(1989) 12 BOM CK 0008

In the Bombay High Court

Algemene Bank Nederland Nv APPELLANT

Vs

Satish Dayalal Choksi RESPONDENT

Date of Decision : 07-12-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 22, 13
Foreign Exchange Regulation Act, 1973 — Section 26(6), 47(3)

Citation : (1991) 72 CompCas 501

Hon'ble Judges : Sujata V. Manohar, J

Bench : Single Bench

Advocate : Virendra V. Tulzapurkar and S.C. Dharmadhikari, for the Appellant; J.I. Mehta, Rohit Kapadia and D.D. Madon, for the Respondent

Judgement

1. This is a notice under Order 21, rule 22 of the CPC for leave to execute against the defendant in Bombay a decree of the Supreme Court of Hong Kong obtained by the plaintiff-applicant against the defendant.

2. The plaintiff-bank in Hong Kong had dealings with one Madhusudan and Co. Ltd. To secure the amounts advanced by the plaintiff-bank to the company, the brothers of the defendant, who were directors of the company, gave personal guarantees, in or about April 7, 1975, to the plaintiff-bank at Hong Kong. According to the plaintiff-bank, the defendant has also executed in favour of the plaintiff-bank a personal guarantee for personal guarantee for repayment of the company''s debt on or about April 7, 1975.

3. In November, 1984 as Madhusudan and Co. Ltd. was unable to discharge its liabilities to the plaintiff-bank, the plaintiff- bank filed a suit against Madhusudan and Co. The brothers of the defendant were joined as a party defendants on the basis of the guarantee executed by them. The defendant was not joined as a party to this suit and no amount was claimed from him. In December, 1984, the suit was decreed against Madhusudan and Co. Ltd. as well as the brothers of the defendant. On or about January 28, 1985, Madhusudan and Co. was ordered to be wound up.

4.Thereafter, in July, 1985 the plaintiff-bank instituted a suit against the defendant on the basis of the guarantee said to have been executed in or around April 7, 1985, by the defendant, for about Rs. 2.05 crores. It is the case of the defendant that he was in no way concerned with Madhusudan and Co. Ltd. and had not given any guarantee to the plaintiff-bank in respect of the dues of Madhusudan and Co. Ltd. around April, 1975, or at any time. It is the contention of the defendant that, in 1971 and a few years thereafter, the defendant had resided in Hong Kong and had worked with his brothers. Madhusudan and Co. was then a proprietary concern. Madhusudan and Co. Ltd. was incorporated only in 1975 by which time the defendant had returned to India. He was never a director of this company. He contends that he may have executed a blank form of personal guarantee in favour of the plaintiff-bank during the periods when he was in Hong Kong prior to 1975. It is his case that, since 1971-72, the defendant resides in Bombay and carries on independent business in the name and style of Indiamco. In this connection, the defendant enjoyed banking facilities with the plaintiff-bank at Bombay.

5. The suit which was instituted by the plaintiff-bank against the defendant was a summary Suit No. 4067 of 1985. In the second week of July, 1985, the Hong Kong solicitors of the plaintiff-bank served a writ of summons and papers in respect of this Hong Kong suit on the defendant. In the first week of September, 1985, an application was filed by the plaintiff in the Hong Kong Supreme Court for a summary judgment against the defendant. On September 25, 1985, the defendant filed an affidavit in reply to this application. On October 7, unconditional leave was granted to the defendant by the Hong Kong Supreme Court to defend the suit.

6. On October 10, 1985, the defendant filed in the suit.

7. On May 2, 1986, the plaintiff-bank took out a summons for directions in the Hong Kong Supreme Court. On June 6, 1986, the Hong Kong Supreme Court gave direction for trial. As a result on July 4, 1986, the plaintiffs filed their list of documents in which they disclosed the guarantee executed by the defendant in favour of the plaintiff-bank. It is an accepted position that the guarantee itself does not bear any date. According to the plaintiff-bank, it was executed around April 7, 1975. They relied on an entry of that date in their register of guarantees. On July 10, 1986, the defendant filed his list of documents. On October 2, 1986, the Hong Kong Court gave further direction for trial of the suit.

8. On October 14, 1986, the plaintiff-bank made an application for fixing a date for the trial of the suit. As a result, on November 24, 1986, the Hong Kong court fixed 14th and 15th January, 1987, as the dates for the trial of the suit. On December 23, 1986, the defendant made an application to the Hong Kong court for adjournment of the suit on the ground that he was sick. The defendant submitted a certificate from a medical practitioner in Surat in support of this application. The certificate stated that the defendant was advised rest in bed for 12 weeks from December 16, 1986. On this application of the defendant, the

Hong Kong Court adjourned the hearing of the suit to 16th and 17th March, 1987.

