

(2019) 11 BOM CK 0094

In the Bombay High Court

Case No : Chamber Summons No. 1045 Of 2005, 710 Of 2010 In Execution
Application No. 37 Of 2005

Arvind Jeram Kotecha And Ors

APPELLANT

Vs

Prabhudas Damodar Kotecha And Ors

RESPONDENT

Date of Decision : 28-11-2019

Acts Referred:

Foreign Judgments (Reciprocal Enforcement) Act, 1993 — Section 10
Code of Civil Procedure (Amendment) Act, 1937 — Section 2, 13, 13(a), 13(b), 13(c),
13(d), 13(e), 13(f), 14, 35(3), 44A, 44A(2), 47
Code Of Civil Procedure, 1908 — Order 21 Rule 22(1)(b), Order 21 Rule 22

Citation : (2019) 11 BOM CK 0094

Hon'ble Judges : R.I. Chagla, J

Bench : Single Bench

Advocate : Zal Andhyarujina, Harsh Meghani, J.J. Thakkar, Nikhil Sakhardande,
Mayur Khandeparkar, Subhra Swami, Rushabh Seth

Final Decision : Dismissed

Judgement

1. This Chamber Summons has been taken out in the Execution Application for leave to be granted to the Defendant / Decree Holder to execute execution proceedings against the original Plaintiff / Judgment Debtor for recovery of the sum due to the Defendant from the Plaintiff as set out in the Execution Application under a judgment dated 22nd January, 1999 of the High Court of Justice of United Kingdom, Queen's Bench Division passed in Case No.1990 K 528 and final costs certificate dated 11th November, 2004 and additional certificate dated 17th January, 2005 issued by the Queen's Bench of the High Court of Justice (United Kingdom) in case No. 1990 K 528 and Certificate under Section 10 of the Foreign Judgments (Reciprocal Enforcement) Act, 1993. The Applicant has further sought dispensation of notices under Order XXI Rule 22(1) (b) of the Code of Civil Procedure, 1908 (for short "CPC").

A brief background of facts is necessary:-

2. The Original Plaintiff had filed Case No.1990 K 528 against the Defendant in the Queen's Bench Division of the High Court of Justice (United Kingdom) seeking an order to release to the original Plaintiff a fund held in the joint names of the Original Plaintiff and the Defendant and for damages. On 25th February, 1993, a consent order came to be passed by the Queen's Bench Division of High Court of Justice (United Kingdom). By the said consent order judgment was entered against the Defendant on the ground that no defense had been served by the Defendant pursuant to the order of Deputy Master Rose dated 3rd August, 1992 and it was adjudged that the Defendant shall pay the original Plaintiff damages as assessed. The Defendant was further ordered to make and deliver an account of the fund held in account of 13044718 at the Standard Chartered Bank Ltd., 37, Gracechurch Street, London EC3V OBX together with all dealings therewith within 28 days of this order. The Defendant was ordered to pay the Original Plaintiff all sums found due to the Original Plaintiff within 28 days upon taking of such account. The Defendant was forthwith to cause his name to be removed from the said account and give and all necessary directions to the bank for release of the fund to the Original Plaintiff absolutely. The interest was to be assessed with damages and the Defendant to pay the Original Plaintiff cost of this action, to be taxed, if not agreed.

3. The Original Plaintiff applied in the Suit pursuant to the said consent order dated 25th February, 1993 for damages and interest to be assessed. Pursuant to the said application, the case for assessment of damages was tried and a judgment and order was passed by the Queen's Bench Division High Court of Justice (United Kingdom) (Judge Rich QC) dated 22nd January, 1999. By the said judgment, the damages were assessed at Nil. The Judge directed that:-

PURSUANT to the Consent Order of Master Foster Under Order 37 of the Rules of the Supreme Court the assessment of damages in this action was tried before His Honour Judge Rich QC (sitting as a Judge of the High Court) without a jury at the Royal Courts of Justice in London on the 20th, 21st and 22nd days of January, 1999.

AND THE JUDGE having assessed the award of damages at nil.

THE JUDGE DIRECTED that judgment should be entered for the Defendant with costs to be taxed if not agreed.

IT IS THIS DAY ADJUDGED that judgment be entered for the Defendant and the Plaintiff do pay the Defendant his costs of the assessment of damages in this action to be taxed if not agreed.

AND THE JUDGE DIRECTED that the Plaintiff's application for leave to appeal be refused.

4. The Decree Holder has sought the execution of the above judgment.

5. The Defendant had filed his bill of costs of the assessment of damages pursuant to the said Judgment dated 22nd January, 1999. On 22nd June, 2000,

the Defendant became bankrupt and remained bankrupt till 5th September, 2003, when the bankruptcy was annulled. On 29th April, 2004, a hearing of costs assessment took place before the Costs Officer O'Riordan of the Supreme Court Costs Office. Pursuant to the hearing, the Costs Officer awarded that the Original Plaintiff shall pay cost of £ 39,273.63 and ruled that interest would run except for the bankruptcy of 1184 days. This was subject to further hearing on the cost assessment which was kept an open issue and the Defendant was to submit a statement of costs as well as the original Plaintiff to serve points of dispute. Thereafter the Defendant was to serve his response thereto. The Defendant has submitted his bill of cost for the cost assessment on 7th July, 2004 which was disputed by the Original Plaintiff and accordingly hearing for assessment of cost took place. On 11th November, 2004, the final cost certificate was issued by the Costs Officer O'Riordan directing the original Plaintiff to pay the Defendant costs of £ 57175.25 within 14 days of the said order. The final cost certificate reads as under:-

In accordance with the Judgment dated 22nd January, 1999.

