes relevant because it is the contention of the defendant that the guarantee which he had given was a blank and undated guarantee. It had been misused by the plaintiff Bank in the present case. The defendant has also relied upon alterations and erasures in the plaintiff Bank's register of guarantees to show that this undated guarantee was subsequently entered in the register by altering another entry to indicate that it was given around 7th April, 1985. There is no material to show that these aspects of the dispute were ever examined by the Hong Kong court. The court seems to have proceeded to pronounce the judgment in view of the defendant's failure to appear at the hearing of the case to defend the claim on merits.

29. In my view, in these circumstances, the case before me falls under the ratio laid down by the Privy Council in *Keymer case* [AIR 1916 PC 121 : 44 IA 6] . The decision of the Hong Kong court is not given on examination of the points at controversy between the parties. It seems to have been given ex parte on the basis of the plaintiff's pleadings and documents tendered by the plaintiff without going into the controversy between the parties since the defendant did not appear at the time of the hearing of the suit to defend the claim. The present judgment, therefore, is not a judgment on the merits of the case. Hence this is not a fit case where leave can be

granted under Order 21 Rule 22 of the Code of Civil Procedure for the purpose of executing the decree here."

26. In our view this authority lays down the correct proposition of law."

37. Explaining the concept of a judgment on merits, the Supreme Court in *Alcon Electronics* held as follows: -

"14. A plain reading of Section 13 CPC would show that to be conclusive an order or decree must have been obtained after following the due judicial process by giving reasonable notice and opportunity to all the proper and necessary parties to put forth their case. When once these requirements are fulfilled, the executing court cannot enquire into the validity, legality or otherwise of the judgment.

15. A glance on the enforcement of the foreign judgment, the position at common law is very clear that a foreign judgment which has become final and conclusive between the parties is not impeachable either on facts or law except on limited grounds enunciated under Section 13 CPC. In construing Section 13 CPC we have to look at the plain meaning of the words and expressions used therein and need not look at any other factors. Further, under Section 14 CPC there is a presumption that the foreign court which passed the order is a court of competent jurisdiction which of course is a rebuttable presumption. In the present case, the appellant does not dispute the jurisdiction of the English Court but its grievance is, it is not executable on other grounds which are canvassed before us.

16. The appellant contends that the order of the English Court is not given on merits and that it falls under Section 13(*c*) CPC as a result of which it is not conclusive and therefore unexecutable. We cannot accept such submission. A judgment can be considered as a judgment passed on merits when the court deciding the case gives opportunity to the parties to the case to put forth their case and after considering the rival submissions, gives its decision in the form of an order or judgment, it is certainly an order on merits of the case in the context of interpretation of Section 13(*c*) CPC.

17. Applying the same analogy to the facts of the case on hand, we have no hesitation to hold that the order passed by the English Court is an order on merits. The appellant who has submitted itself to the jurisdiction of the Court and on its own requested the Court to assess

the costs summarily. While passing a reasoned order by dismissing the application filed by the appellant, English Court granted the costs against the appellant. Had it been the case where appellant's application was allowed and costs were awarded to it, it would have as well filed a petition for the execution of the order. Be that as it is, the appellant did not prefer any appeal and indeed sought time to pay the costs. The appellant, therefore, cannot be permitted to object the execution. It cannot be permitted to blow hot and cold at the same time. In our opinion, it is a pure abuse of process of law and the courts should be very cautious in entertaining such petitions.

18. In *International Woollen Mills* v. *Standard Wool (UK) Ltd.* [*International Woollen Mills* v. *Standard Wool (UK) Ltd.*, (2001) 5 SCC 265 : AIR 2001 SC 2134] , this Court observed: (SCC p. 280, para 29)

> "*29.* … '*17.* … Even where the defendant chooses to remain ex parte and to keep out, it is possible for the plaintiff to adduce evidence in support of his claim (and such evidence is generally insisted on by the courts in India), *so that the Court may give a decision on the merits of his case after a due consideration of such evidence instead of dispensing with such consideration and giving a decree merely on account of the default of appearance of the defendant*.
>
> *18. In the former case the judgment will be one on the merits of the case, while in the latter the judgment will be one not on the merits of the case*. Thus it is obvious that the non-appearance of the defendant will not by itself determine the nature of the judgment one way or the other. That appears to be the reason why Section 13 does not refer to ex parte judgments falling under a separate category by themselves.' [**Ed.**: As observed in *Govindan Asari Kesavan Asari* v. *Sankaran Asari Balakrishnan Asari*, 1957 SCC OnLine Ker 151, paras 17-18.] "

19. The principles of comity of nation demand us to respect the order of English Court. Even in regard to an interlocutory order, Indian Courts have to give due weight to such order unless it falls under any of the exceptions under Section 13 CPC. Hence we feel that the order in the present case passed by the English Court does not fall under any of the exceptions to Section 13 CPC and it is a conclusive one. The contention of the appellant that the order is the one not on merits deserves no consideration and therefore liable to be rejected. Accordingly, Issue (*i*) is answered."

38. The decisions of our Supreme Court noticed above thus clearly hold that a judgment rendered in the absence of the defendant does not cease to be executable merely because it came to be rendered *ex parte* as the expression is loosely and often employed. The principles propounded in both *International Woolen Mills* and *Alcon Electronics* have explained the test to be whether the foreign court has duly tried the claim or merely proceeded to render judgement based on the mere *ipse dixit* of the claimant and the absence of the defendant. The rule to be applied in such cases has been clearly expounded to be whether the court had, in fact, upon due consideration of the evidence laid before it come to the conclusion that the claim was liable to be granted or it merely dispensed with the aforesaid obligation simply on account of the absence of the defendant.

39. Tested on the aforesaid principles, as this Court peruses the judgment rendered by the High Court of England, it finds that it has firstly proceeded on the basis that the judgment debtor stood duly served in accordance with the law as applicable in the United Kingdom. It has, additionally, applied the English law by virtue of invocation of the default rule as enunciated. The High Court of England has thereafter dealt with the dispute on merits and upon taking into consideration the evidence that was placed before it. The judgment in any case does not rest upon an unproven, unsubstantiated or unverified claim. The judgment of which enforcement is sought, thus, can neither be said to be one which has either not been pronounced by a court of competent jurisdiction or one which has not

been given on the merits of the case. This Court also finds itself unable, bearing in mind the facts noticed hereinabove, to hold that the proceeding as initiated against the judgment debtor could be said to be opposed to natural justice.

40. Accordingly, on an overall conspectus of the aforesaid, the Court holds that the judgment of the High Court of England is clearly conclusive and would not fall within the exceptions carved out in Section 13 of the Code. It is thus found and recognized to be duly executable in India. The objections as raised, consequently, stand dismissed.

41. While closing, it may be noted that the reliance placed on *Potluri Rajeswara Rao* is clearly misplaced since that decision was not rendered in the context of Section 1140 of the Act.

EX.P. 37/2021 & EX.APPL.(OS) 535/2021, EX.APPL.(OS) 536/2021, EX.APPL.(OS) 537/2021

42. List on 23.05.2023.

YASHWANT VARMA, J.

APRIL 06, 2023
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