9. On March 3, 1987, the defendant took out a summons for specific discovery. On March 6, 1987, the Hong Kong court refused the application for specific discovery. On March 16, 1987, the defendant''s solicitors in Hong Kong made an application to the Hong Kong court to be allowed to cease to act for the defendant. This application was granted and the trial was adjourned to a date not before April 9, 1987. Ultimately, the court fixed the date of hearing as July 7, 1987. On this date, the defendant was absent and the ex parte decree was granted to the plaintiff-bank. It is this ex parte decree which is sought to be executed here.

10. u/s 44A of the Code of Civil Procedure, where a certified copy of a decree of any of the superior courts of any reciprocating territory has been filed in a District Court, the decree may be executed in India as if it had been passed by the District Court. In the present case, it is an accepted position that Hong Kong has been recognised as a reciprocating territory under the provisions of section 44A by a notification dated November 18, 1968, bearing No. G.S.R. 2096 issued by the Ministry of Law, Department of Legal Affairs, New Delhi, under which the Supreme Court of Hong Kong is recognised as a superior court of a reciprocating territory u/s 44A of the Code of Civil Procedure. A certified Copy of this decree has been filed here for execution. Under Order 21, rule 22 of the Code of Civil Procedure, where an application for execution is made of a decree filed under the provisions of section 44A, the court executing the decree shall issue a notice to the person against whom the execution is applied for requiring him to show cause why the decree should not be executed against him. Hence, the present application is made for leave to execute the decree against the defendant under Order 21.

11. u/s 44A(3) of the Code of Civil Procedure, the provisions of section 47 as from the filling of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section and the District Court shall refuse of any such decree, if it is shown to the satisfaction of the court that the decree falls within any of the exceptions specified in clauses (a) to (f) of section 13.

12. It is the contention of the defendant that leave should not be granted to the plaintiff-bank to execute the decree because the present decree violates the provisions of section 13(b), (e) and (f) of the Code of Civil Procedure. The defendant also contends that the decree cannot be executed without obtaining the permission of the Reserve Bank of India and/or the Central Government in view of the provisions of the Foreign Exchange Regulation Act, 1973.

13. u/s 13(b) of the Code of Civil Procedure, a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties except where the proceedings in which the judgment was obtained are opposed to natural justice. The defendant contends that he was denied an

opportunity to defend the Hong Kong suit on merit. Therefore, the proceedings before the Hong Kong court are opposed to the principles of natural justice. This contention does not have any substance.

14. The defendant initially engaged solicitors in the Hong Kong court and vigorously defended the action. It was a summary in which the defendant appeared through solicitors and obtained leave to defend. The defendant was granted unconditional leave to defend. As a result, the defendant also filed his defence. Documents were also filed by both sides. After notice to both sides, the Hong Kong Supreme Court fixed a date for hearing of the suit. The defendant got the hearing of the suit adjourned on the production of the medical certificate. The defendant also tried to delay the hearing of the suit by making an application for specific discovery, which application was rejected. Thereafter, in March, 1987, after appearing for the defendant for two years, the defendant''s solicitor in Hong Kong obtained a discharge. It is very relevant to note that, in March, 1987, on the date on which the defendant applied for specific discovery, the defendant also filed a suit in this High Court against the plaintiff-bank being suit No. 645 of 1987 to restrain the plaintiff-bank from proceeding with the Hong Kong suit. On the very day on which an application was made on the defendant''s behalf in the Hong Kong court for specific discovery , an application was moved in this court and an ad interim injunction was obtained restraining the plaintiff from proceeding with the suit in the Hong Kong court. This ad interim injunction was ultimately ultimately vacated and the notice of motion of the defendant was dismissed on November 12, 1987, by a learned single judge of this court. The injunction was however, continued for a period for four weeks to enable the defendant to file an appeal.