Upon the Defendant filing a completed bill of costs in this claim Costs Officer O-Riordan has assessed the total costs as £ 57,175.25 (being as to £ 39,272.63 in respect of the said bill of costs, £ 1,728.75 court fee for the detailed assessment, £12,648.87 for the costs of the detailed assessment and £ 3,525 as costs of the costs of the detailed assessment).

You the Claimant must pay the sum of £57,175.25 to the Defendant within 14 days of the date of this order.

The date from which entitlement to interest under this certificate commences under the Judgments Act 1838 at the rate of 8% per annum is as follows:-

1. On the sum of £39,272.63 from 22nd January, 1999 except interest shall not run for 1184 days.
2. On the sum of £1,728.75 from 29th April, 2004.
3. On the sum of £12,648.87 from 29th April, 2004.
4. On the sum of £3,525 from 26th October, 2004.
6. The Decree Holder has also sought execution of the above final cost certificate.
7. A witness statement of Philip Elwood was filed stating that the said judgment dated 22nd January, 1999 and the final cost certificate pursuant to the said judgment dated 11th November, 2004 for the sum of £57,175.25 plus interest thereon of £9,159.73 up to 31st December, 2004 and thereafter the rate of £12.53 per day until payment remained wholly unsatisfied and had not been adjusted. Accordingly, by an additional certificate dated 17th January, 2005 issued by John Ungley, the Master of the Queen's Bench Division of the Supreme Court of England and Wales certifying the judgment dated 22nd January, 1999 and the final cost certificate pursuant to the judgment dated 11th November,

2004 for the sum of £ 57,175.25 plus interest thereon of £ 9159.73 to 31st December, 2004 and thereafter at the rate of £ 12.53 per day until payment remained wholly unsatisfied and has not been adjusted. It was mentioned in the additional certificate that "This certificate is given in order to comply with Section 44A (2) of the Code of Civil Procedure (Amendment) Act, 1937, which was an Act of the Indian Legislature (being Act No. VIII of 1937)". The Decree Holder has also sought for execution of the said additional certificate dated 17th January, 2005.

8. On 17th January, 2005, a certificate under Section 10 of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, in respect of the said claim No.1990 K 528 has been issued. It was mentioned in the certificate that the Original Plaintiff's application was heard by the Court on three days i.e. 20th January, 1999, 21st January, 1999 and 22nd January, 1999. It was further stated that on 11th November, 2004 having heard submissions from the Original Plaintiff and Defendant on the assessment of costs, the Court had issued a final cost certificate awarding costs payable by the Original Plaintiff to the Defendant of £ 57.175.25 plus interest at 8% per annum. It was further stated that the interest was computed at the rate of £9,159.73 to 31st December, 2004 and continued to accrue thereafter on the sum of £ 57,175.25 at the rate of £ 12.53 per day until payment.

9. The Execution Application No.37 of 2005 in Case No.1990 - K-528 had been filed by the Decree Holder in January, 2005. The Decree Holder proceeded on the premise that as the original Plaintiff had not filed an Appeal from the judgment dated 22nd January, 1999 or from the decisions of the Costs Officer i.e. final costs certificate or the additional cost certificate and that neither the judgment nor the said cost certificates having been stayed or suspended, it was necessary for the Decree Holder to take out the Execution Application for execution of the said judgment and costs certificates. It was further mentioned that the Decree Holder is aware that the Original Plaintiff does not have any assets in the jurisdiction of the Court (Queen's Bench) which had passed the said judgment and that the original Plaintiff is a resident in India. It was further stated in the Execution Application that the United Kingdom has reciprocal arrangements with India in the matter of execution of decrees and judgments of Courts. An Affidavit came to be filed by the original Plaintiff to oppose the enforcement of the United Kingdom judgment proceedings in the Bombay High Court. The Decree Holder had filed Chamber Summons No.1045 of 2005 in Execution Application No.37 of 2005 in Case No.1990 - K-528, wherein the identical prayers as now sought in the present Chamber Summons had been prayed for. Upon the pleadings being complete in the said Chamber Summons, the Chamber Summons was heard and by an order dated 5th June, 2006 passed by the learned Single Judge (Coram : S.C. Dharmadhikari, J.), of this Court, the said Chamber Summons was allowed.

10. In the Appeal which was preferred from the said order dated 5th June, 2006, an order was passed by the Division Bench of this Court permitting the Decree

Holder to withdraw the said Chamber Summons with liberty to take out a fresh Chamber Summons claiming the said reliefs. The Appeal was accordingly disposed of.

11. Thereafter, the Decree Holder took out the present Chamber Summons in the above Execution Application seeking the same relief as sought for in the earlier Chamber Summons. An Affidavit in Reply has been filed to the Chamber Summons by the Judgment Debtor and which has been responded to by an Affidavit in Rejoinder filed by the Decree Holder.

12. It would be necessary to first consider the submissions of the learned Counsel for the Judgment Debtor who has opposed the Chamber Summons taken out by the Decree Holder under Order XXI Rule 22 of the CPC. Mr. Sakhardande, the learned Counsel for the Judgment Debtor has submitted that the Chamber Summons ought to be dismissed because the decree dated 22nd January, 1999 is not a judgment given on merits as contemplated by the provisions of Section 13 (b) of the CPC. He has submitted that the cost certificate dated 11th November, 2004 and the final cost certificate dated 17th January, 2005 are merely consequential acts of quantification of costs, the genesis being the decree dated 22nd January, 1999. He has submitted that the decree dated 22nd January, 1999 would thus have to satisfy test under Section 13(b) of the CPC. He has further submitted that the certificate dated 17th January, 2005 issued under Section 10 of the Foreign Judgments (Reciprocal Enforcement) Act, 1933 having not been put in execution should not be considered. He has relied upon judgments of the Supreme Court as well as of this Court in support of his contention that, whether a Foreign Judgment is on merits, or otherwise, has to be apparent from the judgment itself. These decision are as follows:-

- a) International Woollen Mills Vs. Standard Wool (UK) Ltd. (2001) 5 SCC 265 at 280.
- b) Atit Omprakash Agarwal V/s. BNP Paribas (2017) SCC Online Bom 9827.
- c) Percy Shiavak Mistry Vs. Bennett Coleman (2009) 5 Mh. L.J. 652 at 658.
- d) Kolmar Vs. Traxpo Enterprises 2015 (5) BCR 39.

