

(2020) 01 DEL CK 0508

In the Delhi High Court

Case No : Execution Petition No. 102 Of 2018, Eas No. 526, 525 Of 2018

Ameeka Gupta

APPELLANT

Vs

Manish Gupta

RESPONDENT

Date of Decision : 21-01-2020

Acts Referred:

Code Of Civil Procedure, 1908 — Section 13, 13(b), 44A, Order 37
Foreign Judgments (Reciprocal Enforcement) Act 1933 — Section 10
Evidence Act 1872 — Section 45, 78, 86, 114

Citation : (2020) 01 DEL CK 0508

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Sanjeev Mahajan, Saurabh George, Sumant De, Amit Prabhat Deshpande

Judgement

Rajiv Sahai Endlaw, J

1. Execution under Section 44A of the Code of Civil Procedure (CPC) is sought of the foreign judgment and decree dated 13th July, 2018 of the High Court of Justice Family Division, Royal Court of Justice, England in Claim No.BF15D00113 titled "Ameeka Gupta Vs. Manish Gupta".

2. The decree holder, in the column of the prescribed form for execution petition, requiring the amount with interest due upon the decree to be stated, has stated "Principal Amount: £2,10,000/- equivalent to Rs.2,01,60,000/-".

3. Mode of execution pleaded is, by attachment of shareholding of the judgment debtor in Overseas Courier Service India Private Limited (OCSIPL) and by direction to the judgment debtor to file an affidavit of assets as well as by imprisonment of the judgment debtor in civil prison.

4. It is further pleaded in the application for execution, (i) that the last matrimonial home where the parties cohabitated as husband and wife was in United Kingdom and the parties were divorced on 22nd February, 2016; (ii) that

two children were born from the wedlock, both of whom are in the custody of the decree holder mother; (iii) that since the judgment debtor father was not paying maintenance for their education, the decree holder mother approached the Family Court at Brentford for financial dispute resolution under the Matrimonial Causes Act, 1973; (iv) that the judgment debtor father appeared and filed his reply; (v) vide interim order dated 8th March, 2016, the judgment debtor father was directed to pay the school fees of the children; (vi) that thereafter, the District Judge Jenkins Family Court passed final order on 7th June, 2016, directing transfer of the matrimonial home to the name of decree holder mother and payment by the judgment debtor father of a lump sum of £2,10,000/-; (vii) that an application for permission to appeal against the judgment dated 7th June, 2016 was disposed of and permission refused; (viii) on failure of the judgment debtor to pay the amount of £2,10,000/-, the decree holder approached the High Court of Justice Family Division, Royal Court of Justice, England which passed a decree on 13th July, 2018 for a sum of £2,10,000/- and issued a "Form 110 Certificate for enforcement in a foreign country under section 10 of the Foreign Judgments (Reciprocal Enforcement) Act 1933"; (ix) that the judgment debtor has assets in India.

5. The execution petition came up first before this Court on 4th December, 2018, when while issuing notice thereof, personal appearance of the judgment debtor was directed. Vide subsequent order dated 10th December, 2018, the judgment debtor was directed to file affidavit of assets and copy of income tax returns for the previous three years as well as statements of his bank account for the previous three years. Vide orders dated 17th December, 2018 and 14th January, 2019, the judgment debtor was restrained from transferring any of his moveable and immovable assets to the extent of the decretal amount.

6. The judgment debtor has filed a reply to the execution petition to which a rejoinder has been filed by the decree holder.

7. The counsel for the decree holder contends that the judgment debtor in his affidavit filed pursuant to the directions of this Court, has disclosed mutual funds and bank accounts wherefrom the decree can be satisfied. It is further contended that no defence within the meaning of Section 13 of the CPC to the execution is taken in the reply filed by the judgment debtor to the execution petition.

8. Per contra, the counsel for the judgment debtor has raised two contentions. Firstly, it is contended that the foreign judgment of which execution is sought, has not been given on the merits of the case and as per Section 13(b), and is thus not conclusive. The second argument is that the decree itself provides for the mode of execution thereof i.e. by transfer of shareholding of the judgment debtor in OCSIPL to the decree holder and in fact the decree holder initiated steps therefor; the majority shareholders in the said company are Japanese entities and the said company took a stand that the Courts in U.K. did not have the jurisdiction to direct transfer of shares and it is only thereafter that the present execution petition has been filed. It is argued that since the decree itself

provides for the mode of recovery of amount decreed from the judgment debtor, execution can be by that mode only and not by any other mode.

9. However, the counsel for the judgment debtor has prefaced the aforesaid arguments stating that the judgment debtor is willing for the amounts of the mutual funds to be secured for the benefit of his two children. It is however stated that the decree holder has re-married and thus the amount of the mutual funds be secured, though for the children, but paid only after the children have attained majority.