15. In the meanwhile, during the pendency of the notice of motion which was taken out in the suit in this court, the defendant, for the first time, made an application to the Reserve Bank of India on June 25, 1987, for sanction of U.S. dollars 40,000 to contest the Hong Kong suit. This application was rejected by the Reserve Bank of India on October 16, 1987, that is to say, before the dismissal of the notice of motion by the single judge. A few days before the dismissal of the notice of the motion, on November 7,1987, the defendant made a second application to the Reserve Bank of India for sanction of U.S. dollars 40,000 to contest the Hong Kong suit. The second application was also rejected by the Reserve Bank of India on December 8, 1987. On December 11, 1987, the Division Bench of this High Court rejected the defendant''s appeal against the notice of motion but gave time to the defendant to apply to the Reserve Bank of India for reconsideration of his application. To enable the defendant to obtain permission from the Reserve Bank, it is restrained the plaintiff-bank from proceeding with the Hong Kong suit until May 1, 1988.

16. The defendant, therefore, had ample time to get the Reserve Bank to reconsider his application. It was the contention of the plaintiff-bank in the notice of motion and in appeal that the defendant had deliberately obtained rejection

from the Reserve Bank. The wording of the application lends some support to this contention. The application draws pointed attention to the suit in the Bombay High Court and obtaining of an ad interim injunction restraining the plaintiff-bank from proceeding with the Hong Kong suit. It is further stated that the defendant is making an application to the Reserve Bank without prejudice to the suit and without prejudice to the proceedings pending therein. The defendant says : " I, therefore, hereby apply that your immediate sanction or permission may be granted for releasing foreign exchange in U.S. dollars 40,000 initially for the purpose of defending the said suit which is a false suit. This amount is a rough estimate of the possible initial expenses for meeting the living and other expenses of two persons for three months in Hong Kong, of the advocates/ solicitors who may be engaged at Hong Kong for defending the suit, court fee, etc., about which I am not in a position at this stage to give any definite break-up or documentary evidence." In his renewed application of November 7,1987, the defendant has been at pains to point out to the Reserve Bank that even if a decree is passed against him, the plaintiff-bank will not be in a position to execute it in India since it would be illegal to execute the decree without the Reserve Bank''s permission. The defendant, therefore, appears to be inviting rejection of his application. The learned single judge of this court also observed in his judgment of November 12,1987. "In the reply, the defendants have pointed out that. in all probability, and I am inclined to agree with the defendant''s that the plaintiff (defendant here) did not place all the facts before the Reserve Bank. If all the facts had been placed before the Reserve Bank, there would have been no difficulty in getting the necessary foreign exchange for the purpose of defending the suit in Hong Kong."

17. The Division Bench of this High Court, in its judgment on December 11, 1987, had observed that the present defendant cannot be expected to defend the action in Hong Kong without a reasonable amount of foreign exchange. They had, therefore, suggested that the Reserve Bank reconsider the application of the defendant in that behalf. It further said that, in the event of the Reserve Bank denying foreign exchange after such reconsideration. it may become necessary for the defendant to adopt appropriate proceedings. To give the defendant time to do so they would continue the stay on proceeding with the action in Hong Kong until May 1, 1988.

18. Both these orders, therefore, clearly gave the defendant adequate time to make a fresh application before the Reserve Bank. If the Reserve Bank refused his application, it was open to the defendant to take appropriate proceedings against the Reserve Bank in the courts here. The defendant, however, did not make any application to the Reserve Bank for reconsideration until April 22, 1988. In the meanwhile, he filed a SLP before the Supreme Court and waited. On April 22, 1988, he applied for an early date for admission. On May 5, 1988, the SLP was dismissed. However, the Supreme Court granted leave to apply to this court for appropriate relief against the Reserve Bank of India. Even so, the defendant took no steps to obtain permission of the Reserve Bank or to take any

proceedings against the Reserve Bank. Apart from indulging in correspondence with the plaintiff-bank and his advocates in Hong Kong, the defendant took out, as late as June 14, 1988, a notice of motion in the Bombay suit for an injunction restraining the plaintiff-bank from proceeding with the Hong Kong action. He did not even move the court for any ad-interim order, looking to the fact that, to the knowledge of the defendant the trial of the suit had been fixed by the Hong Kong court on 7th and 8th July, 1988. This information was in the possession of the defendant when he took out the notice of motion. Despite this, he did not apply for an ad interim order. On July 7, 1988, the notice of motion became infructuous because it had not reached hearing. In the meanwhile, the plaintiff-bank''s suit before the Hong Kong court had been decreed. On the next day, the defendant quietly withdrew his application to the Reserve Bank for grant of foreign exchange.