13. He has submitted that from the above decisions, it is clear that a foreign judgments to be on merits the same on its face, ought to reveal / disclose that the Foreign Court has applied its mind to the truth or falsity of the case, considered the evidence - oral and documentary and the material on record made available to it as well as considered the rival submissions.

14. He has submitted that the test for determining whether a foreign judgment is on merits, that is to say whether a foreign Court has (i) applied its mind to the truth or falsity of the case; (ii) considered the evidence - oral and documentary - and material on record made available to it; (iii) considered rival submissions, is decipherable only if the foreign judgment records reasons. He has submitted that otherwise it is impossible to conclude or comprehend that a foreign judgment is

one on merits. He has submitted that the requirement for the foreign judgment to contain reasons is essential to enable a party to raise any of the permissible defenses contained in Section 13 of the CPC.

15. He has submitted that without prejudice to the argument that a foreign judgment ought to contain reasons, the foreign judgment should at the very least record / state that it had considered the pleadings, evidence - oral and documentary - and considered rival submissions. He has submitted that in any event, the judgment dated 22nd January, 1999, in which costs were granted does not state any reasons why the damages have been assessed at Nil and there is no discussion at all as to the Court having considered the pleadings, evidence - oral and documentary and / or considered rival submissions. This is despite 11 Affidavits of Evidence having been filed. He has submitted that the submissions of the parties on three days i.e. 20th to 22nd January, 1999 has not been considered in the said judgment. He has accordingly submitted that the judgment dated 22nd January, 1999 in which cost was granted is not given on merits. The consequent exercise and actions of quantification of costs would also necessarily fail.

16. He has relied upon the decisions of the Privy Council in *Brijlal Ramjidas V/s. Govindram Gordhandas Seksaria* ILR 1943 Bombay 366. This was from a judgment of the Division Bench of this Court which had upheld the decision of the Single Judge of this Court. The Single Judge had held that the language of Section 13 of the CPC itself makes it clear that the Court is entitled to look at the reasons given by the Judge for arriving at his judgment, because under Section 13 a foreign judgment is conclusive "as to any matter thereby directly adjudicated upon". The Division Bench had held that "But in order to understand and interpret the decree or order, we must have to look at the pleadings of the parties and reasons of the Judge. Those reasons would not, in my opinion, be binding on any question of fact or law, except, so far as they show what the judgment actually decides, and whether any of the exceptions to Section 13 applies". He has submitted that although the Privy Council had laid down that it would be impracticable to hold that 'a foreign judgment' means a statement by a foreign judge of the reasons for his order, this does not upset the legal position enunciated in the judgments of the Single Judge or the Division Bench. He has submitted that the decision does not lay down that even while considering the exception to Section 13 of the CPC reasons are not necessary. He has submitted that the twin condition to be satisfied under Section 13 of the CPC i.e. the first condition being that it must be a foreign judgment and second that it should not fall within any of the exceptions contained in clauses (a) to (f) of Section 13 of the CPC. Thus, it would be necessary for reasons to be provided in the judgment to perceive if the exception contained in Section 13 apply. He has submitted that the decision of the Privy Council in *Brijlal* (Supra) stands watered down in view of the decisions of the Supreme Court as under:-

a) *Balraj Talreja V/s. Sunil Madan*, (1999) 8 SCC 396.

b) Assistant Commissioner V/s. Shukla and Bros, (2010) 4 SCC 785.

These decisions which have held that a judgment has to contain reasons.

17. He has submitted that it is a settled legal position and normal rule that "costs must follow the event". He has submitted that if the primary judgment (i.e. the event) does not pass the test of a judgment on merits, an order of costs (which only follows an event) cannot have an independent existence dehors the primary judgment and such an order of costs would have to be essentially and inevitably be treated as one not given on merits. He has relied upon the decision of the Supreme Court in Tirumalachetti Rajaram Vs. Tirumalachetti Radhakrishnayya Chetty AIR 1961 SC 1795. in paragraph 19, it is held that:

"if an appellate decree confirms the decision of the Trial Court but merely makes a variation in regard to the order as to costs such a variation would not affect the character of the decree which would in law amount to a decree of affirmance, whether the variation as to costs is made in favour of one party or the other".

18. He has submitted that if the main primary judgment (i.e. the event is) unenforceable on the ground that it is not given on merits, an order of costs will have to meet the same fate.

19. He has relied upon the case of Alcon Electronics Vs. Celem (2017) 2 SCC 253., wherein it is held that, the order of costs which was a composite part of the main judgment (i.e. the event) given on merits of the matter was also held to be on merits. He has submitted that in that case reasons were recorded in the English Court judgment. The same are conspicuously absent in the judgment dated 22nd January, 1999 of which the execution has been sought in the present case. He has accordingly submitted that the said judgment passed in the present case (i.e. the event) in which costs have been granted does not satisfy the test of a judgment on merits and accordingly, the order of costs (which only follows the event) is unenforceable. He has placed heavy reliance upon the judgment of the Supreme Court in International Woollen Mills (Supra) which he has submitted is strikingly identical to the said judgment passed by the English Court in the present case. He has submitted that the Supreme Court as in the present case had considered a judgment and decree which did not indicate whether the pleadings had been considered or the documents looked into and /or whether the merits of the case were at all considered and merely granted to the party a decree for the amounts mentioned therein. This judgment and decree was held not to satisfy the test of a judgment on merits and hence unenforceable.