10. On enquiry of the amount of the mutual funds, it is stated that the value of the mutual funds today is little over Rs.1,00,00,000/-. On enquiry as to how the balance decretal amount will be satisfied, it is stated that the judgment debtor has no vocation and no source of income except the interest from the mutual funds and is living in Delhi at the charity of his father.

11. The counsel for the decree holder in his arguments has reiterated that there is no plea in the reply that the foreign judgment of which execution is sought is not conclusive for the reason of being not on merits. It is argued that without pleading so, it is not open to the judgment debtor to make the first contention aforesaid. With respect to the second contention of the counsel for the judgment debtor, it is stated that though an attempt was made for satisfaction of the decretal amount by transfer of shares of the judgment debtor in favor of the decree holder, but upon the same being not possible, the High Court of Justice Family Division has confined the decree of which execution is sought to recovery of money and thus it cannot be said that the decree prescribes only one mode of realization of the decretal amount.

12. The counsel for the judgment debtor, in rejoinder has contended that the order of the High Court of Justice Family Division, though of after the date of initiation by the decree holder of steps for transfer of shares of the judgment debtor in OCS IPL, does not make any mention thereof.

13. The counsel for the judgment debtor, in support of the contention that the decree under execution is not on merits, has drawn attention to paras 28 & 29 of International Woolen Mills Vs. Standard Wool (U.K.) Ltd. (2001) 5 SCC 265.

14. The foreign judgment or decree in terms whereof execution is sought by the decree holder, is between the decree holder and the judgment debtor and the relevant part thereof is as under:-

"Before Mr. Justice HOLMAN sitting at the Royal Courts of Justice, Strand, London WC2A 2LL on 13th July, 2018.

AFTER HEARING counsel, Miss Mandy Tanner, who appeared on behalf of the applicant wife and the respondent husband being neither present nor represented.

AND UPON reading a letter to the court dated 11 July 2018 from 12 Bridge

Solicitors on behalf of the respondent husband in which they state that neither they nor the respondent are able to attend this hearing but in which they do not request an adjournment.

AND AFTER consideration of the documents lodged by the applicant wife including in particular the Note of counsel, Mandy Tanner, dated 11 July, 2018.

AND UPON hearing the oral evidence of the applicant wife, Ameeka Gupta, sworn upon the Sundar Gutka, that as at the date hereof (12 July 2018), the respondent husband has not paid any part of the lump sum of £210,000 ordered on 6 June 2016 and required to have been paid in full by 16 June 2017, and that as at the date hereof the whole of the said sum of £210,000 remains outstanding and unpaid and still owing.

AND UPON the court reading the expert evidence of Alka Dahar regarding enforcement of the order of the 6 June 2016 and noting the advice therein.

AND UPON the court noting that it will need to make a declaration setting out what sum the respondent must pay to the applicant under the order of the 6 June 2016 in order that there may be an application for an execution petition under section 44A of the Code of Civil Procedure in India by the applicant.

AND UPON the court confirming that this sum due is owing from financial remedy court proceedings following the parties' divorce and is akin to decree for payment of money. It is not a tax, fine or penalty.

AND FOR THE REASONS fully given in the oral judgment delivered today of which any party may obtain a transcript on payment of the transcribers' fees.

IT IS DECLARED THAT:-

1. The lump sum payment ordered on the 6 June 2016, namely £210,000, remains outstanding and has not been satisfied in full or in part by any means of enforcement or otherwise as at the date hereof, namely 12 July 2018.

IT IS ORDERED THAT:-

2. The respondent must pay the applicant's costs of this application summarily assessed in the sum of £5,630.00 inclusive of all V.A.T. within 14 days of the date of this order."

15. The decree holder along with the execution petition, has also filed "Form 110 Certificate for enforcement in a foreign country under section 10 of the Foreign Judgments (Reciprocal Enforcement) Act 1933" dated 12th July, 2018 issued by Hon'ble Mr. Justice Holman of the Royal Courts of Justice, Family Division.

16. The counsel for the judgment debtor, along with his reply has filed the proceedings of 6th June, 2016 in the Family Court sitting at Brentford, between the decree holder and the judgment debtor under "The Matrimonial Causes Act, 1973" and in the "marriage of Ameeka Gupta and Manish Gupta". The relevant part thereof is as under:-

"After hearing counsel Miss Hartnett for the applicant wife and counsel for the respondent husband attending in order to make an application to adjourn, but then not having instructions to act in the matter any further

After consideration of the documents lodged by the parties

ORDER MADE BY DISTRICT JUDGE JENKINS ON 6 JUNE 2016 SITTING IN PRIVATE AT THE FINAL HEARING

The parties

1. The applicant is Ameeka Gupta The respondent is Manish Gupta

Definitions

2. The former matrimonial home (FMH) is the property at 3 Christopher House, Rosewood Way, Farnham Common, SL2 3QE.

3. The shares are the shares held in the respondent husband's name with Overseas Courier Service (India) Private Limited, registered in India under registration number U74899DL1994PTC057839.