19. Looking to these circumstances, can it be said that the defendant has been prevented from defending the Hong Kong suit and that hence the decree which has passed is in violation of the principles of natural justice? In my view, there has been no violation of the principles of natural justice on the facts of the present case. In the first place, the defendant was granted unconditional leave to defend the Hong Kong suit. He had also taken all steps to defend the suit. But, for reasons best known to the defendant, he did not defend the suit when it reached hearing. His contention that he could not defend the suit because he could not get release of foreign exchange from the Reserve Bank of India for the purpose of defending the suit also does not appear to be a valid grievance in the circumstances of the present case. From the facts set above, it would seem that the defendant did not take proper steps nor did he make any proper application for permission of the Reserve Bank to defend the suit. The learned single judge as well as the Division Bench of this court and the Supreme Court gave the defendant ample opportunity to make a proper application to the Reserve Bank, and, if necessary, to apply to the court for obtaining such foreign exchange, if the Reserve Bank refused to grant it to him. The defendant took no steps to make any application in the court against the refusal of the Reserve Bank of India to release foreign exchange to him. In these circumstances, the defendant has to blame himself for his alleged inability to defend the Hong Kong suit. It cannot, therefore, be said that the principles of natural justice have been violated in any manner.

20. In the case of Sankaran Govindan Vs. Lakshmi Bharathi and Others, , the Supreme Court has observed : "It is extremely difficult to fix with precision the exact cases in which the contravention of any rule or procedure is sufficiently serious to justify a refusal of recognition or enforcement of a foreign judgment." The Supreme Court stated that, when applied to foreign judgments, negation of natural justice merely relates to the alleged irregularities in procedure adopted by the adjudicating court has nothing to do with the merits of the case. If the proceedings be in accordance with the practice of the foreign court and that practice is not in accordance with natural justice, the court will not allow it to be

concluded by them. In other words, courts are vigilant to see that the defendant had not been deprived of an opportunity to present his side of the case. In the present case, the defendant was given sufficient opportunities both by the Hong Kong court as well as by our courts to ensure that he gets adequate opportunity to defend his case. The defendant has not made proper use of such opportunities which were given to him. It cannot, therefore, be said that the principles of natural justice have been violated in any manner or that the proceedings in which a foreign judgment had been obtained are opposed to the principles of natural justice. This contention must, therefore, be negatived.

21. It is next contended by the defendant that the present foreign judgment is not given on the merits of the case and hence that it is in violation of section 13(b) of the Code of Civil Procedure. Leave to execute such a foreign judgment should not, therefore, be granted. In the present case, the suit was a summary suit. The defendant was granted unconditional leave to defend the suit. He filed his defence but, at the final hearing, he failed to appear. Hence an ex parte decree was pronounced in favour of the plaintiff-bank. The judgment states that " the defendant having failed to appear and upon proof of the plaintiff''s claim," judgment is entered for the plaintiff. Can this be said to be a judgment on the merits of the case?

22. In the case of D.T. Keymer v. Visvanathan Reddi AIR 1916 PC 121, the defendant refused to answer interrogatories which had been submitted to him. Because of his refusal, the defence was struck out. The merits of the case were not investigated and the defendant was treated as though he had not defended the suit. Judgment was given upon that footing. The Privy Council held that such a decision cannot be regarded as a decision given on the merits of the case within the meaning of section 13(b) of the Code of Civil Procedure. The Privy Council observed that, in their Lordships'' view, section 13(b) refers to those cases where, for one reason or another, the controversy raised in the action has not, in fact, been the subject of direct adjudication by the court. This decision has been followed in a number of subsequent decisions of this High Court as well as of other High Courts.

23. The Full Bench of the Madras High Court, in the case of R.E. Mahomed Kassim and Co. v. Seeni Pakir AIR 1927 Mad 265, considered a foreign judgment which was passed on default of appearance of the defendant without trial on evidence. The Madras High Court, following the Privy Council decision in D.T. Keymer''s case AIR 1916 PC 121 , held that that this was not a judgment on the merits of the case. It also said that there was in principle no distinction between a case where the defence on the defendant was struck out for not answering the interrogatories (as in the case before the Privy Council) and the case such as the one before them where the defendant did not appear at all. In both the cases, the Madras High Court said, the merits of the case had not been into. It overruled an earlier judgment of the Madras High Court in A. Janno Hassan Sait Vs. S.N. Mahamad Ohuthu, which had held that in a case where the defendant

did not appear and raise a defence, there would be an implied admission of the plaintiff''s claim and hence the ex parte judgment should be considered as a judgment on merits.