20. He has submitted that without prejudice to the above argument and assuming whilst denying that the test of judgment on merits is satisfied, the inclusion of VAT; the costs of costs assessment and the costs of the costs of costs assessment has to be excluded from the decretal amount as being unenforceable as contrary to Indian Law. He has submitted that in so far as VAT is concerned, the same being a tax is specifically excluded from the provisions of Section 44A of the CPC. The other two components i.e. the costs of costs assessment and the

costs of the costs of costs assessment are barred under Indian Law. There is no provision to grant such costs under the provision of CPC.

21. Mr. Zal Andhyarujina, the learned Counsel for the Decree Holder has submitted that the order of costs is executable in India as it partakes the character of a decree for payment of sum of money and is therefore, covered under the term "decree" under Section 44A of CPC. He has relied upon the decisions of the Supreme Court in *Alcon (Supra)* as well as decision of this Court in *Janardhan Mohandas Rajan Pillai Vs. Madhubhai Patel & Ors.* 2004 (1) Mh.L.J. 37. and *Aspee (India) Ltd. V. M.L. Dahanukar & Co. Ltd.* (1953) B.L.R. Vol. LV page 614. He has submitted that the due judicial process as per Civil Procedure Rules of U.K. were followed in the proceedings and the parties were given adequate opportunities to present their case and were heard at length. There was a trial of three days before the said decree was passed. The necessary requirements for the said decree to be conclusive have been complied with. He has relied upon the decision of the Supreme Court in *Alcon (Supra)* and *R Vishwanathan & Ors. Abdul Wajid* AIR 1963 SC 1. in this context. He has further submitted that the decree of assessment of damages and award of costs was not challenged by the Judgment Debtor though appellable and has attained finality. He has submitted that the Judgment Debtor having participated in the proceedings for assessment of costs and was also heard extensively, has by his conduct accepted the binding nature of the decree. He is now estopped from contending that the said decree is neither conclusive nor binding on him nor given on merits of the case. He has submitted the principles of comity of nations require that the order of the English Court ought to be respected and it is to the reciprocal advantage to enforce the Foreign rights as far as practicable. In this context he has relied upon the decision of the Supreme Court in *Alcon (Surpa)*. He has submitted that the Supreme Court in the said decision has expressly held that an order and decree must be 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 and when these requirements are fulfilled, the executing Court cannot inquire into the validity, legality or otherwise of the judgment. The judgment can be considered as a judgment passed on merits. He has submitted that this is also made clear in the decision of the Supreme Court in *R. Vishwanathan (Supra)* which is to the similar effect. He has submitted that there is no dispute that in the present case all the aforesaid requirement have been satisfied and fulfilled. Due judicial process was followed and parties were given adequate opportunities to present their case.

22. He has submitted that the term decree used in Section 44A, which shows that it is only a formal adjudication and the operative part / order which is required to be filed for execution. There is no requirement under Section 44A or any other provision that for purpose of execution, the judgment containing statement of reasons is required to be filed along with the decree. He has submitted that the arguments of the Judgment Debtor that Foreign Judgment would have to contain reasons in order for it to be judgment on merits would

result in reading words in the provision which are not there and would be completely contrary to the plain meaning of the provision. He has submitted that the term decree itself implies that the reasons are not required to be filed in form of a judgment for purpose of execution. He has relied upon the decision of the Privy Council in case of Brijlal (Supra) in support of this contention. In the decision of the Privy Council, it was held that it would be impracticable to hold that, a foreign judgment means a statement by Foreign Judge for its reasons for his order since if that were the meaning of the judgment, the other section viz. Section 13 would not apply to an order where no reasons were given. There is nothing in Section 13 to support a contention that every step in the reasoning which led the foreign Court to its conclusion must have been directly adjudicated upon. He has submitted that the decision of the Division Bench of the Bombay High Court in the case of Brijlal (Supra), which has been approved by the Privy Council supports the contentions of the Decree Holder. He has submitted that the decision of the learned Single Judge and of the Division Bench in Brijlal (Supra) case, which have been relied upon by the learned Counsel for the Judgment Debtor should be viewed from the facts of that case. He has submitted that in that case in view of the controversy as to what was the "matter" that was directly adjudicated upon by the foreign judgment that the observations relied upon by the Judgment Debtor were made. In that case, in view of the peculiar operative part of the foreign judgment that "the award had been properly filed" and in view of the contentions raised to the effect that "the only actual order is that the award be filed", the Court was required to see as to what matter was actually adjudicated upon or decided and whether the same barred the suit of the Plaintiffs. He has submitted that the interpretation and contention of the Judgment Debtor that the observations of the Single Judge and the Division Bench in Brijlal (Supra) lay down the law that every foreign judgment, decree or order which is sought to be enforced in India must contain a statement of reasons and in absence which the foreign judgment would be unenforceable in view of the exception under Section 13 (b) of the CPC is untenable. He has placed reliance upon observations of the Single Judge and Division Bench, which are to the effect that an order in a summary proceeding can operate as res judicata. It had been observed by the Division Bench that some systems of foreign procedure may not recognize the distinction between decrees and orders and there may be no requirement on a Judge to give reasons. Under Section 13, judgment is not used in the sense of a statement by a foreign judge of the reasons for his order. This has been observed by the Privy Council in Brijlal (Supra). He has submitted that for the judgment of a foreign Court to be conclusive, the Court must have directly adjudicated upon the matter, before it. What is conclusive under Section 13 of the CPC is the judgment, i.e. the final adjudication and not the reasons. In that context, he has relied upon decision of the Supreme Court in the case of R. Vishwanathan (Supra). He has submitted that the specific observation that the definition of "judgment" in Section 2 of the CPC is not applicable to interpret "foreign judgment" under Section 13 of CPC and that an order where no reasons are given is still conclusive, clearly negatives