4 Introductory recital

The Court orders that the terms set out in this order are accepted in full and final satisfaction of:

- a. All claims for income;
- b. All claims for capital, that is payments of lump sums, transfers of property and variations of settlements;
- c. All claims in respect of each others pensions;
- d. All claims in respect of the contents of the family home and personal belongings including but not limited to furniture, art work, jewellery and motor vehicles;
- e. All claims against each other's estate on death;
- f. All other claims of any nature which one may have against the other as a result of their marriage/civil partnership howsoever arising either in England and Wales or in any other jurisdiction save those already adjudicated upon and the Court having previously made orders in relation to.

Recitals

5 UPON the respondent husband not attending at Court, having informed the Court that he has moved to India

6 AND UPON the husband having written to the Court requesting an adjournment and this being denied on paper

7 AND UPON the husband renewing his application to adjourn the final hearing

through counsel instructed to attend at the hearing

8 AND UPON the Court refusing the further application to adjourn, and counsel for the husband then having to excuse himself as he had no instructions to act in the final hearing

9 AND UPON the Court having ordered a freezing injunction in relation to the shares with Overseas Courier Service (India) on 23 May 2016

10 AND UPON all previous orders for payment of school fees and costs orders remaining in place and enforceable by the applicant wife

11 AND UPON the Court drawing inferences from the lack of disclosure by the husband

12 AND UPON the Court acknowledging that the husband's shares with Overseas Courier Service (India) are likely to have to be sold to fund the lump sum ordered below and therefore varying the freezing injunction to allow for the sale of the shares with the proceeds to be paid to the client account of MacKenzie Solicitors, who act for the wife, and to be used in satisfaction of the lump sum ordered below

13 AND UPON the Court indicating that if the husband does not pay the lump sum ordered below then it will consider an application by the wife for transfer of the shares with Overseas Courier Service (India) into the name of the wife for her to dispose of as she wishes to.

IT IS ORDERED (with effect from Decree Absolute):

1. Lump sum order

a. The respondent shall pay to the applicant a lump sum of £210,000 by 4pm on 15 August 2016

b. If the respondent fails to pay all or any part of this lump sum by 4pm on 15 August 2016 simple interest shall accrue on the remaining balance of the lump sum at the rate applicable for the time being to a High Court judgment debt.

2. Transfers of property

The respondent shall transfer to the applicant all his legal estate and beneficial interest in the family home [as in definition above], [subject to the mortgage secured against the property], by 15 August 2016.

3. Procure release from mortgage and to indemnify

The applicant shall use her best endeavours to procure the release of the respondent from any liability under the mortgage, and shall in any event indemnify the respondent against all such liability after the transfer of his legal estate and beneficial interest in the family home."

17. The counsel for the judgment debtor, along with his reply has also filed the

proceedings of 6th July, 2016 before the District Judge, sitting at the Family Court at Brentford, in the proceedings between the decree holder and the judgment debtor, the relevant part whereof is as under:-

"AND UPON the Court ordering in the substantive financial remedy proceedings that the respondent should pay to the applicant a lump sum of £210,000

AND UPON the Court having already ordered on 23 May 2016 a freezing injunction in relation to the respondent's shares with Overseas Courier Service (India) Private Limited preventing him from disposing or dealing with them

IT IS ORDERED THAT

1. The respondent may deal with his shareholding in Overseas Courier Services (India) Private Limited, registered in India no U74899DL1994PTC057839 in so far as he may offer them for sale to the other shareholders in Overseas Courier Services (India), with the proceeds of sale to be paid to the bank account of MacKenzie solicitors for the benefit of the applicant wife."

18. The counsel for the judgment debtor, while addressing his arguments with respect to the decree of which execution is sought being not on merits of the case, had drawn attention to para 5 and 6 of the reply but which merely mention that the decree holder, after the order dated 6th June, 2016 of the Family Court at Brentford, has herself sought directions from the said Court for transfer of shares in OCSIPL in her favour and the said Court vide subsequent order dated 6th July, 2016 passed directions to the said effect and the solicitors of the decree holder on 3rd July, 2017 and 7th July, 2017, sought details for transfer of the shares. The said pleas do not amount to taking a plea of the foreign judgment of which execution is sought being inconclusive for not being on the merits. The counsel for the judgment debtor is unable to point out any other para of the reply, where the plea of the foreign judgment being not on merits may have been taken.

19. Thus, the counsel for the decree holder is correct in the contention that the first argument of the counsel for the judgment debtor is not backed by any pleading.