24. This decision of the Full Bench of the Madras High Court was followed in a subsequent decision of the Madras High Court in the case of S.S.A.S. Arunachalam Chettiar Vs. A.M. Muhammad Salihu Marakkayar and Others, . Here also, the Madras High Court said that, under the provisions of section 13(b) of the Code of Civil Procedure, a foreign judgment was not a judgment on merits where the defendant, though served, had remained absent and a judgment against him was pronounced ex parte.

25. In A.N. Abdul Rahman v. J.M. Mahomed Ali AIR 1928 Ran 319, an ex parte judgment of a foreign court where the judgment had been granted without taking the plaintiff''s evidence but only on his pleadings in view of the absence of the defendant to appear and defend the suit was considered as not a judgment on merits u/s 13(b) of the Code of Civil Procedure. The court observed that a decision on merits involves the application of the mind of the court to the truth or falsity of the plaintiff''s case ; and, therefore, though a judgment passed after judicial consideration of the matter by taking evidence may be a decision on the merits even though passed ex parte, a decision passed without evidence of any kind but passed only on the plaintiff''s pleadings cannot be held to be a decision on the merits. The Calcutta High Court has also come to a similar conclusion in the case of Derby McIntyre and Co. Ltd. v. Mitter and Co. [1935] 39 CWN 557. The Calcutta High Court said that a foreign judgment given by default under summary procedure in the absence of appearance by the defendant and filing of any defence against him, and without any consideration of the plaintiff''s evidence is not a judgment given on the merits of the case and thus it comes under the exception contained in section 13(b) of the Code of Civil Procedure.

26. In the case of Ephrayim H. Ephrayim Vs. Turner, Morrison and Co., , the provisions of the section 13(b) were once again considered. In that case, a foreign judgment was obtained from the court at Basra. The defendant has been served with the writ of summons. The defendant had given the power of attorney to a pleader in Basra which power of attorney was in force at the time when the suit was heard. On behalf of the defendants, the pleader applied for an adjournment which was not granted. Thereafter, the court proceeded to go into the form of proceedings and to pass a decree against the defendants. the Court held that no defence had been raised but merely an adjournment was asked for which was refused. The judgment which proceeded ex parte had proceeded on the evidence of the plaintiff and the papers in the form of a suit. The court held that, in such a case, the judgment cannot be said to be one which is not on merits. Therefore it is held that the judgment, though it was ex parte, was on merits and hence it was not hit by section 13(b).

27. In the case of East India Trading Co. Vs. Badat and Co., (overruled by the Supreme Court on a different point), a decision Bench of this court analysed the

expression "given on the merits" in section 13(b) of the Code of Civil Procedure. It held that, for a decision to be given on the merits, the Tribunal giving the award should have considered the merits of the matter and come to a decision. The expression does not mean that every decision given ex parte is necessarily a decision not on merits. It is only those cases where the courts, for some reason or the other, pass a judgment against a party without investigating the merits of the matter, that it could be said that the decision is not given on merits. The mere fact that the decision is ex parte, the mere fact that the defendant, after being served, does not choose to appear does not mean that an ex parte decision is a decision not on merits.

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 and Co. Ltd. The entry of April 7, 1985, in the register of guarantees 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 April 7, 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 judgment in view of the defendant''s failure to appear at the hearing of the case to defend the claim on merits.

28. In my view, in these circumstances, the case before me falls under the ratio laid down by the Privy Council in D.T. Keymer''s case AIR 1916 PC 121.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 the documents tendered by the plaintiff without going into the controversy between the parties since the defendant did not appear at the time 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 CPC for the purpose of executing the decree here.

29. It is also contended by the defendant that the judgment cannot be enforced because it sustains a claim founded on a breach of law in force in India, namely, the Foreign Exchange Regulation Act, 1973. According to the defendant, the judgment is, therefore covered by section 13(F) of the CPC and hence it cannot be enforced. Section 13(F) provides that a foreign judgment shall not be conclusive where it sustains a claim founded on a breach of any law in force in India.

30. u/s 26, sub-section (6) of the Foreign Exchange Regulation Act, 1973, except with the general or special permission of the Central Government or the Reserve Bank, no person resident in India shall give a guarantee in respect of any debt or other obligation or liability of a person resident outside India. In the present case, the defendant who is a resident in India has given a guarantee in favour of a company which is incorporated outside India and to a bank outside India without obtaining such permission of the Central Government or the Reserve Bank. The claim of the plaintiff is founded on this guarantee which was given in violation of section 26(6) of the Foreign Exchange Regulation Act, 1973.