the contention of Judgment Debtor. He has relied upon the decision of this Court in Janardhan Mohandas (Supra) which related to execution of an order regarding cost passed by the English Court a similar objection had been raised by the Judgment Debtor to its enforceability and which were negated by the Single Judge and confirmed by the Division Bench of this Court vide judgment and order dated 30th March, 2010. The Division Bench of this Court had observed that it was the intention of the legislature behind incorporating Explanation II to Section 44A of the CPC to permit execution of such orders which may not amount to decrees but which amount to orders. The order for payment of costs would amount to a decree within the meaning of Section 44A of the CPC. The decision of the Division Bench of this Court in Janardhan (Supra) had been carried in appeal to the Supreme Court by the Judgment Debtor and which SLP filed by them was dismissed by 13th May, 2010. Thus, it is settled that the order for payment of costs would amount of decree within the meaning of Section 44A of the CPC and hence executable. This has further been held by the Supreme Court in Alcon (Supra) and in Aspee (India) Ltd. He has submitted that it is thus clear from the above decisions that a foreign judgment / decree / order is conclusive of any matter directly adjudicated upon between the parties and which would include an order for payment of costs which is executable under Section 44A of the CPC.

23. He has submitted that the decisions relied upon by the Judgment Debtor, in particular International Woolen Ltd.(Supra), Percy Shiavak Mistry (Supra) and Atit Omprakash Agarwal (Supra) have to be read in the context of the facts of those cases where the judgment or decree had been passed *ex parte* and / or only on account of default on part of the Defendant to appear for hearing of the case and to deliver defense and / or in a formal manner on account of absence of the Defendant and / or by way of penalty for non-appearance. He has submitted that, the Courts considering the facts in those cases have held that the decree / judgment / order passed would not be said to be on the merits of the case. These decisions cannot apply to the facts of the present case as it is an admitted position that the Judgment Debtor had applied for assessment of damages and had filed Affidavits and that trial went on for three days. The Judgment Debtor was also heard in the proceedings for assessment of costs and thus given all opportunities to present his case. It was thereafter that the Judgment Debtor was held to be not entitled to any damages and was liable to pay costs. Thus, the requirement of due judicial process by giving opportunity to the parties to put forth their case have been fulfilled. Thus as laid down by the Supreme Court in Alcon (Supra) and R. Vishwanathan (Supra), the executing Court cannot inquire into the validity or legality or otherwise of the said foreign decree.

24. He has submitted that the judgment / decree dated 22nd January, 1999 is entered into two parts. The first part assessed damages at Nil and the second part imposes costs upon the Judgment Debtor. Considering that the Plaintiff has accepted the finality of the first part and participated in proceedings of assessment of costs which were commenced pursuant to the second part of the

same decree and submitted to the jurisdiction of the Costs Officer to assess the costs which decision has not been challenged although appellable, it would not be open for the Judgment Debtor to contend that the said decree or judgment is not a judgment on merits of the case. The Judgment Debtor cannot be allowed aprobate or reprobate.

25. He has submitted that in so far as the objection raised by the Judgment Debtor as to the executability of the foreign judgment, insofar as it awards cost of the proceedings for assessment of costs, this objection is untenable as the cost in support of the proceedings for assessment of costs undertaken by the Cost Officer are payable as per the Civil Procedure Rules of U.K. The Judgment Debtor has not disputed that such an amount can be included in the cost certificate as per the relevant rules in UK. He has submitted that once there is jurisdiction to direct payment of such costs as per relevant provisions and Rules of the English Court, the fact that no such provision is found in Indian Law i.e. in the CPC is not a relevant fact for denying payment of the said amount to the Applicant. The said amount cannot be equated to "penalty" as urged by the Judgment Debtor. He has relied upon the decision of the Supreme Court in *Alcon* (Supra).

He has dealt with the other objection of the Judgment Debtor that the certificate of costs included component VAT, which cannot be recovered in execution. He has submitted that submissions were made on the basis that VAT is included in the amount of costs awarded to the Applicant, whereas it is noticed that the same was excluded. He has submitted that VAT was included in the bill of costs of assessment of damages which was not awarded. He has submitted that it was only after hearing the parties including the Judgment Debtor, which trial went on for three days in the proceeding for damages filed by the Judgment Debtor, the Court assessed damages at Nil. The said judgment / decree reveals that there was a hearing on merits. This is also evidenced by the certificate issued under Section 10 of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, wherein it is specifically mentioned that the Judgment Debtor's application was heard and thereafter the said judgment / decree was passed. In view thereof, the objection of the Plaintiff, that the judgment / decree falls in exception (b) of Section 13 is entitled.

26. He has submitted that if the contentions of the Judgment Debtor are accepted then it would be impossible to execute in India a decree / judgment / order of the English Court and especially order / decree of costs passed by the English Court, even if all the requirement of following the due judicial process and hearing of both the parties is complied with. The reciprocal arrangement between the two countries would become meaningless. He has accordingly, submitted that the Chamber Summons is required to be allowed as prayed.

27. Having considered the submissions, it would be appropriate to refer to the relevant provisions of the CPC in the context of execution of a foreign judgment. Sections 44A and 13 of the CPC are accordingly reproduced herein below:-

Section 44A of Code of Civil Procedure 1908 "Execution of decrees passed by Courts in reciprocating territory"

(1) Where a certified copy of 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.

(2) Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of section 47 shall as from the filing 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 execution 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.

Explanation I- "Reciprocating territory" means any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of this section; and "superior Courts", with reference to any such territory, means such Courts as may be specified in the said notification.

Explanation II.- "Decree" with reference to a superior Court means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect to a fine or other penalty, but shall in no case include an arbitration award, even if such an award is enforceable as a decree or judgment.