20. Though whether a judgment is on the merits of the case or not would be a question of law inasmuch as the reading of the judgment itself would show whether it is on merits or not, but when an argument of foreign judgment being not conclusive for the reason of not being on merits of the case, is to be raised, in my view, it is essential to plead the same. It was incumbent upon the judgment debtor to, with reference to the foreign law, plead as to how the judgment was a default judgment or without any evidence or disclose the provision of the foreign law permitting such a judgment, without being on the merits of the case, being returned. Not only has the judgment debtor not pleaded so but the counsel for the judgment debtor today also is not able to show how under the foreign law on which the judgment has been given, it is not

on the merits of the case.

21. Per section 45 of the Evidence Act 1872, when the Court has to form an opinion on foreign law, the opinion of the person skilled in foreign law is a relevant fact. Such fact needs to be pleaded. Under Section 78 of the Evidence Act also, the acts of legislature of a foreign country are to be proved in the manner provided therein and to be entitled to prove, there has to be pleading. Section 86 however permits Court to presume that any document purporting to be a certified copy of any foreign country is genuine and accurate.

22. For the aforesaid reason, the reliance placed by the counsel for the judgment debtor on International Woollen Mills *supra*, is misconceived. The dicta therein was on the following facts:-

(i) There was a controversy whether the appellant-defendant therein was at all served.

(ii) It was on record that the summons to the appellant-defendant had been issued upon reading of the affidavit of solicitor for the respondent-plaintiff therein.

(iii) The solicitor of the respondent-plaintiff had thereafter filed another affidavit stating that the service had been effected of an employee on the appellant-defendant whereupon, the English Court pronounced judgment and decree without even recording that the same was after reading the second affidavit filed or after considering any documents on record.

(iv) The judgment had been pronounced merely granting decree for the amounts mentioned therein.

23. As distinct therefrom, a reading of the proceedings of 6th June, 2016 relied upon by the counsel for the judgment debtor himself, shows (i) that the judgement debtor was present and had sought an adjournment which was refused; (ii) that the judgment was pronounced "after consideration of the documents lodged by the parties"; (iii) that the judgment was in full and final satisfaction of all claims of income, capital, pension, contents of family homes and personal belongings against each other and also against each other's estate on death; (iv) that the counsel for the respondent-judgment debtor, upon refusal of adjournment, withdrew stating that "he had no instructions to act in the final hearing"; (v) that prior thereto, the Court had "ordered a freezing injunction in relation to the shares of Overseas Courier Services (India) Private Limited on 23rd May, 2016"; (vi) that the judgment was passed after recording that all previous orders for payment of school fee and costs, were in place and enforceable by the decree holder; (vii) that the judgment was passed drawing inference from the lack of disclosure from the judgment debtor-husband and after indicating that if the judgment debtor did not pay the lump sum ordered, then it will consider an application of the decree holder wife for transfer of shares of OCS IPL into the name of the decree holder, to be disposed of by her as wished.

24. The aforesaid distinctions between International Woollen Mills supra on which alone reliance is placed and the present case show the said case to be not applicable. Rather, counsel for the judgment debtor on inquiry during the hearing, whether a decree in a suit under Order XXXVII of the CPC in the failure of defendant to apply for leave to defend would be a judgment on merits or not, has answered that the same would be a judgment on merits.

25. For the judgment debtor to make out a case of foreign judgment of which execution is sought being not on merits, the judgment debtor was required to plead the foreign law of which presumption under the Evidence Act (Section 114), can be drawn.

26. A mere perusal of recital of the proceedings of 6th June, 2016 would also show that only liberty was given to the decree holder to apply for transfer of shares in the event of the judgment debtor not paying the lump sum amount ordered. However the operative part of the order/judgment is of payment of the lump sum amount only and not of transfer of shares.

27. Similarly, as shown by the counsel for the decree holder, the proceedings before the Royal Court of Justice was also for payment of lump sum amount and not for transfer of shares. In fact, the proceedings of 6th July, 2016 of the District Judge at the Family Court at Brentford filed by the judgment debtor himself, as reproduced above, show that though on 23rd May, 2016, a freezing injunction with respect to the shares had been issued, but on 6th July, 2016, the said injunction was vacated and the judgment debtor was set at liberty to deal with the shares. The judgment debtor cannot be permitted today to urge that the decree has to be executed from the shares only.

28. Thus, no merit is found in any of the objections of the judgment debtor and the decree is entitled to be executed forthwith.

29. Counsel for the decree holder is not sure how the monies in the mutual funds are to be appropriated towards the decree i.e. whether by transfer of the mutual funds from the name of the judgment debtor to the name of the decree holder or by liquidation thereof or by waiting for maturity thereof.

30. The counsel for the decree holder is also unable to state that monies from which bank account are directed to be transferred to this Court.

31. List on 3rd February, 2020.