31. Section 47, sub-section (3) of the Foreign Exchange Regulation Act, 1973, provides as follows :

(3) Neither the provisions of this Act nor any term (whether express or implied) contained in any contract that anything for which the permission of the Central Government or the Reserve Bank is required by the said provisions shall not be done without that permission, shall prevent legal proceedings being brought in India to recover any sum which, apart from the said provisions and any such term, would be due, whether as debt, damages or otherwise, but -

(a) the said provisions shall apply to sums required to be paid by any judgment or order of any court as they apply in relation to other sums ; (b) no steps shall be taken for the purpose of enforcing any judgment or order for the payment of any sum to which the said provisions apply except as respects so much thereof as the Central Government or the Reserve Bank, as the case may be, may permit to be paid ; and (c)...

32. u/s 47(3), therefore, a suit for the enforcement of a guarantee for which the permission of the Reserve Bank/Central Government would have been required u/s 26(6) can be brought in India. Filing of a suit, therefore, on such a guarantee cannot be said to be contrary to any law in India because section 47, sub-section (3) expressly permits such legal proceedings in India. Such proceedings abroad cannot be said to be violative of any law in India. However, no steps can be taken for the purpose of enforcing ant judgment or order for the payment of any sum under such a guarantee except in respect of so much thereof as the Central Government or the Reserve Bank may permit to be paid. With the result that, before a foreign decree passed on such a guarantee can be executed in India,

permission of the Reserve Bank or the Central Government for realising such sum is necessary.

33. Section 47(3)(b) says,"no steps shall be taken for the purpose of enforcing any judgment or order for the payment of any sum to which the said provisions apply except as respects so much thereof as the Central Government or the Reserve Bank ... may permit to be paid". An application under Order 21, rule 22, is certainly a step for the purpose of enforcing a judgment. Under Order 21, rule 11, every application for execution of a decree shall be in writing signed and verified by the applicant and shall contain, inter alia, various particulars including the mode in which the assistance of the court is required. Under Order 21, rule 22, inter alia, where an application for execution of a foreign decree is filed under the provisions of section 44A, leave is necessary. Therefore, before any leave can be obtained under Order 21, rule 22, it is necessary to make an application under Order 21, rule 11. These are, therefore, clearly proceedings for the purpose of enforcing a foreign judgment. Before such steps can be taken, permission of the Reserve Bank or the Central Government, as the case may be, is necessary u/s 47(3)(b).It was contended by Mr. Tulzapurkar, learned counsel for the plaintiff-bank, that such permission can be obtained after leave is granted under Order 21, rule 22 but before the actual execution is levied. This contention cannot be accepted in view of the express provisions of section 47(3)(b). Section 47(3)(b) clearly prohibits any step being taken for the purpose of enforcement without the permission of the Reserve Bank or the Central Government. It does not say that actual execution shall not be levied without such permission. In fact, once leave is granted under Order 21, rule 22 nothing further is required to be done and the plaintiff-bank can proceed with execution. Prior permission of the Reserve Bank or the Central Government, as the case may be, is, therefore, required before taking any step for the enforcement of the decree, including an application under Order 21, rule 22. Such permission has not been obtained by the plaintiff-bank. Without such permission, it cannot proceed.

34. In the case of R.M.S. Shanmugham Chettiar and Others Vs. Gian Cheng Kiet, , the provisions of section 21(3)(b) of the Foreign Exchange Regulation Act, 1947, which are similar to section 43(3)(b) of the present Foreign Exchange Regulation Act, 1973, were considered. In that case, the decree holder had merely filled a certified copy of the judgment of the foreign court and prayed for transmission of the decree to the executing court. The court said that this did not amount to a step in the enforcement of a judgment. That case has no application here, because an application under Order 21, rule 22 is directly for leave to enforce the foreign judgment.

35. In the case of Dhanrajamal Gobindram Vs. Shamji Kalidas and Co., , the Supreme Court had considered section 21 of the Foreign Exchange Regulation Act, 1947. The court said that the responsibility of obtaining permission of the Reserve Bank before enforcing a judgment, decree or order of a foreign court is transferred to the decree-holder under the provisions of section 21.

36. As such permission has not been obtained in the present case, the application is not maintainable.

37. Leave asked for under Order 21, rule 22 of the CPC is refused and the notice is discharged.