13. When foreign judgment not conclusive -

A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except-

(a) where it has not been pronounced by a Court of competent jurisdiction;

(b) where it has not been given on the merits of the case;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud;

(f) where it sustains a claim founded on a breach of any law in force in India.

28. It is clear from Section 44A that 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. Section 44A further provides that together with the certified copy of the decree, the certificate from such Superior Court must be filed and must be such as contemplated by Section 44A (2). Upon the filing of the certified copy of the decree, the provision of Section 47 of the CPC shall apply to the proceedings before the District Court. The District Court has the power to refuse execution of any decree of a Foreign Court, if it is shown to the satisfaction of the Court that the decree falls within the exceptions specified in Clauses (a) to (f) of Section 13 of the CPC. Explanation 1 which concerns reciprocating territory is not necessary to be referred to, as it is an accepted position that United Kingdom is a reciprocating territory. Explanation 2 however, speaks of the term "decree" to mean any decree or judgment of a Superior Court under which a sum of money is payable. In other words, the money decree or judgment of a Court in a reciprocating territory for payment of money, is executable and enforceable, provided the sum of money payable should not be in the nature of tax or charges or of a like nature or in respect of fine or other penalty.

29. Section 13 provides as to when a foreign judgment is not conclusive. It is provided that a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties, or between the parties under whom they or any of them claim litigating under the same title is conclusive provided it does not fall within clauses (a) to (f) to Section 13. In this particular case, the objection raised by the Judgment Debtor is to the foreign judgment not having been given on the merits of the case. Thus, unless it is established by the Judgment Debtor that the foreign judgment has not been given on merits of the case, the foreign judgment shall be conclusive and binding.

30. It appears from the facts of the present case that the direction and order to pay costs had already been issued in the judgment delivered on 22nd January, 1999 which assessed the award of damages at nil. It was only the quantification and computation of costs which had to be carried out by the authorized officer as the parties could not have arrived at a figure by consent. It is this judgment dated 22nd January, 1999, which is being executed and enforced by the Decree Holder. The order of payment of costs partakes the character of a decree for payment of a sum of money and is therefore within the term "decree" under Section 44A of the CPC. Explanation II to Section 44A makes the concept of "decree" clear. It means any decree or judgment of a superior court under which a sum of money is payable. The present judgment falls within this definition. It is also further seen from the decisions relied upon by the learned Counsel for the Decree Holder that an order of payment of cost has been covered under the term "decree" under Section 44A of the CPC and for which execution is permitted provided the exceptions under Section 13 of the CPC are not attracted. This has been expressly held in the decision of the Supreme Court in *Alcon* (Supra), while dealing with a matters regarding execution and enforcement of an order for

payment of costs passed by the English Court, the Supreme Court dealt with the same objection which has been raised in the present case regarding the exception under Section 13(b) raised on behalf of the judgment debtor whilst opposing the enforcement of order of costs and in paragraphs 14 to 17 held as under:-

"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."

31. From the decision of the Supreme Court in *Alcon* (Supra) , it is clear that a

judgment can be considered as having been passed on merits, when the Court deciding the case has given an opportunity to the parties to the case to put forth their case and after considering rival submissions has given its decision in the form of an order / judgment. In the present case, due judicial process as per the CPC rules of UK were followed in the said proceedings and the parties were given adequate opportunities to present their case. The case was tried for three days before the said judgment was passed. Thus the said judgment / decree can be considered to be conclusive and having been passed on merits of the case.

32. In a earlier decision of the Supreme Court in R. Vishwanathan (Supra) it has been held in paragraph 14 and 21 as under:

"In considering whether a judgment of a foreign Courts is conclusive, the Courts in India will not inquire whether conclusions recorded thereby are supported by the evidence, or are otherwise correct, because the binding character of the judgment may be displaced only by establishing that the case falls within one or more of the six clauses of S.13e, and not otherwise.

"By Section 13 of the Civil Procedure Code a foreign judgment is made conclusive as to any matter thereby directly adjudicated upon between the same parties. But it is the essence of a judgment of a Court that it must be obtained after due observance of the judicial process, i.e., the Court rendering the judgment must observe the minimum requirements of natural justice - it must be composed of impartial persons, acting fairly, without bias, and in good faith, it must give reasonable notice to the parties to the dispute and afford each party adequate opportunity of presenting his case. A foreign judgment of a competent Court is conclusive even if it proceeds on an erroneous view of the evidence or the law, if the minimum requirements of the judicial process are assured; correctness of the judgment in law or on evidence is not predicated as a condition for recognition of its conclusiveness by the Municipal Court."

33. Considering that the order of costs had been directed in the judgment dated 22nd January, 1999 to be paid to Decree Holder by rejecting the claim for damages of the Judgment Debtor has been accepted by the parties as observing judicial process i.e. the minimum requirements of natural justice as laid down in the above decision, the said judgment is on merits. In fact the first part of the judgment i.e. the assessment of damages at nil has been accepted by the Judgment Debtor. The Judgment Debtor had also participated in the said proceedings for assessment of costs and was also heard extensively. Thus it can be held that by the conduct of the Judgment Debtor, he had accepted the binding nature of the said order of costs. He, therefore, would be estopped from contending that the said judgment / decree is neither conclusive nor binding on him nor is it given on the merits of the case. The requirement in the above decisions of the Supreme Court and in Alcon (Supra) and R. Vishwanathan (Supra) can be said to have been satisfied and fulfilled in the present case.

34. The decisions relied upon by the Judgment Debtor viz. International

Woolen(Supra), Atit Omprakash Agarwal (Supra) and Percy Shiavak Mistry (Supra) have been decided in the facts of those cases. In those cases the Defendant did not enter an appearance in the foreign proceedings and the judgment was entered in default of the Defendants. Further, no evidence was adduced on behalf of the Plaintiff in those cases. Thus, it was in the facts of those cases relied upon by the Judgment Debtor that the judgments were not held to be judgments on merits as on its face it did not reveal / disclose that the foreign Court had applied its mind to the truth or falsity of the case and / or considered evidence - oral and documentary available on record and considered rival submissions. Thus, the said decisions are inapplicable to the facts of the present case. In the present case the Judgment Debtor had not only appeared but also evidence was led and trial was conducted which went on for three days. Further, an opportunity of hearing had been granted to the Judgment Debtor to present his case and thereafter it was held that he was not entitled for any damages and was liable to pay costs. It is pursuant to the said decree / judgment that there was cost assessment proceedings and the amount of cost was quantified.

35. The learned Counsel for the Judgment Debtor has contended that a foreign judgment must contain reasons in order to be executable and for the party to raise any of the permissible defenses contained in Section 13 of the CPC. The Judgment Debtor has relied upon then decision in Brijlal (Supra) for contending that reasons are necessary to be given in a judgment to determine whether any exception to Section 13 applies. The observations of the Single Judge and Division Bench relied upon by the Judgment Debtor to the effect that the Courts may look into the reasons of a foreign judgment were made in the facts of that case, where there was a controversy as to what was the matter that was directly adjudicated upon by the judgment. In that case, the award had been passed in Arbitration Proceedings and immediately thereafter one of the parties filed a Suit in the High Court for declaration that the award is invalid. The Arbitrator sent the award to the District Court of Indore for filing the award. The Plaintiffs were issued notice to show cause as to why the award should not be filed. Thereafter, the Plaintiffs filed detailed objection and prayed that the award should not be taken on the file of the Court and should be set aside. The matter was transferred to the High Court of Indore and after hearing the parties, the judge gave a judgment upholding the validity of the award and in the operative part stated that the award had been properly filed. This judgment was relied upon in the suit filed by the Plaintiffs to contend that the suit was barred in view of the said judgment. In view of the peculiar operative part of the foreign judgment that "the award had been properly filed" and in view of the contention raised to the effect that "the only actual order is that the award be filed", the Court had held that it was required to be seen as to what the matter was actually adjudicated upon or decided and whether the same barred the Suit of the Plaintiffs. It was in this context that the observations were made by the Single Judge and the Division bench. The decision of the Division Bench which upholds

the Single Judge was further appealed to the Privy Council and the Privy Council has in paragraphs 8 and 12 held as under:-

"Some difficulty has been occasioned in the interpretation of S.13, by the definition of "judgment" contained in S.2. Notwithstanding this definition, their Lordships agree with the learned Chief Justice that the expression "foreign judgment" in S.13 must be understood to mean "an adjudication by a foreign Court upon the matter before it." The Chief Justice pointed out that "it would be quite impracticable to hold that ' a foreign judgment' means a statement by a foreign Judge of the reasons for his order," since "if that were the meaning of 'judgment' the other section (viz.S.13) would not apply to an order where no reasons were given." (Reference Paragraph 8)

The Order of the Court, which was left standing after the appeal, was to the effect that the award had been properly filed and that the objections to it must be dismissed, and in their Lordships' opinion that Order was a "judgment", within S.13, Civil P.C., which is conclusive between the parties as to the validity of the award. There is nothing in S.13 to support a contention that every step in the reasoning which led the foreign Court to its conclusion must have been "directly adjudicated upon." (Reference paragraph 12)

36. It is thus clear from the decision of the Privy Council that the definition of judgment in Section 2 of CPC is not applicable to interpret a "foreign judgment" under Section 13 of the CPC and that an order where no reasons are given is still conclusive. Thus, the submission of the learned Counsel for the Judgment Debtor that in view of Section 13 of the CPC and exception contained therein, reasons are necessary cannot be accepted.

37. It has been held in the decision of the Supreme Court in the case of R. Vishwanathan (Supra) that what is conclusive under Section 13 of the CPC is the foreign judgment i.e. the final adjudication and not the reasons. The decision of the Privy Council in Brijlal (Supra) has been relied upon in that decision. In fact it has been accepted by the Judgment Debtor that the judgment dated 22nd January, 1999 of which the enforcement is sought is a "foreign judgment" but the only objection appears to be that the foreign judgment does not contain reasons. The decisions of the Supreme Court relied upon by the Judgment Debtor in case of Balraj Talreja (Supra) and Shukla and Bros (Supra) are both decisions which do not consider foreign judgments for enforcement but consider judgments of Courts in India and in that context has stated that the judgments must contain reasons. These decision are accordingly not applicable in the facts of the present case.

38. Considering that, the said judgment is a judgment on merits, the costs which follow the event is also to be treated as one given on merits. It is part and parcel of the primary judgment which has been held to be on merits. The decision of the Supreme Court in Alcon (Supra) would apply in the present case as in that case the Judgment was held to be on merits and the order of cost was

considered to be a composite part of the main judgment and also held to be on merits. The distinction drawn by the Judgment Debtor that in *Alcon (Supra)*, the main judgment was a reasoned order will make no difference in view of the finding that the said judgment in the present case is on merits, as it gives an adequate opportunity to the parties to present the case and due judicial process has been followed, fulfilled and satisfied. The Decree Holder had contended that the order of costs amounts to a decree within the meaning of Section 44A of the CPC and are executable by placing reliance upon the decision of this Court in the case of *Janardhan Mohandas (Supra)*. Although the Judgment Debtor has not disputed that the order of costs amounts to a judgment has contended that although evidence had been led in the present case, the judgment in the present case is not on merits because on the face it does not disclose application of mind, consideration of evidence and / or consideration of rival submissions. However, it is noticed that from the decision of this Court in the case of *Janardhan Mohandas (Supra)*, this Court had clearly held despite no evidence being led, that it is the clear intention of the legislature behind incorporating Explanation II to Section 44A of the CPC that such orders of cost which may not amount of decrees but which amount to orders, execution will be permitted under said provision. The decision of the Division Bench of this Court in that case was carried in appeal to the Supreme Court by the Judgment Debtor therein and which SLP was dismissed. Accordingly, the finding of the Division Bench that an order for payment of costs would be executable as a decree under Section 44A of the CPC. This decision would, therefore, apply in the facts and circumstances of the present case and the order for payment of cost in the present case would amount to decree within the meaning of Section 44A of the CPC and thus executable.

39. It would also be necessary to consider that the Judgment Debtor has accepted the finality and the conclusiveness of the said judgment on his application for assessment of damages. Having not challenged the said judgment, it would not be open for the Judgment Debtor to contend at the time of execution that the said judgment which was passed after hearing him and after allowing him to file an Affidavit and after the trial for three days, is not a judgment or decree on merits. Such an objection raised by the Judgment Debtor would open flood gates by allowing parties who have suffered an adverse judgment and decree to come to a Court in the reciprocating territory and avoid execution despite the order having been passed after complying with all requirements of due judicial process and the party having been fully heard and having not challenged the said judgment and accepting its finality.

This would be against the principles of comity of nation which demand Courts in India to respect the orders of English Court.

40. In view of the above observations, I accordingly hold that the said judgment dated 22nd January, 1999 is capable of being enforced and executed because it is a decision on the merits of the case and not hit by Explanation II to Section

44A of the CPC. The objection raised by the Judgment Debtor to the executability and enforceability of the said foreign judgment accordingly fails. The judgment is by the Superior Court of the United Kingdom. It is only the quantification and computation of the figure of costs which had been done by the authorized officer.

41. The objection regarding the award of costs of the proceedings for assessment of cost, requires to be rejected. The award of costs of proceedings for assessment of cost were granted by the Cost Officer and is payable as per the Civil Procedure rules of UK. The jurisdiction of the Cost Officer to exclude and direct payment of cost of assessment has not be questioned. The fact that no such provision is found in the Indian Law by the CPC is not a relevant fact for denying payment of the said cost to the Decree Holder. The decision of the Supreme Court in Alcon (Supra) had dealt with a similar contention with regard to interest on cost falling within the ambit of Explanation II to Section 44A of the CPC and therefore the decree being unexecutable. It was held that the decree for cost as well as interest on cost are executable as they have assumed the character of a money decree for costs and cannot be equated with fine or penalty which was imposed on a party by the Court. Further in the decision of the Supreme Court in the case of Alcon (Supra) in paragraph 37, it was held thus:-

"37. It is to be reciprocal advantage of the Courts of all nations to enforce foreign rights as far as practicable. To this end, broad recognition of substantive rights should not be defeated by some vague assumed limitations of the Court. When substantive rights are so bound up in a foreign remedy, the refusal to adopt the remedy would substantially deprive parties of their rights. The necessity of maintaining the foreign rights outweighs the practical difficulties involved in applying the foreign remedy. In India, although the interest on costs are not available due to exclusion of Section 35(3), the same does not mean that Indian Courts are powerless to execute the decree for interest on costs. Indian Courts are very much entitled to address the issue for execution of the interest amount. The right to 8% interest as per the Judgment Act, 1838 of UK can be recognized and as well as implemented in India."

42. It has thus been held by the Supreme Court that although it may not be a provision under Indian Law on payment of interest of costs, the right to recover interest can be recognized and can be implemented in India. Accordingly, when expenses of the costs in respect of proceedings for assessment of costs are contemplated, as per the English law, the same can be and ought to be implemented in India. As regards the objection of the Judgment Debtor that the certificate of cost includes component of VAT which cannot be recovered in execution, this objection no longer arises, since it has been noticed that VAT was not included in the amount of cost awarded to the Applicant. In fact, as per the reply of the Judgment Debtor, VAT was included in the bill of cost of assessment of damages which was not awarded. This is stated in paragraph 6(v) of the reply of the Judgment Debtor.

43. The order of the costs is a direct result of adjudication between parties in the

controversy. Accordingly, it is a judgment and decree which can be said to be conclusive and binding. Further, it has attained finality. The certificate issued under Section 10 of the Foreign Judgments (Reciprocal Enforcement) Act, 1933 sets out in clause 4 that the entire proceedings took place before the UK Court and specifically mentions that the Plaintiffs application was heard and thereafter the said judgment was passed. It, thereafter, sets out in clause 5 that the Decree Holder and the Judgment Debtor were heard by the Court on the assessment of costs and thereafter, the final cost certificate was issued. In view of the above findings, the objection of the Judgment Debtor that the said judgment falls in exception (b) of the Section 13 is untenable.

44. In the result, the Chamber Summons is made absolute in terms of prayer clause (a). The Decree Holder is granted leave to execute the judgment dated 22nd January, 1999 and the final cost certificate dated 11th November, 2004 and additional certificate dated 17th January, 2005 issued by the Queens Bench Division, High Court of Justice (UK) in Case No.1990 K 528. All objections of the Judgment Debtor with regard to the executability and enforceability of the decree stand rejected. In the facts and circumstances of the case and more particularly when no injury or prejudice is caused to Judgment Debtor, leave under Order XXI Rule 22 of the CPC is dispensed with. There will be no order as to costs.

45. The learned Counsel for the Judgment Debtor seeks a stay of this Order and Judgment. Considering that the judgment of the Queens Bench Division, High Court (United Kingdom) is of the year 1999 and which has been held to be executable, it would be appropriate that the decree is executed. In any event, the decree is to be executed in due course and hence there is no emergent situation, to warrant a stay of this Order and Judgment. Accordingly, the application is rejected.